in fact wasted, I cannot conceive that a court of equity would ever compel the sureties to pay up the administration bond for the relief of the heirs. Their liability is legally confined to the demands of creditors and distributees alone; and I can see no equity in subjecting them, directly or indirectly, to the general equity of the heirs, in stretching that liability beyond its strict legal limits.

Baldwin, Justice, also dissented from the judgment and opinion of the court.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the eastern district of Virginia, and on the points and questions on which the judges of the said circuit court were opposed in opinion, and which were certified to this court for its opinion, in pursuance of the act of congress for that purpose made and provided; and was argued by counsel: On consideration whereof, it is the opinion of this court, that the debt of Patton, or such portion of it as was paid out of the proceeds of the sale of the real estate, should be credited to that fund, and not to his account of the administration fund. Whereupon, it is ordered and adjudged by this court, that it be certified to the judges of the said circuit court, that the debt of Patton, or such portion of it as was paid out of the proceeds of the sale of the real estate, should be credited to that fund, and not to his account of the administration fund.

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*319] *The Lessee of James B. Clarke and others, Plaintiff in error, *v.* John Courtney and others, Defendants in error.

Proof of deed.—Power of attorney.—Adverse possession.

The clerk of the court brought into court, under process, a letter of attorney, and left a copy of it, by consent of the plaintiffs and defendants, returning home with the original; M., a witness, stated, that the clerk of the court showed him the instrument, the signature of which he examined, and he believed it to be the handwriting of the party to it; with whose handwriting he was acquainted; another witness stated, that the instrument shown to M. was the original power of attorney; the letter of attorney purported to be executed and delivered by "James B. Clarke, of the city of New York, and Eleanor his wife," to "Carey L. Clarke, of the city of New York," on the 7th of October 1796, in the presence of three witnesses. In the ordinary course of legal proceedings, instruments under seal, purporting to be executed in the presence of a witness, must be proved by the testimony of the subscribing witness, or his absence sufficiently accounted for; when he is dead, or cannot be found, or is without the jurisdiction of the court, or otherwise incapable of being produced, the next secondary evidence is the proof of his handwriting, and that, when proved, affords *primâ facie* evidence of a due execution of the instrument; for it is presumed, that he could not have subscribed his name to a false attestation. If, upon due search and inquiry, no one can be found who can prove his handwriting, no doubt, resort may then be had to proof of the handwriting of the party who executed the instrument; such proof may always be produced as corroborative evidence of its due and valid execution; though it is not, except under the limitation stated, primary evidence. Whatever may have been the origin of the rule, and in whatever reason it may have been founded, it has been too long established to be disregarded, or to justify an inquiry into its original correctness. The rule was not complied with in the case at bar; the original instrument was not produced at the trial, nor the subscribing witnesses, or their non-production accounted for; the instrument purported to be an ancient one; but no evidence was offered, in this stage of the cause, to connect it with possession under it, so as to justify its admission as an ancient deed, without further proof. The agreement of the parties dispensed with the production of the original instrument, but not with the ordinary proof of the due execution of the original, in the same manner as if the original were present.

Clarke v. Courtney.

A power of attorney "to sell, dispose of, contract, and bargain for land, &c., and to execute deeds, contracts and bargains for the sale of the same," did not authorize a relinquishment to the state of Kentucky of the land of the constituent, under the act of the legislature of that state of 1794; which allowed persons who held lands subject to taxes, to relinquish and disclaim their title thereto, by making an entry of the tract, or the part thereof disclaimed, with the surveyor of the county.[1]

A power of attorney from "James B. Clarke and Eleanor his wife," to "Carey L. Clarke," for the sale of lands, is not properly or legally executed in the *following form: "I, the said Carey L. Clarke, attorney as aforesaid, &c., do;" "in witness whereof, the said Carey L. Clarke, attorney as aforesaid, has hereunto subscribed his hand and seal, this 25th day of November, in the year of our Lord 1800.—Carey L. Clarke. [L. S.]" This act does not purport to be the act of the principal, but of the attorney; this may savor of refinement, since it is apparent, that the party intended to pass the interest and title of his principals; but the law looks not to the intent alone, but to the fact, whether the intent has been executed in such a manner as to possess a legal validity.[2] [*320

In the case of Hawkins *v.* Barney's Lessee (*post*, p. 457), it was decided, that when the plaintiff's title, as exhibited by himself, contains an exception and shows that he has conveyed a part of the tract of land to a third person, and it is uncertain whether the defendants are in possession of the land not conveyed, the *onus probandi*, to prove the defendant on the ungranted part, is on the plaintiff.

If a mere trespasser, without any claim or pretence of title, enters into land, and holds the same adversely to the title of the owner, it is an ouster or disseisin of the owner; but in such case, the possession of the trespasser is bounded by his actual occupancy; and consequently, the owner is not disseised, except as to the portion so occupied.

Where a person enters into land, under a deed or title, his possession is construed to be co extensive with his deed or title; and although the deed or title may turn out to be defective or void, yet the true owner will be deemed to be disseised to the extent of the boundaries of such deed or title; this, however, is subject to some qualifications; for if the true owner be, at the same time, in possession of part of the land, claiming title to the whole, then his seisin extends, by construction of law, to all the land which is not in the actual possession or occupancy, by inclosure or otherwise, of the party so claiming under a defective deed or title.

In the case of the Society for Propagating the Gospel *v.* Town of Pawlet, 4 Pet. 480, the court held, that where a party entered as a mere trespasser, without title, no ouster could be presumed in favor of such a naked possession; but that when a party entered under a title adverse to the plaintiff, it was an ouster of, and an adverse possession to, the true owner; the doctrines recognised by this court are in harmony with those established by the authority of other courts, especially, by the courts of Kentucky.[3]

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[1] A power of attorney to sell and convey lands, was held, under the circumstances, to empower the attorney to enter into a covenant of seisin. Le Roy *v.* Beard, 8 How. 451. See Hubbard *v.* Elmer, 7 Wend. 446.

[2] If an agent sign and seal a deed in his own name, it does not bind his principal, though it purport to be made between the other party and the principal, by such agent. Bellas *v.* Hays, 5 S. & R. 427. Where, however, an instrument, executed by an agent, shows on its face, the names of the contracting parties, the agent may sign his own name first, and add to it "agent for the principal," or he may sign the name of his principal first, and add, "by himself as agent;" either form may be followed; all that is required, in such case, is, that the contract shall purport on its face to be the contract of the principal. Smith *v.* Morse, 9 Wall. 76. And in Van Ness *v.* United States Bank, 13 Pet. 20–1, it was held, that the rule does not apply, where an authority is to be executed under the decree of a court of chancery.

