This document is one deposition only in a
much larger lawsuit, colloquially called
'The Lort Inheritance Dispute',
from the family of Gilbert Campbell of Auchinbreck,
a younger son of Sir James Campbell, 5th Baronet of Auchinbreck.

Memorial for Gilbert Campbell, eldest son now in life of the deceased Sir James Campbell of Auchinbreck, and Mrs Susanna Campbell his second wife

Gilbert Campbell

Memorial for Gilbert Campbell, eldest son now in life of the deceased Sir James Campbell of Auchinbreck, and Mrs Susanna Campbell his second wife, for behoof of himself, and of William, Elisabeth, Mary, and Anne Campbells, the younger children of the said marriage, defenders; against Mary-Philippa-Jean-Agnes Campbell, daughter of the deceased James Campbell, eldest son of the said marriage, pursuer, and Jean Woodrow, her mother.

Campbell, Gilbert
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[Edinburgh, 1762].
14p. ; 4°

M Gilbert Campbell &c
Mary Philippa Jean Campbell
July 16. 1762.

MEMORIAL

FOR

Gilbert Campbell, eldeſt ſon now in life of the deceaſed Sir *James Campbell* of *Auchinbreck*, and Mrs *Suſanna Campbell* his ſecond wife, for behoof of himſelf, and of *William*, *Eliſabeth*, *Mary*, and *Anne Campbells*, the younger children of the ſaid marriage, defenders;

AGAINST

Mary-Philippa-Jean-Agnes Campbell, daughter of the deceaſed *James Campbell*, eldeſt ſon of the ſaid marriage, purſuer, and *Jean Woodrow*, her mother.

IN the proceſs at the inſtance of *Mary Philippa-Jean-Agnes Campbell*, daughter of the ſaid deceaſed *James Campbell* and *Jean Woodrow*, againſt *John Campbell* of *Calder*, for the ſum of *L.* 2000, veſted, by tripartite articles of agree- Dec. 20. 1717.
ment, betwixt him, and the ſaid Sir *James Campbell*, and his ſecond wife, the younger children of the ſaid marriage compeared, and inſiſted they had a preferable right to the ſaid ſum: And the Lord Ordinary, after pronouncing an interlocutor in their favour, did, upon adviſing a repreſentation, take the cauſe to report; but when it came, in courſe of the roll, to be reported, it occurred to the court, that the ſaid *Mary-Philippa Campbell* was not only an *alien*, as having been born in *Spain*,

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when her father was engaged in the military ſervice of that crown, during the late war with *Great Britain*, but that ſhe is alſo an *alien enemy* in the ſenſe of the law, as ſhe is ſtill reſident in the dominions of *Spain* during the preſent war, and as ſuch cannot maintain any action in this country.

This queſtion being remitted to the Lord Ordinary, the purſuers counſel, in place of making any anſwer to the objection made to her title, were pleaſed to make compearance for *Jean Woodrow*, her mother, and inſiſted upon a teſtament ſaid to have been executed by *James Campbell*, her deceaſed huſband,
July 7. 1744. in her favour, in 1744, which ſhe contended was a ſufficient title to carry on the action.

It was anſwered, for the ſaid *Gilbert Campbell*, and the younger children, 1*mo*, That by the copy of the teſtament produced, it appeared to be void and null, as neither being ſigned by the defunct, nor atteſted by witneſſes. And if it were ſuppoſed to be true, it bears ſtrong *indicia* of the defunct's weakneſs and incapacity at the time. 2*do*, The will appoints *Mary-Philippa*, his daughter, his only and univerſal heir, that ſhe may have and poſſeſs his effects. So the mother appears only to be a name for behoof of the daughter; and if the daughter is incapable of ſuing any action in this country, the interpoſition of the name of another for her behoof cannot avail her.

The Lord Ordinary having ſtated this preliminary queſtion to your Lordſhips, Mrs *Campbell* inſiſted, That the teſtament was executed agreeably to the form obſerved in *Spain*, the country where the defunct reſided at the time. But inſtead of bringing any evidence of the law of *Spain*, ſhe contended, that every deed that is ſigned in a foreign country ought to be preſumed to have been executed agreeably to the law of that country.

