

This obligation contains the following clause: "Faute aussi par le dit débiteur de rembourser la somme ci-dessus mentionnée à son échéance il payera en sus de l'intérêt dix par cent pour frais de collection."

By his action, the plaintiff asks for the capital of the obligation, with interest, \$20 for costs of collection, and the costs of suit.

The law gives him his costs of collection by allowing the costs of suit; but he wants twenty dollars in addition to what the law so allows. He wants a double toll, which certainly does not seem proper nor right. But does the law sanction such a demand?

Damages incurred by the inexecution of an obligation other than for the payment of money are estimated in money; in other words, the obligation is converted into the debt of a certain sum of money. In the case of an obligation to pay a sum of money, its inexecution cannot change its nature; it was an obligation to pay money and it remains what it primitively was.

In the case of such obligations, damages do not therefore accrue for inexecution, but only for delay in the payment.

In the case of the non-performance of an obligation other than for the payment of money, the damages are either fixed by agreement or estimated by the Court at a certain sum, which represents the loss or injury sustained. In the case of default or delay in the payment of money, a special rule as to the damages resulting therefrom is laid down by article 1077 of the C. C., which provides that such damages shall consist *only* of interest at the rate legally agreed upon by the parties, or, in the absence of such agreement, at the rate fixed by law. They are, however, due without it being necessary for the creditor to prove that he has sustained any loss, and they accrue from day to day as long as the default lasts. The article is imperative, and prohibits anything being stipulated in addition to the interest; but the damages are commensurate with the length of the default.

Sirey, in note 1, under article 1153, says: "Les dommages-intérêts dus à raison du retard apporté à l'exécution d'une obligation qui se borne au paiement d'une somme d'argent, ne consistent jamais que dans la

"condamnation aux intérêts fixés par la loi, quelque soit d'ailleurs le préjudice que le défaut de paiement a causé au créancier."

It may be observed here that article 1153, C. N., limits the damages to interest at the rate fixed by law; whereas our Code allows of the rate being fixed by agreement as well.

Messrs. Aubry & Rau, in volume 4, page 107, say: "Les dommages-intérêts. . . . . consistent toujours, mais consistent uniquement, dans les intérêts légaux. . . . . quelque soit d'ailleurs le préjudice que le défaut de paiement a causé au créancier. . . . . Ainsi, le créancier, qui, en stipulant le remboursement à jour fixe de la somme à lui due, aurait indiqué au débiteur un dommage spécial. . . . . devant résulter pour lui du défaut du remboursement au terme convenu, ne pourrait, malgré cela, réclamer que les intérêts moratoires."

In the present case, the ten per cent. stipulated by the creditor for costs of collection is nothing else than a special damage payable, in addition to the interest, in consequence of the debtor's default. This is contrary to the provisions of article 1077, C. C., and is therefore illegal and cannot be allowed. The article is prohibitive, and any agreement in contravention thereto is consequently null. (Article 14, C. C.)

Judgment for two hundred dollars with interest and costs: "And the Court doth reject the surplus of the plaintiff's demand, the same being contrary to the provisions of article 1077 of the C. C."

*Rochon & Champagne* for plaintiff.

#### SUPERIOR COURT.

DISTRICT OF OTTAWA, October 25, 1886.

Coram WÜRTELE, J.

COSGROVE v. MAGURN.

*Action en Bornage—Old Borne—Prescription—Costs.*

**Held:**—*That by law, a peaceable possession, as proprietor, for thirty years, prevails over the limits indicated by titles, or by measurement, and also over posts and boundary marks between lots and other tracts of land, and confers ownership of the lands so possessed upon the possessor.*