[3] The law deems every man to be in the legal seisin and possession of land to which he has a perfect and complete title; this seisin and possession is co-extensive with his right, and continues until he is ousted thereof by an adverse possession. United States *v.* Arredondo, 6 Pet. 743. So, where a person enters upon unoccupied land, under a deed or title, and holds adversely, his possession is construed to be co-extensive with his deed or title, and the true owner will be deemed to be disseised to the extent of the boundaries described in that title; still, his possession beyond the limits of his actual occupancy is only constructive; if the true owner be, at the same time, in actual possession of part of the land, claiming title to the whole, he has the constructive possession of all the land not in the actual possession of the intruder, and this, though the owner's actual possession be not within the limits of the defective title Hunnicutt *v.* Peyton, 102 U. S. 368.

Error to the Circuit Court of Kentucky. This was an action of ejectment, instituted in February 1821, against a number of persons in possession of a large tract of land, containing 55,390 acres, in the state of Kentucky. The suit was afterwards dismissed, by the plaintiffs, as to forty of the defendants.

The declaration contained five counts, each count stating separate demises of the same tract of land. The first was on the demise of James B. Clarke, *321] of the 1st of September 1820, for 55,390 acres, granted *by Virginia to Martin Pickett, by patent, bearing date the 10th December 1785, "beginning at a sugar tree and white oak, at the head of a hollow corner, to another survey of the said Pickett, and of younger Pitt's land, thence with a line of said Pickett's survey of 44,740 acres," &c., describing the abuttals as set forth in the patent.

The second count was on the demise of John Bryant, Maxwell and wife, Anna Maria Maxwell and Eliza Bryant Grant, heirs of John Bryant, deceased. The third was on the demise of Abraham Schuyler, and Neelson and wife. The fourth, of Theodocia, Thomas and John B. Grant. The fifth on several demises made by John B. Maxwell, Anna Maria Maxwell, Eliza B. Grant, Theodocia S. Grant, Thomas R. Grant, John B. Grant, Abraham S. Neelson and wife.

The case was tried at November term 1826; when the verdict and judgment were for the defendants. In the course of the trial, the plaintiffs took three bills of exception to the opinions of the court on the matters set forth therein.

The first bill of exceptions set forth, that on the trial of the cause, some of the defendants, professing to hold a conveyance from the plaintiff, Clarke, by Carey L. Clarke, as attorney in fact of the said plaintiff, offered in evidence, a deed and letter of attorney, the former, executed by Carey L. Clarke, as the attorney in fact of James B. Clarke and Eleanor Clarke, his wife, on the 23d October 1800, to Robert Payne, and the latter, the power of attorney, executed at the city of New York, on the 7th of October 1796. The deed to Robert Payne, which was duly admitted to record, released to him all James B. Clarke's title to all the land embraced by the surveys of John and Robert Todd, on the North Fork of Eagle and Mill Creek, so far as they interfered with the patent to Martin Pickett, under which Robert Payne claimed; and gave testimony likewise, conducing to prove them. And that, Andrew Moore, the clerk of the Harrison circuit court, who brought the letter of attorney into this court, under process for that purpose, desiring to return, and considering it his duty to retain possession of that instrument, by consent of plaintiff and defendant, departed with it, *322] leaving a copy. And at a *subsequent day, Moses L. Miller was introduced as a witness, to prove the letter of attorney, who stated, that being summoned as a witness, he met with the clerk of Harrison aforesaid, in Georgetown, who showed him an instrument, the signature to which he examined, and he believed it to be the handwriting of James B. Clarke, with whose handwriting he was acquainted. And another witness was examined, tending to prove that the instrument so shown by said Moore to Miller, was the same previously read before this court as aforesaid. When Andrew Moore, the clerk of Harrison court, was about to resume possession of the letter of attorney, and to depart, the attorney of the plaintiff declared

that he had no objections. No further evidence was offered relative to the power of attorney. To the admission of the testimony of Miller, the plaintiff objected, especially, in the absence of the letter of attorney ; but the court overruled the objection, and submitted the testimony to the jury, as tending to prove that instrument ; to which the plaintiff excepted.

The second bill of exceptions stated, that the plaintiff proved and read in evidence, a patent from the commonwealth of Virginia, to Martin Pickett, dated 10th of December 1785, for 55,390 acres, "beginning at a sugar tree and white oak, at the head of a hollow corner to said Pickett's and younger Pitt's land, thence with a line of said Pickett's survey of 44,740 acres, being part of said entry, north 9°, east," &c.; being the same abuttals set forth in the declaration of ejectment, and in the power of attorney. And also a deed from the said Martin Pickett, of Virginia, to William and John Bryant, for the said land, dated May 1st, 1793 ; and also a deed from William Bryant to James B. Clarke, dated 18th July 1794, for an undivided moiety of the said land ; and also a deed from John Bryant to James B. Clarke, dated October 13th, 1794, for the other moiety ; he having proved the possession of the defendants, and that James B. Clarke, at the date of his deed and ever since, was and had been, a citizen and resident in the state of New York.

*The plaintiff relied solely on the demise from James B. Clarke, and gave no evidence on the other demises—and relied solely upon the patent to Pickett for 55,390—none of the defendants being within the patent to Pickett for 44,370 acres. [*323

The defendants offered in evidence the following exhibits : a release of 49,952 acres by Carey L. Clarke, as attorney for James B. Clarke, and John Bryant, bearing date 25th November 1800—acknowledged same day, before John Payne, the surveyor of Scott county, by him certified—afterwards lodged with the auditor of public accounts :—it recited that James B. Clarke and wife, and John Bryant and wife, had appointed Carey L. Clarke their attorney, to sell, transfer and convey a certain tract on the waters of Eagle creek, in the county of Scott, and state of Kentucky, containing 100,192 acres, entered in the name of Martin Pickett, and which tract of land is now held by the said Clarke and Bryant, as tenants in common : "Now, therefore, I, the said Carey L. Clarke, attorney as aforesaid, in pursuance of an act of the legislature of the state of Kentucky, authorizing claimants of land within its commonwealth to relinquish, by themselves or their attorneys, any part or parts of their claims to the commonwealth ; I do hereby relinquish to the commonwealth of Kentucky, all the right, title, interest, property, claim and demand of the said Clarke and Bryant, of, in and to the hereinafter described tracts of land, being part of the above mentioned tract, and lying within the boundaries, viz :—" Here, the deed specified various conflicting surveys, and gave the quantity in the various surveys ; also specified certain other quantities, by boundaries expressed, altogether amounting to 49,952 acres.