This queſtion appeared to your Lordſhips to be attended with difficulty; and it was remitted to the Lord Ordinary, to hear parties. His Lordſhip is now to ſtate it to the court, and has appointed memorials to be given in. What follows is humbly offered

offered in behalf of *Gilbert Campbell* and the other younger children.

And, in the *first* place, it is to be obſerved, that the deed here inſiſted on would appear, by the copy produced, to have been executed in a very ſingular form, and ſuch as the memorialiſts believe no inſtance has hitherto occurred before this court. It is not ſigned by the party, nor do the witneſſes atteſt, that they heard him give any command to any other to ſign for him: but only one of the witneſſes takes upon him to ſign for him; and this is ſaid to be done before the notary. The teſting clauſe is as follows: "And the diſponent, whom I "knew, and ſaw, did not ſign it, by reaſon of the weight of "his diſeaſe; but, at his requeſt, one of the witneſſes ſigned "it. They were, *Don Caſper Zerecedo*, a clergyman, Dr *Mar-* "*tin de Vitchin*, *Don Domingo Benter*, all inhabitants of this "village; Dr *Martin de Vitchen*, witneſs for *James Campbell*. "Before me, *Lucas Paſtor* notary-public." Here is neither the *ſubſcription* of the *party*, nor the *ſubſcription* of any *two witneſſes* concurring with the notary to atteſt his conſent to the deed. Only one witneſs takes on him to ſign in place of the teſtator, and the whole is ſaid to be ſigned by the notary.

2*do*, The defunct appears to have been in a very low condition at the time: and indeed it would appear that he did not think himſelf fit for making a ſettlement; for the deed bears the following clauſe: "And as death is a natural occurrence, "and that when I am called, I wiſh to make the neceſſary "prevention of a teſtament, the weight of my diſeaſe not per- "mitting me now to diſpone, I have communicated to my "wife Mrs *Jean Campbell* what ſhe is to do; and to enable her "to do ſo, I do grant her hereby the moſt full and extenſive "power I can make, That, immediately after my deceaſe, ſhe "may make out and diſpoſe my laſt will according to what I "have communicated to her; reſerving with myſelf, as I do "reſerve, ordering my burial, naming an executor, and ap-

"pointing

" pointing an heir ; and I deſire I may be buried in the pariſh-
" church of *St Domingo*," &c.

This deed does not appear to be altogether conſiſtent with itſelf. He declares, that the weight of his diſeaſe does not permit him to diſpone, and impowers his wife, after his death, to make out and diſpoſe, his laſt will ; and yet, immediately after, he names an executor and an heir to poſſeſs his effects. If this be truly the defunct's will, it would appear that the weight of his diſeaſe has been ſo great, as not to leave him a ſufficient degree of attention to direct the framing of it in a conſiſtent manner. At any rate, it appears that he muſt have been *in extremis* at the date of this deed ; and the purſuer admits that he died in two days after ; and therefore it would have been neceſſary that it ſhould have been atteſted by better evidence than that of a ſingle witneſs, who took upon him to ſign his name in his place. If this were allowed to be ſufficient to prove the authenticity of a deed, it would open a door to practices very dangerous in the caſe of dying perſons. In ſuch caſes, the law of reaſon, without any poſitive ſtatute or conſtitution, ſeems to require, that the defunct's condition, as well as his conſent, ſhould be atteſted by a reaſonable number of witneſſes, beſide the notary who is ſuppoſed to frame the deed. What that number ſhould be, will depend upon the law or cuſtom of every particular country. But the memorialiſts do not know, that the law of any country allows one witneſs to be ſufficient in a deed of this kind ; and yet here there is only one witneſs who ſubſcribes along with the notary.

3*tio*, The principal teſtament is not produced, nor any atteſtation or tranſcript of it by *Lucas Paſtor* the notary, but only a certificate, as follows : " *Juan Migcul De Lozano et Marquiz*, " notary public of the village of *Bornos*, and who alone diſpatch " that branch, do certify, that the above copy agrees with the " original that remains among the originals in my regiſter, to " which I refer." Signed at *Bornos*, 14th *June* 1758.

