

the parties were heard *de novo*, and the case having again been submitted, the Court below by final Judgment rendered on the 31st March, 1845, maintained the Opposition of the said Respondent, with costs against the said Appellant.

It is from this judgment that the present Appeal is instituted, and the main grounds upon which it is respectfully submitted that the Judgment in question ought to be reversed, are these :—

1stly.—That there is no competent authority vested in the Judges of the land to name a Testamentary Executor.

2ndly.—That in the event of a Testator having omitted to name an Executor, or the Executor refusing to act, the execution of the Will by law devolves upon the heirs of such Testator.

3rdly.—That consequently the nomination of the Respondent as Testamentary Executor to the last Will of the said P. M. Cressé is illegal, nul and void.

4thly.—That there is no legal evidence of the existence of the *acte de constitution de rente*, and that the said *constitution de rente* is not proved.

5thly.—That there being no evidence that the deed of *constitution de rente* has been enregistered pursuant to the provisions of the 4th Vict. cap. 30, the Respondent hath lost his right of mortgage as against the Petitioner Douglas, a subsequent purchaser, who has complied with the requirements of the Statute above mentioned.

Upon the first and second points, the Respondent refers with confidence to the following authorities as being conclusive upon the subject :

“ Il n’y a que le Testateur qui puisse nommer un Exécuteur Testamentaire, s’il l’a omis, alors l’exécution du Testament appartient de droit aux héritiers.—Ancien Denizart.—*Verbo* Exécuteur, No. 5.”

“ 2. Bourjon, Droit commun, page 373, cap. 11, des Exécuteurs Testamentaires, No. 2.”

“ Ferrière, Dict. de Droit, *verbo* Exécuteur Testamentaire, page 615, vol. 2.”

“ 1 Argou, p. 409.”

“ Actes de Notoriété, p. 491, note a.”

“ Pand. françaises, p. 168, No. 373 ; p. 170, No. 374 ; p. 187, No. 386.”

“ Pothier, des Donations Testamentaires, cap. 5.

The 3rd point is established if the two first are well founded.

As to the fourth point, the Respondent refers to the Respondent’s Exhibits, No. 4 and 5 (No. — of the record) it will be found that this document purports to be a true copy of the Exhibit No. 1, filed by the Plaintiff on the 1st February, 1840, in the cause No. 994, then pending in the Court of King’s Bench for the District of Montreal, in which the now Respondent and his wife were Plaintiffs, and the Hon. Louis Gugy et al. Defendants.

It appears that the Officer of the Court of King’s Bench, Montreal, having in his keeping a document purporting to be a copy of the *acte de constitut* in question, makes a copy of this copy which he delivers ; and this copy of a copy is the document filed in support of the claim of the Opposant.

With respect to the fifth ground above stated, the Respondent refers to the 4th Vict. cap. 30 ; see 4th.