Also, a release, bearing date 25th November 1801, executed by the said Carey L. Clarke, as attorney in fact for John Bryant, reciting the act of assembly aforesaid, authorizing the relinquishment of lands to the commonwealth, specifying various conflicting surveys and other specific boundaries of the several parcels, amounting to 34,027 acres—also certified by the sur-

veyor of Scott, and filed in the *auditor's office—with a transcript by the auditor, from the books of his office, certifying the entries for taxes, of the 55,390 acres—and the subsequent relinquishment of 49,952 acres thereof, and the sale to the state for taxes of 3438 acres—also, the entry for taxes of the 44,547 acres; the release to the state of 34,029 thereof, and that the residue was the property of John Hawkins, of George (Kentucky): —annexed also was the certificate of the auditor, that neither James B. Clarke nor John Bryant appeared to have paid any taxes since the said relinquishments were made. To prove which, he relied upon the power of attorney to Carey L. Clarke, mentioned in a former bill of exceptions, and the original relinquishment from the auditor's office, and proved the execution thereof by John Payne, the surveyor of Scott county, wherein the land relinquished then was situate.

John Payne also stated, that in the year 1794, or thereabouts, ——— Griswold came to his residence in Scott county, claiming the land in Pickett's patent, by contract with Clarke; that the deponent and Robert Parker, the surveyor of Fayette, made out a connected plot, showing the interfering claims set forth in this relinquishment, and Griswold, expressing dissatisfaction with the claim and the contract, returned. Afterwards, Carey L. Clarke came to Kentucky, avowing himself the agent of Clarke, by the letter of attorney, a copy of which was set forth in the bill of exceptions taken in this cause; that Carey L. Clarke, in 1796, or thereabouts, called on the witness, and expressed a disposition to relinquish. The witness advised Clarke, that he might be able to prevail for some of the land, and nad better not make the relinquishment. Afterwards, in the year 1800, the relinquishment was prepared by Carey L. Clarke, in his own handwriting, and executed in the surveyor's office, before said Payne, and he, the surveyor, certified it, and took copies; Carey L. Clarke then took the original; and the witness having no record-book for the purpose (this being the only relinquishment ever made in his office for taxes), still kept a copy, with his private papers, andhe did not deliver the copy to his success or in office
*325] (and did *not suppose Clarke had used it, till lately), when he resigned and handed over the records; which took place some years afterwards.

Porter Clay, the present auditor of state, produced the original, stating, on examination, that he found it in his office, and that no tax had been paid upon that part of the tract embraced by that instrument, subsequent to its date.

The attorney for the plaintiff then made a motion to the court to instruct the jury, that the instrument, under the proof, did not bind the plaintiff, and could not bar his recovery; but the court overruled the motion, and instructed the jury, that the said relinquishment for the 49,952 acres, if the execution thereof was satisfactorily proved, was a bar to the recovery of all the land described in said relinquishment: And on the motion of the defendants, the court instructed the jury, that if they believed the execution of the power of attorney from James B. Clarke to Carey L. Clarke, and of the relinquishment in evidence, then it was incumbent on the plaintiff, to maintain his action, to show that the defendants, or some of them, were, at the service of the ejectment, outside of the several parts relinquished to the state: to which several opinions of the court, the plaintiff excepted.

The third bill of exceptions stated, that the plaintiff having given in evidence the patent to Pickett, the deed to John and William Bryant, the deeds from John and William Bryant to the plaintiff, James B. Clarke, and proved, that the said James B. Clarke was, at the date thereof, and ever since, resident of the state of New York, and that the title papers aforesaid, all embrace the land in controversy, and that the defendants were all in possession, at the time of the commencement of this suit; and after the defendants had given the evidence touching the relinquishment, as set forth in the bill of exceptions on file in this cause, and the court had given the instructions and opinions therein also contained, the plaintiff gave testimony conducing to prove, that some of the defendants, to wit, William Hinton, James Hughes, John Vance, John Gillum, Henry Antle, Jeremiah Antle, Peter Sally, Benjamin Sally, Samuel Courtney, &c., were not within the limits set forth by the said instrument of relinquishment; and these all *relying in their defence upon their possession, they gave in [*326
evidence a patent to James Gibson, and a patent to Sterrett and Grant. That Gibson's patent was for 657 acres, surveyed 4th December 1783, patented March 1st, 1793. Sterrett and Grant's patent, 1629 acres, entered 16th January 1783, surveyed 1st November 1792, patented 24th October 1799. And gave testimony conducing to prove that the said Sallys, Courtneys, &c., were within the boundary prescribed by the patent of Grant and Sterrett; and Hinton, Hughes, Gillum, Vance, Antles, were within the bounds of the grant to Gibson: and touching the possession within Gibson's patent, the witness stated, that in the year 1796, William Hinton entered within the patent of Gibson, claiming a part of the tract under that grant; and that tenement had been occupied ever since; and at subsequent periods, the other tenants claiming under said William Hinton, had settled in the same manner upon other parcels, claimed by them as parts of said William Hinton's purchase, and from the time of their respective settlements, their possession had been continued; the witness knew not the extent of boundary of any of the purchases, and no title papers were produced. And touching the possession within the grant to Sterrett and Grant, the witness stated, that in the year 1791 or 1792, Griffin Taylor entered under that patent; that tenement had been still occupied by Taylor and his alienees, and at periods subsequent, the other tenants had entered and taken possession, claiming under said Taylor, within the limits of the patent to Sterrett and Grant. No written evidences of purchase were offered.

Whereupon, the attorney for the plaintiff made a motion to the court to instruct the jury: 1. That the possession of those defendants was no bar to the plaintiff's action. 2. That the statute of limitations could only protect the defendants, to the extent that had actually inclosed their respective tenements; and occupied for twenty years preceding the commencement of this suit. The court overruled the motion of the plaintiff for the *in- [*327
structions aforesaid, as made; and instructed the jury, that adverse possession was a question of fact; that under the adverse patents given in evidence, it was not necessary to show a paper title derived under those adverse grants, to make out adverse possession; but that such hostile possession might be proved by parol; that an entry under one of the junior grants, given in evidence by the defendants, and within the boundaries of

the elder grant of Pickett, made by one claiming under such junior grant, without any specific metes and bounds, other than the abuttals of the grant itself, did constitute an adverse possession to the whole extent of the abuttals and boundaries under which such entry was made. To the refusal of the court to give the instructions asked by the plaintiff, and to the instructions given by the court, the plaintiff excepted.

The case was argued by *Loughborough*, for the plaintiff in error; and by *Bibb*, for the defendant.