And another certificate is ſubjoined, of the ſame date, by *Joſeph*

ſeph Romero and *Andrew De Soto-Boreta*, who call themſelves *apoſtolic notaries*, as follows: "We the under-written apoſtolic notaries, inhabitants of this village of *Bornos*, hereunto ſubſcribing, do certify, that *Juan Migcul De Lozano et Marquiz*, by whom the foregoing copy of a power to teſtate is authenticated and ſigned, is a notary-public of the council of this village, and who alone diſpatches that branch, and as ſuch entire faith and credit is given to his atteſtations, in judgment, and elſewhere."

Theſe are the only certificates produced in ſupport of this deed. For though the purſuers were pleaſed to refer to a certificate ſigned by *Benjamin Keene*, his late Majeſty's plenipotentiary at the court of *Madrid*; yet it does not appear to affect the preſent queſtion. It is not ſubjoined to the certified copy of the teſtament above recited, which was taken out in *June* 1758. It is ſigned by Mr *Keene*, at *Madrid*, on the 26th *September* 1750, and ſubjoined to a power of attorney granted by Mrs *Campbell*, and ſome other papers in the *Spaniſh* language, which the purſuers have not thought fit to tranſlate, as being of no importance to the preſent queſtion. And indeed it is not to be ſuppoſed, that Mr *Keene*, reſiding at *Madrid* in 1750, could give any atteſtation with reſpect to a teſtament, ſigned in an obſcure diſtant village of *Bornos*, in *July* 1744, when *Spain* was at war with *Britain*, which made it impoſſible for him to know any thing that paſſed in that country.

The queſtion therefore depends entirely upon the copy of the teſtament produced, with the atteſtation of the notary of 14th *June* 1758. And the point now ſubmitted to your Lordſhips conſideration, is, Whether that copy is *per ſe* probative, and ſufficient to found an action in this country? or, If it is incumbent on Mrs *Campbell* to prove, that it contains the ſolemnities required by the law of the kingdom of *Spain*, in which the defunct is ſaid to have reſided at the time?

It would appear at firſt view, that this queſtion could be of no difficult ſolution. The laws of this and every other coun-

try require certain ſolemnities to be adhibited to writs, and forbid their judges to ſuſtain any writing in which theſe ſolemnities are wanting. The deed now produced, were it a principal, (as it is only a copy), behoved to be found void and null by our law, as it has none of the ſolemnities required. The only ground upon which it can be ſuſtained, is, that it was executed in a foreign country; and the expediency of commerce, and the correſpondence among nations, requires, that writs ſhould be ſuſtained which are executed according to the law of the country where the parties reſide, as they may be deprived of the aſſiſtance of perſons ſkilful in the laws of their own country. It is upon this ground only that an *exception* has been introduced from the *general rule* by the *comitas* of modern nations. And from the common principles of all judicial proceedings, it ſeems obvious, that the party who pleads the privilege of the exception, ought to ſatisfy the court to which he applies, that his caſe falls under it. He ought to inſtruct, that the deed which is null by the law where he ſues, is valid and formal by the law of the place where it was executed. If he does not ſhow this, he cannot aſk a decree upon a deed which appears to the court to be void by the law of their own country, and is not proved to be valid by that of any other.

It is no ſufficient ground to preſume the formality or regular execution of a deed, that it appears to have the ſubſcription of a party adhibited, or the atteſtation of a notary. It is notorious in all countries, how many deeds ſo atteſted appear every day, that are void and null; and we have no reaſon to preſume, that notaries in other countries either know their duty better, or perform it with more accuracy, than thoſe who live in our own.

And ſtill leſs can ſuch preſumption be pleaded, where a deed appears to be deſtitute of the ſolemnities which may reaſonably be ſuppoſed to be required by the law of every country, to ſatisfy judges of the authenticity of it. Where a party is not capable to adhibit his own ſubſcription, it will not eaſily be preſumed,

preſumed, that the law of any country would be ſo negligent of the ſecurity of the ſubjects, as to make the validity to depend on the ſubſcription of a ſingle witneſs atteſted by a notary, which is all that occurs in this caſe, even although the principal were produced in place of the copy. When ſuch extraordinary deed appears, it ought to be ſupported by an inconteſtable proof of the *lex loci*, to overbalance the preſumption that naturally lies againſt the validity of ſuch defective writing.

