

Morton v. Tenny.

it is on money paid to another's use. So, for money collected and withheld an unreasonable length of time. *Bedell v. Janney et al.*, 4 Gil. R. 202. Money obtained by an extortionate demand of ferry license was allowed to be recovered back, with interest. *The County of LaSalle v. Simmons*, 5 Gil. R. 520.

"Money received to the use of another, and retained without the owner's knowledge," and "money withheld by an unreasonable and vexatious delay of payment," (Rev. Stat. 295, Sec. 2,) shall bear interest.

The debtor should have thrown obstacles in the way, by some circumvention, contrivance, or management of his own, have induced delay, to make it unreasonable and vexatious. *Sammis v. Clark et al.*, 13 Ill. R. 546, 547; *Hitt v. Allen*, *ibid.* 596.

The first clause of the statute recited, would authorize this interest. When the money was paid, it was intended to be paid in good faith, on the land; but without apprising defendant of the fact, plaintiff resold the land, and concealed the fact from defendant's knowledge, until called on for a deed. At the same time he learned of the rescision, and breach of contract, he became aware that the money had become his again, and had been received to his use in law. Plaintiff, instead of tendering back the money, offered him the obligation of a third person for masonry, and then delays payment until sued. If we were to say that such conduct was contrivance, management, and circumvention, to obtain the use of his money, it might be justified within the spirit of an unreasonable and vexatious delay of payment, but little short of fraud.

Judgment affirmed.

GEORGE MORTON, Appellant, v. WILLIAM TENNY, Appellee.

APPEAL FROM TAZEWELL.

A note was described in the declaration, as being payable "on or before" a certain day; the note offered in evidence was payable "on" the day named: *Held*, that this did not constitute a variance between the declaration and the proof.

THIS was an action on a promissory note, tried before DAVIS, Judge, without the intervention of a jury, at April term, 1855, of the Tazewell Circuit Court. Judgment was rendered for the plaintiff, and the defendant took this appeal.

The only question raised upon the record, is one of variance. The declaration described a note payable "on or before" the

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first day of January; the note offered in evidence under the declaration, was made payable "on" the first day of January. It was insisted that this was a variance.

MANNING and MERRIMAN, for Appellant.

N. H. PURPLE, for Appellee.

SCATES, C. J. The note is sufficiently described in substance and legal effect; and this, we think, is all that can be required, to entitle the party to read it in evidence. It may be, and doubtless is true, that plaintiff could make a legal tender, and by it stop interest upon such a note as is described in the declaration, before the day of payment therein. Yet that will not alter the legal effect of its terms. For it would not be due, nor could the owner maintain suit until the day named. So the words import no obligation, are not mutual, and consequently do not determine, import, or describe any characteristic of it, or its legal effect as a contract. If the doctrine of substantive variances is once carried beyond this test, it will be difficult to fix boundaries to its application. We do not feel willing or justified in entering upon speculative differences, and can only sanction those that may affect the merits of the case, or be demanded by special averments.

Judgment affirmed.

EBENEZER HIGGINS, Appellant, v. JOSEPH LEE, Appellee.

APPEAL FROM LA SALLE.

16	495
53a	569
55a	225
57a	608
16	495
60a	255
62a	198

16 495
109a 1 99

Where it is apparent that the jury misunderstood or disregarded the evidence or instructions of the court, or neglected properly to consider the facts, or overlooked prominent and essential points in them, and have failed to do substantial justice, the verdict will be set aside and a new trial granted.

A new trial will be granted for giving improper instructions to or withholding proper instructions from the jury.

Where a contract specifies that materials to be used, shall be of the best quality, and to be approved before used, the party furnishing them should apply to have them approved, or he uses them at his peril.

In a contract for finishing a building, a party sustaining damage by the use of poor materials and workmanship, may recoup under the general issue, by way of reducing the recovery under the *quantum meruit* or *valebant* counts.

The damages so recouped, to be deducted from the value of the labor and materials proportionately, as fixed by the contract.

Where an instrument is not truly described in its material parts, it cannot be read in evidence, under a special count upon it.