For the *plaintiff's* in error, it was contended:

1. As to the proof of the letter of attorney. The court erred in admitting a copy to the jury. The original was in existence, and it was in the power of the defendants to produce it. This should have been done. Peake's Evid. 96; 9 Wheat. 558; *Tayloe* v. *Riggs*, 1 Pet. 591. To admit the copy as evidence, it was necessary first to have proved the execution of the original. *Rees* v. *Lawless*, 4 Litt. 220; *Elmendorf* v. *Carmichael*, 3 Ibid. 479. This was not done. There were subscribing witnesses to the deed. Proof of handwriting in such case, is secondary evidence; and to admit it, a foundation must be laid, by showing that the testimony of the subscribing witnesses cannot be had. Here, the absence of the subscribing witness was not accounted for in any manner; proof of handwriting was, therefore, incompetent. Peake's Evid. 101, and cases cited in notes. *Fox* v. *Reil*, 3 Johns. 477; *Henry* v. *Bishop*, 2 Wend. 575; *McMurtry* v. *Frank*, 4 T. B. Monr. 39; 1 Stark. Evid. 330.

But admitting a sufficient excuse shown for the absence of the subscribing witnesses, the next best evidence is proof of *their handwriting. *328] Phil. Evid. 420–21; Stark. Evid. *ubi supra*. Norris' Peake 152; *Sluby* v. *Champlin*, 4 Johns. 461 and notes. It does not appear that this proof was given here. Proof of the party's signature was, therefore, incompetent and misplaced.

That the plaintiff's counsel did not object to the withdrawal of the original by Moore, does not preclude his exception to the secondary evidence. The instrument constituted a part of the defendants' evidence, offered by themselves; which they had a right at any time to withdraw, without the plaintiff's assent. The plaintiff could have made no objection. At the proper time, the proper objection was made; that was, when the secondary and objectionable evidence was offered. And surely, the defendants cannot be permitted to cut off the objection, upon the ground that the plaintiff did not make himself the guardian of their case, by forewarning them that he would in due time avail himself of a just exception to incompetent testimony. No surprise could have been occasioned by the objection. It was one which the defendant's counsel should have expected.

2. But if the court shall consider the power of attorney sufficiently proved, it is insisted by the plaintiff, that it does not authorize the act of relinquishment attempted to be performed by the agent. In the commencement, it authorizes the attorney "to sell and dispose of, contract and agree for, a certain tract of land," &c., and after describing the land, proceeds as follows, "hereby fully authorizing and empowering the said Carey L. Clarke to sell, dispose of, contract and bargain for, all or so much of said tract of land, and to such person or persons, and at such time and times, as

he shall think proper; and in our or one of our names, to enter into, acknowledge and execute, all such deeds, contracts and bargains, for the sale of the same, as he shall think proper." Then follows a proviso, limiting the attorney's power to make warranties. Whether this power of attorney be regarded in the whole, or with a view to its several parts, it will not appear to give the agent any authority to abandon the land of his principal, by relinquishing it to the commonwealth. No one can believe, that James B. Clarke expected to escape from his title in this manner. The agency intended seems to have been *one for the sale of the land, or such [*329
parts of it as the agent might think proper. This will appear from the first clause recited; and when the power to execute deeds, contracts and bargains, for the principal, is given, it is limited to such as shall be "for the sale" of the lands. When, therefore, the agent attempted to execute a deed, not for the sale of the land, he exceeded his authority. That an authority must be strictly pursued: Bac. Abr., tit. Authority; 1 Com. Dig., tit. Attorney; *Nixon* v. *Hyserott*, 5 Johns. 58. The power of attorney shown does not appear to have been that under which C. L. Clarke acted By the relinquishment, it appears, that the attorney had a joint letter of attorney from Clarke and Bryant, tenants in common of a tract of 100,192 acres of land, to sell, &c. The authority shown is from J. B. Clarke, sole tenant of 50,000 acres; this does not support the relinquishment; it is inconsistent with it.

3. But the relinquishment was not duly made. The power to relinquish did not exist at common law; it was given by the act of assembly of Kentucky of the 4th of December 1794. 1 Litt. Laws 222; Digest Laws of Kentucky 845. The act provides, that the relinquishment shall be, "by making an entry of the tract, or that part thereof, so disclaimed, with the surveyor of the county in which the land, or the greater part thereof, shall lie, in a book to be by him kept for that purpose; which said entry shall describe the situation and boundary of the land disclaimed, with certainty, and be signed by the party, in the presence of the surveyor, who shall attest the same." It is a principle of law, that enabling statutes must be strictly pursued; where a statute innovates upon the common law, and confers authority, in derogation thereof, to do a particular thing; as, in this case, to surrender land to the commonwealth; the act must be performed in the manner directed by the statute, else it cannot prevail: not by the common law, for that does not at all permit it; not by the statute, because its requisitions have not been complied with. The statute declares, that when certain things are done, in the mode pointed out by it, they shall operate a relinquishment of the title. To make an act valid, therefore, under this statute, it must *be shown to have been performed in the prescribed [*330
manner. In *Wilson* v. *Mason*, 1 Cranch 97, this court held, that a party claiming under a statute, should show that its requirements had been fully complied with; and that the court could not substitute any equivalent act for that required by the law.

The court will perceive no motive for liberality in the construction of this act of the Kentucky legislature. The land had been appropriated by entry, survey and patent, all on record; the relinquishment should have been made of record; in a book kept for that purpose, by the surveyor, signed by the party, in presence of the surveyor, by him attested; and if an agent,

that officer should have received the power, duly authenticated, and recorded it with the entry. None of these requisitions have been fulfilled. The relinquishment offered was in no book—not even held officially by the surveyor; for he laid the copy aside, with waste papers, and handed none of them to his successor. Suppose, an entry upon a land-warrant had been thus made; no court could recognise it as a valid act.

In *Hardin* v. *Taylor* (4 T. B. Monr. 516), the court of appeals of Kentucky deemed it a valid objection to a relinquishment made by an attorney, that the power of attorney was not filed in the surveyor's office. The relinquishment, in this case, was, it is true, after the act of 1801, which directed the power to be recorded; but that direction was only an affirmance of an established principle of law, that the authority of the agent should be evidenced as the act performed by him. In England, the title to land can pass, neither to nor from the king, except by matter of record. 3 Bl. Com. 344. This rule is applicable to the commonwealth of Virginia. *Fairfax* v. *Hunter*, 7 Cranch 603. In the case of *Barbour* v. *Nelson*, 1 Litt. 59, the court of appeals of Kentucky recognise the principle as existing in that state. Also, 4 Litt. 479. In *Robinson* v. *Huff*, 3 Ibid. 38, the court of appeals of Kentucky decided, that the common law prevailed in that state; and that an act of the legislature which provided that lands which could not be sold for taxes, should be *"stricken off to the state," did not affect it; and they held, that the title to lands actually stricken off to the state was not thereby vested in it. If the rule, that a record is necessary to pass a freehold to the king, or to the commonwealth, be as inflexible as these authorities show it, then that record must be complete between the holder of the freehold and the state. Such is not the case here. Admitting the relinquishment to be a record, still, it is a record made up between C. L. Clarke and the commonwealth, and to which J. B. Clarke, the owner of the title, is no party. It does not appear of record, that C. L. Clarke was the attorney of J. B. Clark, for the purpose of this relinquishment. The authorities, it is believed, will show, that to an inquest of office, to vest a freehold in the king, it was necessary, that the party interested, should appear in person or by an attorney, whose warrant was entered on the record of the proceeding.

