

*d'Orleans*, makes mention of this Ordinance in very flattering terms, and cites it as authority.

The first point being settled, the next that presents itself is whether the prescription of *five years* as laid down in the 142 *art.* of this Ordinance is a complete and positive bar to the action, or whether it is only a restraint as to the evidence, and to be considered a mere presumption of payment requiring confirmation by the oath of the Defendant.

To assist in deciding these questions it would be well to examine how the terms of the article are explained by *Dunod* in his able Treatise on Prescriptions, when discussing the prescriptions of *five years* generally.

*Dunod*, pages 169-70, part II. cap. VII.

It will be found upon reference to this authority that *Dunod* treats the prescription of five years for rent as an absolute bar to the action, and not as a mere presumption of payment.

The same doctrine is also laid down in the *2nd Répertoire de Jurisprudence v. Bail*, 16<sup>me</sup> partie, 7<sup>me</sup> paragraphe. *Bretonnier, Questions de Droit*, page 251. *Troplong de la Prescription*, vol. 2<sup>nd</sup>, page 509, No. 1005.

*Dalloz, Dictne, Univl. v. Prescription*, No. 856-7. and was acted upon in the case No. 2072, *Garron v. Saucier*, decided in the Inf<sup>r</sup> term of the King's Bench, Quebec, 1824.

I am therefore of opinion that the Prescription invoked in this cause must be considered as a bar to the action, and not a mere presumption of payment.

The Plea of Prescription is therefore maintained, and the action dismissed with costs.

## L'AVEU JUDICIAIRE EST-IL DIVISIBLE ?

TO THE EDITOR OF THE REVUE DE LEGISLATION.

SIR,—In answer to a communication which appeared in your first number, and headed: "L'aven judiciaire est-il divisible?" will you do me the favor of inserting the following authorities, selected for the purpose of establishing the principle, that a plea or assertion of payment is not, in general, an admission of the debt.

In the absence of a very positive Law, we have the uniform Jurisprudence both before and since the promulgation of the Code Civil, as well as the practice of our own Courts, with the exception of a practice prevailing in the District of Three-Rivers, which has been established since the removal from that District, of the present Chief Justice of Montreal.

"Exception proposée n'est pas censée admettre la Demande. Ainsi celui qui propose l'Exception de paiement n'avoue pas la dette," 2<sup>nd</sup>. *Despeisses*, Tit. 6, No. 5."

"1. *Brodeau sur louet*, lettre C. Sommaire 34, page, 278, cite deux arrêts de Paris, l'un du dernier mai, 1630, l'autre du premier Août 1630. Celui qui excipe ne confesse que conditionnellement, c'est-à-dire, en cas que le Demandeur fasse preuve de sa Demande."

*Denisart verbo Exception*, No. 11.

"Ce n'est pas avouer qu'exciper,—"*qui excipit non fatetur*"—*ibid* No. 12.