CIRCUIT COURT.

Montreal, Sept. 13, 1878.

PAPINEAU, J.

PERRAULT v. ETIENNE.

Community—Renunciation—Medical Attendance—Liability of heirs for Community Debt notwithstanding Renunciation.

A claim for medical attendance, though in its nature a debt of the community, may be recovered from the personal heirs of the wife deceased, notwithstanding their renunciation of the *communauté de biens*.

The plaintiff, a physician, sued the tutor to a minor, heir by will of his deceased mother, for professional services rendered to the latter. The tutor had accepted for the minor the personal property of the deceased, but had renounced to the community which existed between the deceased and her husband.

The claim was resisted on the ground that the debt was a debt of the community, to which the minor had renounced.

The plaintiff's counsel cited C. C. 1994, 2003; 2 Bourjon, p. 688; Bacquet, p. 294.

PER CURIAM. The debt is undoubtedly a debt of the community, but it is also a natural debt of the child who has been constituted heir. I might dismiss the action *sauf recours*, and let the plaintiff sue the husband, who is the head of the community. But of what use would that be, seeing that by the inventory and renunciation produced, the community is worth nothing? The plaintiff must have judgment.

A. W. Grenier for plaintiff.

Duhamel, Pagnuelo & Rainville for defendant.

COURT OF QUEEN'S BENCH.

Montreal, Sept. 18, 1878.

Present: DORION, C. J., MONK, RAMSAY, TESSIER and CROSS, JJ.

CORNELL (plaintiff and contestant in the Court below), appellant; and RHICHARD (defendant and opposant in the Court below), respondent.

Opposition—Payment on Account not Proved in Original Suit.

A defendant, after he has contested an account, and judgment has gone against him, will be permitted, on an opposition to the seizure under judgment, to prove a payment which he had failed to prove in the principal suit, owing to his having been in error as to the date when he made such payment.

The appeal was from a judgment partially maintaining an opposition filed by the respondent. The appellant had obtained a judgment against the respondent for a balance of principal and interest due under an obligation and mortgage. Execution having issued, the respondent put in an opposition alleging that he had not received credit for certain payments on account, made by him before he was sued, and that he had been unable to prove these payments owing to an error of date, which he had only recently discovered. Respondent established by the evidence of plaintiff himself that he had paid $1,270 at certain dates specified, and his opposition was maintained to this extent, and a deduction of this sum made. The plaintiff appealed, contending that these sums had been accounted for in a settlement made in 1872, and objecting also that the defendant was re-opening under the opposition the *enquête* in the original suit.

RAMSAY, J., dissenting, thought the judgment was incorrect. There had been a suit in which the payments had been in question, and after the respondent had had an opportunity to prove all he could, judgment went for a certain sum, with 12 per cent. interest. There was hardship for the respondent to have to pay such a rate, but the Court had nothing to do with that. The issue was clearly raised as to a general indebtedness. On that there had been a solemn enquiry and a judgment. But now the defendant came in by opposition and said the judgment was wrong because he forgot that he had paid a certain sum. Whether the evidence on this point was explicit or not, it appeared to his Honor that what had been decided in the previous case could not be put in issue again. It was *res judicata*.

CROSS, J., remarked that when the parties went to evidence on the opposition, the respondent proved two payments, one of $900, and the other of $370, and he proved them by the oath of Cornell himself. The latter tried to evade the consequences, but still he admitted that there were two payments, for which Rhichard had not got credit. As to the objection of *chose jugée*, there was not identity of demand. What the respondent set up in his defence to the original action was not identical with what he