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But furthermore, this deed of relinquishment is invalid upon its face, as not having been executed in the proper manner. It is executed in the name of the attorney, not of his principal. In *Combe's Case*, 9 Co. 76, it was resolved, that if attorneys have power by writing to make leases by indenture, they cannot make indentures in their own names, but in the name of him who gives them warrant. In *Frontin* v. *Small*, 2 Ld. Raym. 1418, s. c. 1 Str. 705, held, that a deed purporting to be made by an attorney, in his own name, was void upon its face. Also, *White* v. *Cuyler*, 6 T. R. 176; 2 Stark. Evid. 477. *Elwell* v. *Shaw*, 16 Mass. 42, s. c. 1 Greenl. 339, is a case analogous to the present; there, the supreme court of Massachusetts review all the cases, and adduce from them the rule now advanced.

The case of *Parker* v. *Kett*, reported in 1 Salk. 95, and 12 Mod. 466, which would seem to conflict with the rule, is the case of an act *in pais*, not of a deed. That the deed in question is not a common-law, but a statutory deed, cannot vary the rule. The act authorizing this relinquishment, it is true, says, that lands may be relinquished to the commonwealth, by the holder or his attorney, but as it does not prescribe any *particular

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mode in which the attorney may perform the act, it follows, that he must proceed according to the common-law rule above stated.

The relinquishment does not describe the boundaries of the tracts given up, with the certainty required by the statute ; it is, therefore, invalid. It is insisted, that the circuit court erred in the instruction predicated from the relinquishment ; by which was thrown upon the plaintiff the *onus* of showing that the defendants were without the relinquished tracts. The boundaries of the abandoned territory are not defined. The jury could not say, from the documents and proof before them, that the land in controversy was embraced by that writing. As the obscurity arose out of he defendants' proof, and affected their defence, it was incumbent upon them to clear it up ; the plaintiff had made out his cause of action clearly, and had closed his proofs. This is not the case of an exception contained in the title papers of the plaintiff. If, after the plaintiff had proved his title, the defendant had shown in evidence a deed from him, for 100 acres of land, it certainly woudl be required of them also to show its boundaries. The instruction of the court supposes, that all the relinquished tracts were within the patent of 55,390 acres. Upon the proof offered, this does not appear to be so. The fact of the relinquishment does not afford any evidence of it. It shows only that the surveys relinquished lie within the claim of 100,192 acres, entered in the name of Martin Pickett.

The case of *Hawkins* v. *Barney's Lessee*, decided at the present term (*post*, p. 457), does not support the instruction of the court below. As that case is understood, it is this—plaintiff showed his title, and proved defendant in possession ; defendant then showed that plaintiff had conveyed his title to a third person ; and the plaintiff showed a conveyance back to him, containing on its face an exception of part of the land ; this court said, he should show the defendants out of the excepted part. This was a case of an exception in the title papers of the plaintiff, which he was bound to show presented no bar to his recovery. The cases cited from Marshall and Monroe's reports, sustain *fully that decision ; but they do not bear upon the present case, because they are all cases in which the ambiguity grew out of the plaintiff's title. When the defendant shows an elder outstanding title for part of the land, he must show what part. *Buckley* v. *Cunningham*, 4 Bibb 285. [*333

The transcript from the books of the auditor, that 3438 acres had been sold to the state, is no evidence of that fact. It does not show the title vested in the state, and the defendants cannot avail themselves of it. *Robinson* v. *Huff*, 3 Litt. 38. The recital in the power of attorney, that J. B. Clarke had conveyed to John Bryant, 5390 acres of the land, is not evidence in this case, and for these defendants. Peake's Evid. 111, and cases there cited. The recital of that which is a nullity cannot estop. The deed of a person out of possession is merely void, and does not prevent the grantor from maintaining his action. *Jackson* v. *Vredenburg*, 1 Johns. 161 ; *Williams* v. *Tibbits*, 5 Ibid. 489 ; *Meredith* v. *Kennedy*, 6 Litt. Sel. Cas. 516 ; *Jackson* v. *Brinckerhoff*, 3 Johns. Cas. 101. The case of *Carver* v. *Astor*, 4 Pet. 1, does not show that the recital in the power of attorney in this case is evidence against the plaintiff. That was the case of the recital of a lease in a deed of release, which the court say is evidence. But the case decides nothing beyond this.

But admitting the recital is evidence, should not the defendants, to make it available, show themselves within the land recited to have been conveyed by Clarke? If the recital is evidence that the title is out of Clarke, one of the lessors, it also shows that it is in the heirs of John Bryant, who are also lessors of the plaintiff. The proof of possession is insufficient to warrant the finding of the jury. Hinton, one of the defendants, entered within the junior patent of Gibson, claiming a part of that tract by purchase; and subsequently, others of the defendants settled upon parcels claimed by purchase of Hinton. His was not a contract for an interest in common in the whole tract, but for an entire parcel. His possession, therefore, was
*334] confined to *his purchase; and, as he did not show its boundaries, should not be a bar for more than was actually inclosed by him. When the other defendants entered, what were the boundaries of their parcels, or whether they were in fact within Hinton's first purchase, does not appear. Adverse possession is a question of fact; but, in the absence of the title papers of the tenant, the *quo animo* of his entry and taking possession should appear. The extent of possession depends upon this. *Calk* v. *Lynn's Heirs*, 1 A. K. Marsh. 346; 3 Ibid. 94; *Owings* v. *Gibson*, 2 Ibid. 515. That possession should be restrained to defendants' close, &c.: *Green* v. *Liter*, 8 Cranch 229. If a junior patentee enterupon the interference, and then sell by metes, his possession is limited by bounds of the lands sold: *Trotter* v. *Cassaday*, 3 A. K. Marsh. 365.