And indeed, in all caſes, this is the rule that has been laid down in the law-books, and confirmed by the deciſions of the court, That foreign laws and cuſtoms, when they are founded on, are conſidered as matters of fact, and to be proved by the party who makes the allegation. Many deciſions have been given to this purpoſe above 100 years ago. Lord *Durie* obſerves one in the caſe of a ſtranger of *Middleburgh*, againſt the executors of one *Smith*; where the ſtranger purſued for payment of a ſum contained in the deceaſed *Smith*'s bond, granted in *Flanders*, without witneſſes inſert: "The Lords ſuſtained "the bond, albeit it was alledged that it wanted witneſſes, "and ſo was null; becauſe the purſuer offered to prove, that it "was the cuſtom of the country that ſuch bonds, albeit want-"ing witneſſes, yet was effectual againſt the ſubſcribers there-"of; which the Lords *admitted* to *probation*; but found, that "that cuſtom ſhould not be proven by the declaration of wit-"neſſes, but by a teſtimonial of the judges of the country." Dec. 6 1626, Stranger of Middleburgh contra Smith's executors.

Again, one *Harper*, as aſſignee by a *Frenchman*, purſued *Jaffery*, upon a *French* bond executed in *Rouen*: and *Jaffery* having objected the nullity, that it wanted witneſſes, and did not deſign the writer, the purſuer replied upon the cuſtom of *Normandy*; and the Lords "found the *reply* upon the *cuſtom* of "*Normandy* relevant; which being proven, ſuſtains the bond." Feb. 15. 1630, Harper contra Jaffery.

And upon the ſame principles, when an exception of payment was made to an *Iriſh* bond, and the payment offered to be proven, by witneſſes, being made in *Ireland*; "the Lords "found this exception probable after that manner by witneſ-"ſes, Nov. 16 1626, Galbraith contra Cuningham.

" ſes, to be relevant; the *defender always proving* therewith, " that, by the *laws* of *Ireland*, payment of ſums contained in " ſuch bonds may be proven by witneſſes, and that probation " by witneſſes is received and allowed by the *Iriſh* laws."

The ſame author mentions a fourth caſe, where the purſuer pleaded a reply upon the cuſtom of *England*; and obſerves, that " this *reply* was *ſuſtained* upon the *cuſtom* of the *laws* of " *England*, and *admitted* to the *purſuer's probation*."

July 27. 1633, Gordon contra Worly.

The ſame rule was followed by this court in the deciſions obſerved by Lord *Stair*. In a proceſs at the inſtance of the Maſter of *Salton* againſt the Lord *Salton*, upon a bond granted by his predeceſſor to a *Frenchman* in *Rheims*, which the Maſter had acquired, it was objected, That the bond was null. It was anſwered, That the bond was valid according to the cuſtom of *Rheims* in *France*, where it was made: " For trying of which " cuſtom, commiſſion was granted to the preſidial of *Rheims*; " who returned their report, That, by their cuſtom, and the " common cuſtom of *France*, ſuch bonds were valid, though " there were no witneſſes inſert, if by witneſſes, or by compa- " riſon of writ, the hand-writ of the party were proven."

July 5 1673, Maſter of Salton contra Lord Salton.

And in another caſe, where a purſuer pleaded an allegation to ſupport his claim on an *Engliſh* bond, upon a conſtruction received in the law of *England*, " the Lords found the alledgeance " relevant; and for *proving* thereof, granted *commiſſion* to the " judges of the common pleas, to declare what was their law in " the caſe."

Jan. 16. 1676, Cuningham contra Brown.

This rule is accordingly laid down by Lord *Stair*, in his Inſtitutions; where, after mentioning ſeveral inſtances of the regard ſhown by this court to the laws of other countries, he ſubjoins this limitation: " But the law of *England*, and other fo- " reign nations, being matter of fact with us, the ſame was " found probable by the declaration of the judges there;" and refers to the deciſion laſt mentioned.

Stair, lib. 1. tit 1. § 16. p. 11.

And the learned author of the late *Inſtitute* of the *law*, after obſerving, That, for expediency, deeds granted abroad, conform

Book 1. tit. 1. § 77. p. 32.

conform to the law of the place, are ſuſtained, adds, " How-
" ever, in ſuch caſe, the *perſon* that *ſues* on ſuch *obligation* or
" *teſtament*, muſt *prove*, that it was *executed* according to the
" *law* of the *place* where it was ſigned, if the other party con-
" trovert it: for the law of foreign countries is matter of fact
" to us."

