

by reason of such appointment the intentions of the Testator had been frustrated.

5° That the Appellant could urge the nullity of this appointment under the plea of general issue, inasmuch as the quality of Testamentary Executor, alleged by the Respondent, formed part of his title, and inasmuch as this nullity was an absolute nullity.

A variety of other points were urged, the substance of the arguments in relation to which is omitted, not touching upon the point above stated.

The Respondent contended, 1° That the Appellant could not avail himself of the irregularity of his appointment, not having pleaded the same specially.

2° That the appointment of the Respondent had become necessary by reason of difficulties which had arisen between Dumoulin and the heirs of the Testator.

3° That the appointment, under the circumstances, had been made with the view of carrying out the dispositions of the Will and the intentions of the Testator.

4° That the appointment of the Testator was analogous to the appointment of a *Curateur* to a substitution, and that the terms of the appointment itself were not so much to be taken into consideration as the intentions of the Testator.*

It was replied that supposing the terms of the Will to warrant this appointment, (which was denied,) this provision could not give jurisdiction to the Judge.

QUÉBEC, *Lundi, le 10 Novembre 1845.*

Présens : L'Honorable Mr. le juge Rolland, Président. Mr. le juge Mondelet, Mr. le juge Day, Mr. le juge Gairdner.

La Cour après avoir entendu les parties par leurs Avocats, examiné la procédure et en avoir délibéré, a infirmé et infirme le jugement de la Cour du Banc de la Reine en date du trente-unième jour de Mars, mil huit cent quarante-cinq, dont est appel en cette cause avec dépens contre l'Intimé William Robert Arthur Gilmor. Et rendant le jugement que la dite Cour eut dû rendre; cette Cour sans égard à l'exception péremptoire plaidée par l'Appellant à l'opposition du dit William Robert Arthur Gilmor, l'Intimé, mais considérant que l'Intimé n'a aucune qualité pour former l'opposition dont il s'agit dans l'intérêt des parties qu'il dit représenter, n'étant et ne pouvant être exécuteur testamentaire de feu Pierre Michel Cressé, nonobstant la nomination faite sur avis de parens le huit Septembre mil huit cent trente-six, par le juge résident du district des Trois-Rivières, qui est nulle et sans effet; considérant de plus que la preuve au soutien des allégués de l'opposition est insuffisante, le dit opposant ne produisant pas une expédition authentique de l'acte de constitution de la rente au paiement de laquelle l'appellant s'est obligé comme caution de feu Louis Guky, son père, lequel acte nese trouve ni prouvé ni admis, non plus que le montant

*Note.—The only authority which seems to sustain the pretensions of the Respondent, in so far as the legality of his appointment is concerned, is to be found in Ricard. *Traité des donations* Vol. I part I. p. 404, 405. This authority is contradicted by all the writers on the subject, and seems to be contrary to the arrests and the general principles of the case; it stands isolated.