The adverse possession under Gibson's patent was taken, after the title had vested in plaintiff's lessor. Though the record states that Taylor entered as early as 1791 or 1792, under Sterrett and Grant's patent, yet it appears, that patent did not issue until 1799. Under this grant, the adverse possession, therefore, did not begin, before the conveyance to Clarke. But the possession of Taylor, and those claiming under him, is not properly shown to be adverse; at the time he entered, the plaintiff held the only patent for the land. To protect himself under the patent afterwards issued, he should show some connection with it. The conveyance to Clarke, as regards this part of the land, cannot be void, on account of the law of champerty; because the possession of Taylor is not adverse, within that law, to make the deed inoperative; or it is only so to the extent of his actual inclosure, and the defendants, who entered afterwards, are not saved by it. *Barr* v. *Gratz*, 4 Wheat. 214. Possession taken before survey and patent is limited to the actual close. *Brooks* v. *Clay*, 3 A. K. Marsh. 545; *Henderson* v. *Howard's Devisees*, 1 Ibid. 26. Patentee conveys part of his land by bounds; grantee enters; he gets possession only to the extent of his bounds, and patentee cannot avail himself of possession out of them. *Maury* v. *Waugh*, Ibid. 452. Patentee extending protection to an occu-
*335] pant whose *possession is bounded, acquires possession only to the limits of the occupant's claim. *Lee* v. *McDaniel*, Ibid. 234.

Under each of the junior patents shown by defendants, it appears, that possession was taken by purchasers of distinct parcels. The entries, therefore, could not have been by persons claiming to the abuttals of the patents. It was incumbent on defendants, if they would save more than their actual closes, to show their rightful boundaries. It does not appear, that any of the tenements, except Hunter's and Taylor's, have been occupied for twenty

years before suit. *Clay* v. *White*, 1 Munf. 162 ; *Potts* v. *Gilbert*, 3 W. C. C. 475 ; *Bonnell's Lessee* v. *Sharp*, 9 Johns. 162 ; *Brandt* v. *Ogden*, 1 Ibid. 157 ; *Hardenberg* v. *Schoonmaker*, 2 Ibid. 220 ; *Jackson* v. *Woodruff*, 1 Cow. 276 ; *Jackson* v. *Camp*, Ibid. 605 ; 2 Johns. 230.

Bibb, for the defendants, insisted, that the decisions of the court upon the points set forth in the several bills of exception taken by the plaintiff, contained no just cause of exception : those motions were rightly ruled by the court ; and the instructions given, applied to the facts which the evi dence conduced to prove, were correct expositions of the law.

The first bill of exceptions objects "to the admission of the testimony of Miller, especially, in the absence of the letter of attorney." Miller's testimony proved the handwriting of James B. Clarke, the maker of the letter of attorney to Carey L. Clarke. The exception has two aspects : 1. To the testimony itself : 2. To the absence of the power of attorney at the time when Miller's testimony was given. As to the first, it is to be remembered, that the original letter of attorney was brought into court, and evidence conducing to prove its execution was given, to which evidence there was no objection, and that evidence so given is not stated. The exception is to the after auxiliary testimony of Miller, as to the handwriting of James B. Clarke. If any previous evidence, conducing to prove the execution, could lay the foundation for admitting proof of the handwriting of the maker of the instrument, then this court must presume that such foundation was laid. *Not having made the whole evidence on this subject a part of the bill of exceptions, every intendment should be [*336 indulged in favor of the court, and against him who excepts. *Hodges* v. *Biggs*, 2 A. K. Marsh. 222. The party taking a bill of exceptions must state enough to show that the opinion of the court was erroneous to his prejudice in that very case. *Brown* v. *McConnell*, 1 Bibb 266.

The handwriting of the maker of the deed is proper auxiliary evidence to prove its execution, in certain cases. "When the subscribing witness is dead, insane, or absent in a foreign country, at the time of the trial, whether for a permanent residence or temporary purpose, or by the commission of a crime, or by some interest subsequent to the execution of the instrument, has become incompetent, proof of his handwriting is the next best evidence. In the first case, where the witness is dead, this alone (proof of his handwriting) has been held sufficient ; but in the others, it has been usual, and in one case, was held to be necessary, to prove the handwriting to the deed also; and in all these cases, a foundation must be laid, by proving the situation of the subscribing witnesses." Peake's Evid. 100 ; *Wallis* v. *Delaney*, 7 T. R. 266 ; Gilb. Evid. 105 ; *Jones* v. *Blount*, 1 Hayw. 238 ; *Mushrow* v. *Graham*, Ibid. 361 ; *Oliphant* v. *Taggart*, 1 Bay 255 ; *Hopkins* v. *Degraffenreid*, 2 Ibid. 187 ; *Nelius* v. *Brickell*, 1 Hayw. 19.

As to the absence of the power of attorney, when Miller's testimony was admitted, let it be noted, that the original was in custody of an officer, whose duty it was to keep it ; no court, state or federal, had rightful authority to take it out of his custody ; to bring him into court with the instrument, was the only mode of getting that power of attorney before the court and jury ; that process had been adopted, the officer had attended, the instrument had been produced and given in evidence ; for the accommo-

dation of the officer, who wished to return home, but could not, consistent with his duty, leave the paper, the plaintiff and defendant consented that he should depart, leaving a copy of the instrument. The instrument of which Miller testified, was identified as the same which the clerk, Moore, had produced, and which had been read in the case. Under these circumstances, it seems, that this *exception is captious; that it proceeded from a *337] raging thirst for a bill of exceptions, so scorching that a phantom was grasped at for its gratification.

The second bill of exceptions presents two questions: 1st. The efficacy of the relinquishment in the surveyor's office, of the 49,952 acres, part of the 55,390 acres, to bind the plaintiff, and bar his recovery as to so much as was released. 2d. As to the instruction that it was incumbent on the plaintiff to show that some of the defendants were, at the service of the ejectment, outside of the several parts relinquished to the state.

1. As to the supposed inefficiency to bind the plaintiff, and its want of potency to bar the plaintiff *pro tanto*. The plaintiff, by his argument, supposes the power of attorney to Carey L. Clarke is not broad enough to authorize a relinquishment to the state; and that if the power was sufficient the relinquishment was not consummated according to the statute. The authority is, "to sell and dispose of, contract and agree for"—"fully authorizing the said Carey to sell, dispose of, contract and bargain for, all, or so much of said tract of land, and to such person or persons, and at such time or times, as he shall think proper"—"and execute all such deeds, contracts, and bargains," &c. The statute under which this relinquishment by James B. Clarke was made to the commonwealth, passed in 1794. 2 Digest, Laws Ky. 845. This did not require the power of attorney under which an agent relinquished to be filed in the surveyor's office; but the act of the 11th of December 1801 did. 2 Digest 846. The entry of relinquishment, so made with the surveyor, describes the land relinquished with certainty; was signed in the presence of the surveyor, who tested it, as required by the statute. Whether the surveyor kept his copy of it in a bound book, or on a sheet of paper; and whether he delivered it to his successor or not, are facts immaterial. The deed was consummated by the signature, acknowledgment, attestation and delivery in the surveyor's office; as to keeping a book for such *purposes, that was but directory to the surveyor for *338] safe-keeping and preserving the evidence of its interest on behalf of the state; but the omission of the surveyor in this behalf, could not vitiate the act and deed of the party relinquishing. 1 Litt. Laws Ky., Act of 1792, p. 64, § 14, 15.