The purſuer did not refer to any evidence for proving that the teſtament in queſtion was executed according to the forms of the law of *Spain*, nor to any precedent in this court, in which it had been found that foreign deeds ought to be ſuſtained, without proving that they had been executed conform to the *lex loci*; but reference was made to certain authorities, from which it was inferred, that the preſumption lies for the ſubſiſtence of the deed, as executed agreeably to the *lex loci*, unleſs the contrary is proved. The authorities referred to were, *Voet, tit. De ſtatut.* § 13.; *tit. De probat. et præſump.* § 15.; *tit. De fide inſtrument.* § 3. and 8.; *Simon Van Leeuwen cenſura forenſ. part.* 2. *lib.* 1. *cap.* 29. § 11.; — *Berlichius Concluſ. pract. part.* 1. *concluſ.* 44. N° 31. 34. and 35.; *Menochius De præſumptionibus, lib.* 2. *præſump.* 2. N° 7.; and *præſump.* 78. N° 10. and 14.

The *firſt citation* from *Voet*, proves only a point that is not diſputed in this caſe, *viz.* that deeds executed in foreign countries are *ex comitate* ſuſtained, if the ſolemnities of that country are obſerved; and the ſame is alſo the purport of the *firſt citation* referred to from *Menochius*. But it is a quite different queſtion, What evidence is requiſite to prove, that foreign deeds are executed according to the law of the country where they bear date?

Voet, ad ff. lib. 1. tit. 4. num. 13.

Menochius, lib. 2 præſ 2. num 7.

Voet, in *tit. De probat. et præſumpt.* ſays, " Negotium unum-
" quodque, quod geſtum eſt rite atque ordine, ſolennitatibus,
" tum externis adhibitis, geſtum eſſe." This is a general rule, That every thing is to be preſumed that is implied in a deed; but has no reference to *foreign deeds*; as appears from the laws referred to for proof of it, § 17. *Inſtit. De inutil. ſtipulat.* " Si ſcriptum in inſtrumento fuerit, promiſiſſe aliquem, perinde

Voet, ad ff. lib. 22. tit. 3. num. 15.

" habetur

" habetur atque ſi interrogatione præcedente reſponſum ſit." § 4. *Inſtit. De fidejuſſoribus, l.* 30. *ff. De verbor. obligat.* " Sciendum eſt generaliter, quod ſi quis ſe ſcripſerit fidejuſſiſſe " videri omnia ſolenniter acta."

In the title *De fide inſtrumentorum*, § 3. after obſerving, that in all deeds the ſolemnities ought to be adhibited, which are required by the law of the place where the deed is executed, he adds, " Quales etiam in dubio præſumi adhibitas, donec con- " trarium probetur," *dict. tit. præcedent. De probat.* N° 15. This is the ſame general rule, That every thing is preſumed, which is implied in the nature of the deed. But he is not ſpeaking here of deeds brought from diſtant countries. Theſe are referred to in N° 8. of the ſame title, as follows.

Voet, De fid inſtrument. num. 8.

" Denique, ſi inſtrumentum publicum ex longinqua producatur regione, non adeo indubitatam fidem judici faciat; unde " tutius eſſe monent pragmatici, ſi is, qui tali inſtrumento uti " vult, jungat ei ſcriptum, ac ſigillo publico munitum teſtimonium magiſtratuum loci ubi factum, quo ſignificatur inſtrumentum talis argumenti, ſeu talia continens, a perſona " ejus loci, publica ſeu legali, conſcriptum eſſe." *Mer[illegible] De præſumption. lib.* 2. *præſ.* 78. N° 10. *et* 14.; *Ber[illegible] Concluſ. pract. part.* 1. *concluſ.* 44. N° 34. 35.; *Leeuwe[illegible] for. part.* 2. *lib.* 1. *cap.* 29. N° 11.

This precaution, That what is brought from a diſtant country ought to be confirmed by the *teſtimonial* of a *magiſtrate*, atteſted by a *public ſeal*, is, in the ſame manner, laid down by *Van Leeuwen* and *Berlichius*, in the paſſages referred to by the purſuer.

Leeuwen, part 2 lib. 1. cap. 29 num. 11.