The state of Kentucky commenced her system of land tax in 1792. By her revenue laws, non-residents were bound to enter their lands for taxation, at first, with some commissioner; but afterwards, with the auditor of public accounts. Act of 1794, p. 265, § 2, 3. The taxes were to be paid to the treasurer; his receipt to be filed with the auditor, who was to give a *quietus*. Act of 1795, p. 321; 1797, p. 663, § 15; 2 Litt. 1798, p. 55; 1799, p. 316, § 15, 17. If the taxes were unpaid, as required by law, the auditor was to transmit the list of lands and taxes due thereon (at first to the sheriff), but by a subsequent law, to the register of the land-office, whose duty it was to sell at auction, the lands, on the third Monday of November, in every year, and transmit the account of sales to the auditor; taxes in arrear to bear an

interest of ten per cent. per annum. The state held a perpetual lien on the land for the payment of the taxes; all personal property found upon the land in possession of any tenant or occupant, claiming under the proprietor from whom the taxes were due, was liable to distress for the taxes; the tenant who paid taxes had a lien on the land for reimbursement; the auditor was to keep a book of transfers; and non-residents, who transferred their lands entered with the auditor for taxation, were bound to have the alteration made accordingly in the auditor's office. 2 Digest 946, 951, 953. Non-residents and residents were required, upon pain of forfeiture, to enter their lands for taxation by the last day of November 1795, but prolonged until 1st December 1798; and until 15th December 1806, &c. Lands offered for sale for the taxes, and not sold for the amount, for want of bidders, to be stricken off to the state. Those who had paid the taxes were entitled, upon relinquishing their interest, to have the taxes upon the land so relinquished refunded from the treasury.

*Carey L. Clarke, then, by relinquishing for his principal a part of the tract, disengaged the residue from the taxes and arrearages [*339 and interest due, and to become due, upon the part relinquished; prevented the sale of the whole tract, for the amount of taxes due upon the whole—and if the taxes had been paid upon the part relinquished, was entitled to draw them back. In effect, he sold the 49,952 acres for the amount of taxes which had accrued thereon from 1792 up to 1800; and by so doing, disengaged the residue from liability to distress or sale for taxes accrued or accruing upon the part relinquished.

2. As to the instruction that it was incumbent on the plaintiff to show some of the defendants outside of the several parts relinquished, to recover in ejectment: the plaintiff must prove title of right of entry, and that the defendant, at the service of the ejectment, was in possession in some part of the land, to which the plaintiff, at that time, had the right of entry. It is not enough, that the plaintiff once had title; if he had title, and had parted with it, before action brought, he could not recover. If he had parted with title to part of a tract, he must still prove the defendant possessed of that which was not aliened; possessed of that to which his right of entry was existing. *Taylor* v. *Floyd*, 3 A. K. Marsh. 20; 7 T. R. 323; Bull. N. P. 110.

The third bill of exceptions was taken to the refusal of the court to instruct: 1. That the possession of these defendants, within the patents of Gibson and Sterrett, and Grant, was no bar to the plaintiff's action. 2. That the statute of limitations could only protect them to the extent of their actual inclosures of twenty years' duration. The counsel of the plaintiff in error having declined arguing the question presented by the first proposition, no notice is taken of it.

Upon the second proposition, "that the statute of limitations could only protect the defendants to the extent that had actually inclosed their respective tenements, and occupied for twenty years preceding the commencement of this suit," *the court negatived that proposition, and instructed [*340 the jury, "that adverse possession was a question of fact; that under the adverse patents, given in evidence, it was not necessary to show a paper title derived under those grants, to make out adverse possession; but that such hostile possession might be proved by parol: that any entry under

one of the junior grants, given in evidence, and within the boundaries of the elder grant of Pickett, made by one claiming under such junior grant, without any specific metes and bounds, other than the abuttals of the grant itself, did constitute an adverse possession to the whole extent of the abuttals and boundaries under which such entry was made." The counsel for the defendants insisted, that the points involved in this proposition for instruction moved by the plaintiff, were correctly ruled by the court.

It must be remembered, that no evidence was adduced, tending to prove any actual possession by Pickett, or the lessors of the plaintiff, under Pickett's patent. Entry by purchaser of part of a survey not patented, his purchase not meted : he is possessed of the whole survey, and possession is not limited to his actual inclosure. *Kendall* v. *Slaughter*, 1 A. K. Marsh. 376; *Roberts* v. *Sanders*, 3 Ibid. 29 ; *Walden* v. *Heirs of Gratz*, 1 Wheat. 295. Entry by one claiming under a deed of conveyance specifying the boundaries : he is possessed to the extent of those boundaries, although the person who made the deed had only an entry, not perfected by survey or patent, and not appearing to cover the land so deeded. *Thomas* v. *Harrow*, 4 Bibb 563 ; *Smith's Heirs* v. *Lockridge*, 3 Litt. 20. An occupant, possessing himself of part of a tract, with intent to occupy the whole, is possessed of the whole, although he enters without the assent of the patentee, and without any written evidence of title. *Taylor* v. *Buckner*, 2 A. K. Marsh. 19 ; *Herndon* v. *Wood*, 2 Ibid. 44 ; *Smith's Heirs* v. *Lockridge*, 3 Litt. 20. Entry under a junior patent, within the interference, no possession existing under the elder patent : the possession so taken under the junior patent is not limited to the close, but *is co-extensive with the interference. *Fox* v. *Hinton*, 4 Bibb 559.

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But it would have been improper for the court to have told the jury, that the limitation was no protection to those defendants who were within Gibson's survey ; because the evidence conduced to prove, and the jury might have so found, that those defendants were not within the part to which James B. Clarke had title. That James B. Clarke had conveyed 5390 acres, part of the 55,390 acres, to John Bryant, is proved by his recital in the power of attorney of October 1796. The recital in that power is evidence of the fact against said James B. Clarke, and all persons claiming under him. *Carver* v. *Astor*, 4 Pet. 8, 19, 83.

Although there is a demise laid from the heirs of John Bryant, the plaintiff gave no evidence to show that they were within any of the savings of the statute, nor that John Bryant was. Neither did he give any evidence to show that the residue of Pickett's patent, after deducting the part conveyed to John Payne, by deed of October 1800, and the 5390 acres conveyed to John Bryant, which remained to James B. Clarke, included these defendants. The proof was, that they were within the patent of 55,390 acres, and outside of the 49,952 acres relinquished to the state. But were they outside of the surveys of John and Robert Todd, conveyed to Payne? Were they outside of the 5390 acres conveyed to Bryant? Had James B. Clarke the title to the land within the survey of Gibson? James B. Clarke was not the only lessor ; he was not the only substantial plaintiff. This state of the evidence required of the plaintiff to open his case on the demise from the heirs of John Bryant ; having failed to do so, he had no right to the instruction asked for ; he had no right to recover on the demise from James B.