Van Leeuwen, after quoting *Berlichius*, ſays, " Ubi tamen pro cautela addit, tutius eſſe, ut is qui inſtrumento ex lon- " ginquis regionibus uti velit, in rei fidem, teſtimoniale ſcrip- " tum ſecum adferat, publico aliquo ſigillo munitum, per quod " teſtificetur eum qui inſtrumentum illud, talem rem compre- " hendens, ſcripſit, publicum notarium atque legalem eſſe."

And,

And, in the *ſame paragraph*, ſpeaking of the cuſtom of *Guelderland*, and other neighbouring countries, he obſerves, That they give no credit to notorial inſtruments, unleſs they are ſupported by the atteſtation of a magiſtrate: "Qui nec "propterea notarialibus inſtrumentis noſtris aliquid deferunt, "niſi et illa a magiſtratu loci legali, ut loquuntur, atteſtatione, "ſint recognita, qua profitentur eundem notarium eſſe hominem "bonæ fidei, notarium publicum, cujus, in omnibus coram ſe "ſolenniter confectis, publica fides ſit."

The purſuer referred to *Berlichius*, a *Saxon* author, in his *Concluſiones practicabiles*, *concluſ.* 44. N° 31. "Publicum vero "inſtrumentum recognitione opus non habet; quoniam illud "per ſe plenam fidem faciat, ſatiſque probet." Here it is plain, the author ſpeaks of deeds executed in the country where they are tried; for he proceeds to treat of *foreign deeds*, N° 34. and 35.; and yet even as to theſe he obſerves, That lawyers are of different opinions, and that the practice in *Saxony* is different from the rule here laid down: "*Quamvis Johan. Ferrar. Montan.* "*in ſuo proceſſu, part.* 1. *lib.* 2. *cap.* 5. contrarium vellet; cu- "jus contrarium etiam in his terris obſervatur, ubi nullum inſtrumen- "tum, nec etiam publicum, abſque recognitione probat." Berlichius, concluſ. 44. num 31.

But with reſpect to *foreign deeds*, the rules laid down by this author are as follows: "Externo autem inſtrumento, quod ex "longinqua regione, puta Italia, Hiſpania, Gallia, Anglia, "Dania, et aliis peregrinis locis, affertur, et cujus neque nota- "rius, neque ſigillum commode agnoſci vel probari poterit, "etſi quidam tunc fidem adhibent, ſi producens ſit bonæ et in- "tegræ famæ, et juret inſtrumentum eſſe verum, atque a pub- "lica perſona confectum." Num. 34.

"Tutius tamen erit, ut is qui inſtrumento ex longinquis re- "gionibus uti velit, etiam, in rei fidem, teſtimoniale ſcriptum "ſecum afferat, publico aliquo ſigillo munitum, per quod teſti- "ficetur, eum qui inſtrumentum illud, talem rem comprehen- "dens, ſcripſit, publicum notarium atque legalem eſſe," &c. Num. 35.

The *laſt authority* referred to on the other ſide was from

Menochius De præſumptionibus, præſumpt. 78. N° 10. and 14. In the beginning of the title, he lays down the general preſumption, *Quod nemo præſumitur notarius*, which he limits, in certain caſes, to the above paragraphs above referred to. " Declaratur, ter-

Menochius, præſumpt. 78. num. 10. " tio, non procedere, quando ex remota regione allatum fuit " *inſtrumentum, habens debitam formam publicam*, nec *aliquod vi-* " *tium* in eo apparet, et *nemo contradicit*; nam et tunc præſu- " mitur notarius qui illud confecit: et ideo illi inſtrumento ad- " hibetur fides.

Num. 14. " Declaratur, ſexto, ut locum non habeat, quando in inſtru- " mento ex alio loco allato extant literæ teſtimoniales, quod is " qui recepit illud inſtrumentum eſt publicus notarius: hoc ſane " caſu præſumitur ita eſſe, et ei fides adhibetur."

Theſe are all the authorieies that were referred to on the other ſide; and the memorialiſts are in your Lordſhips judgment, that they do not prove any thing contrary to the rule laid down in our own law-books and deciſions, That when a writing is produced from a foreign country, which is not ſupported by any check ſufficient to aſcertain its authenticity, it muſt be incumbent on the uſer to prove, that the law of the country authoriſes writings to be ſigned in that form. The authorities relate chiefly to another queſtion, What evidence is ſufficient to prove, that foreign writs were truly ſigned by notaries? and here they require the *teſtimonial* of a *magiſtrate*, atteſted by a *public ſeal*; which is very different from the evidence offered in this caſe, where *Juan Migcull Lazanos* being a notary, is only atteſted by other two perſons, who call themſelves *apoſtolic notaries*, inhabitants in the village of *Bornos*. But there is no atteſtation whatever, either by any magiſtrate, or under a public ſeal, that theſe two perſons were veſted in the characters which they here aſſume to themſelves: and it is a certain rule, agreed on by lawyers, that the declaration of a notary cannot prove that he is inveſted in that office.

Maſcardus, De probationibus, concluſ. 1098 num. 1. Thus *Maſcardus*, after laying down the general preſumption, That *nemo præſumitur notarius*; *et ideo probandum eſſe, qualitatem*

tem notariatus, tradunt omnes ; et producens inſtrumentum hujuſmodi probationis onere gravatur ; and after quoting many authors to this purpoſe, he adds,

" Ampliatur hujuſmodi concluſio procedere, etiam quod in- Num. 12.
" ſtrumentum conficiens aſſereret, in inſtrumenti ſubſcriptione,
" ſe notarium ; *ut ego vero publ. imperiali, ſive pontificia autho-*
" *ritate, notarius ſcripſi, et publicavi, &c.* : non enim credi-
" tur aſſertioni notarii ſuper *ipſo notariatu.*" And this he confirms by a number of teſtimonies, unneceſſary to be here recited. And therefore, if the queſtion were ſingly with reſpect to the *character* of the *notary* by whom this teſtament is ſaid to have been executed, the evidence here produced would not be ſufficient to ſupport it, even in terms of the authorities appealed to by the purſuers themſelves.

But here there is ſtill a different queſtion, which it is incumbent on the purſuers to prove, *viz.* That this extraordinary and uncommon form of a deed, atteſted only by a ſingle witneſs, who is ſaid to ſubſcribe for the dying perſon, is ſuch a deed as is authoriſed by the law of *Spain*. This is ſurely a *matter* of *fact*, and a very *improbable* one too ; and it muſt be incumbent on the maker of the allegation to prove it. So it has been eſtabliſhed by an uniform tract of deciſions of this court ; and the authorities referred to, were they of equal weight, do not prove the contrary. They ſuppoſe, that the deed produced is an *inſtrumentum habens debitam formam publicam*. They do not ſuppoſe ſo abſurd a thing, as that a deed which bears no evidence of the party's ſubſcription, ſhould be taken for granted to be an authentic deed, merely becauſe it bears date in a foreign country.

The memorialiſts are ſorry that this paper ſhould have been drawn out to ſo great a length, by reciting many foreign authorities which do not much affect the preſent queſtion ; but as they were referred to on the other ſide, we behoved to recite them, that the full import of them might appear to the court : and we ſhall give your Lordſhips very little trouble on the other point,

point, for which it is believed there will be no occaſion, *viz.* That if Mrs *Campbell* could prove, that the teſtament was executed according to the rules of the law of *Spain*, yet it could not maintain an action in this country; becauſe it appears, *ex gremio*, that ſhe is named executor to her huſband only for behoof of her daughter, who is, by the will, appointed to be her father's only and univerſal heir, and to have and poſſeſs his effects: and therefore, as the daughter is an *alien enemy*, and diſabled to recover any effects in this country, it ſeems to be a plain conſequence, that it can as little be competent to her mother to recover the ſame for her behoof, when the truſt appears *ex facie* of her *title*. Your Lordſhips would not ſuſtain an action at the inſtance of the truſtee of an attainted perſon; and the memorialiſts believe that an alien enemy is in no better caſe. But it is unneceſſary to trouble the court with enlarging upon this point, as the purſuers have neither brought nor offered any evidence to prove, that this writing, which could bear no faith by the law of this or any other country known to the memorialiſts, was executed according to the form eſtabliſhed by the law of *Spain*: And until ſuch proof is brought, it cannot be ſuſtained as the ground of an action before this court.

In reſpect whereof, &c.

JAMES FERGUSON.