Clarke. The plaintiff was John Doe ; the real actors were the heirs of John Bryant, and others, as named in the 2d, 3d, 4th and 5th counts, as well as James B. Clarke. The motion *for instruction was, that the plaintiff was not barred by the possession of the defendants : this instruction, if given, would have included the heirs of John Bryant and the other lessors, as well as Clarke. To this the court refused their assent. [*342

Had the plaintiff asked a hypothetical instruction, that if the jury found from the evidence, the land within Gibson's survey was within James B. Clarke's part of the 55,390 acres, not relinquished, nor sold, nor conveyed from him, then the possession of the defendants would be no bar to the demise from James B. Clarke ; in that case, it would have been necessary to bring into view the statute of Kentucky, passed 22d January 1814, in force six months after its passage, repealing the saving in the statute of limitations, in favor of persons out of the commonwealth. 4 Litt. Laws 91 ; 2 Digest 866 ; *Kendall* v. *Slaughter*, 1 A. K. Marsh. 377–80 ; *McCluny* v. *Silliman*, 3 Pet. 277 ; *Jackson* v. *Lamphire*, Ibid. 290. Possession of twenty years by a junior patentee, within the interference, tolls the right of entry of the elder patentee to the whole extent of the junior patent. *Smith* v. *Morrow*, 5 Litt. 210 ; *Botts* v. *Shields's Heirs*, 3 Ibid. 34. Where a tenant occupied the plantation, the presumption is, that he was in possession of all the woodland belonging to the tract ; and evidence of his possession being circumscribed, must come from those whose interest requires the establishment of that fact. *Hinton* v. *Fox*, 3 Litt. 383. Written evidence of title is not necessary to create a hostile possession. *Taylor* v. *Buckner*, 2 A. K. Marsh. 19 ; *Herndon* v. *Wood*, Ibid. 44. Whether the possession was adverse or not to the plaintiff, is properly a question of fact, of which the jury are the competent triers. *Bowles* v. *Sharp*, 4 Bibb 551. Nor is it necessary, that possession should be held under color of title, to render it adverse and transferrible from one to another, so that the successive possessions may be knit together, and toll the right of entry. *Bowles* v. *Sharp*, 4 Bibb 551. A continued, uninterrupted possession for twenty years, not only tolls the right of entry, but gives a right of possession which will sustain an ejectment. Bull. N. P. 103 ; *Stokes* v. *Berry*, 1 Salk. 421.

*Story, Justice, delivered the opinion of the court.—This is a writ of error founded on a judgment of the circuit court in the district of Kentucky, in an action of ejectment, in which the plaintiff in error was the original plaintiff. The case is before us upon certain bills of exception taken by the plaintiff ; and to the consideration of these the court will address their attention, without entering upon any examination of other facts, not involved in the decision of them. [*343

Some of the defendants, professing to hold a conveyance from the lessor of the plaintiff, Clarke, made by Carey L. Clarke, as his attorney in fact, offered in evidence the deed of conveyance, and the letter of attorney, "and gave testimony conducing to prove them And Andrew Moore, the clerk of the Harrison circuit court, who brought the letter of attorney into this court, under process for that purpose, desiring to return, and considering it his duty to retain possession of that instrument, by consent of plaintiff and defendants, departed with it, leaving a copy. And at a subsequent day, Moses L. Miller was introduced as a witness to prove the letter of attorney ;

who stated, that being summoned as a witness, he met with the clerk of Harrison aforesaid, in Georgetown, who showed him an instrument, the signature of which he examined, and believed it to be the handwriting of James B. Clarke (the plaintiff's lessor), with whose handwriting he was well acquainted; and another witness was examined, tending to show that the instrument, so shown by said Moore to Miller, was the same previously read before this court, as aforesaid. When Andrew Moore (the clerk of Harrison court) was about to resume possession of the letter of attorney and to depart, the attorney of the plaintiff declared that he had no objection. It is not pretended, that any expectation of offering further proof was entertained, or intimated to the parties. To the admission of the testimony of Miller, the plaintiff objected, especially, in the absence of the letter of attorney. But the court overruled the objection, and submitted the testimony to the jury, as tending to prove that instrument."

The letter of attorney purports to be made by "James B. Clarke, of the city of New York, and Eleanor his wife," to "Carey L. Clarke, of the city of New York;" to be dated on the 7th of October 1796, and to be sealed and delivered in the presence of three witnesses. *The question is, *344] whether, under these circumstances, it ought to have been admitted in evidence?

In the ordinary course of legal proceedings, instruments under seal, purporting to be executed in the presence of a witness, must be proved by the testimony of the subscribing witness, or his absence sufficiently accounted for. Where he is dead, or cannot be found, or is without the jurisdiction, or is otherwise incapable of being produced, the next best secondary evidence is the proof of his handwriting; and that, when proved, affords *primâ facie* evidence of a due execution of the instrument, for it is presumed, that he would not have subscribed his name to a false attestation. If, upon due search and inqury, no one can be found who can prove his handwriting, there is no doubt, that resort may then be had to proof of the handwriting of the party who executed the instrument; indeed, such proof may always be produced as corroborative evidence of its due and valid execution, though it is not, except under the limitations above suggested, primary evidence. Whatever may have been the origin of this rule, and in whatever reasons it may have been founded, it has been too long established, to be disregarded; or to justify an inquiry into its original correctness.

The rule was not complied with in the case at bar. The original instrument was not produced at the trial, nor the subscribing witnesses; and their non-production was not accounted for. The instrument purports to be an ancient one; but no evidence was offered in this stage of the cause, to connect it with possession under it, so as to justify its admission as an ancient deed, without further proof. It is said, that the conduct of the parties amounted to a waiver of the due proof of the original. We are of opinion, that the production of the original was, under the circumstances, dispensed with by the parties, and that a copy of it was impliedly assented to as a substitute for the original. But we do not think, that the implication goes farther, and dispenses with the ordinary proof of the due execution of the original, in the same manner as if the original were present. It would be going very far, to draw such a conclusion, from circumstances of so

equivocal a nature. The rules of evidence are too important securities for the titles to property, *to allow such loose presumptions to prevail. It would be opening a door to great practical inconvenience; [*345 and if a waiver of the ordinary proof is intended, it is easily reduced to writing.

It is also said, that the language of the exception, that the defendants gave testimony "conducing to prove" the instruments, may well be interpreted by the court to have included all the usual preliminary proofs. We do not think so: to justify the admission of the lowest kind of secondary proof, it should clearly appear, that all the preliminary steps have been taken and established. The court can presume nothing; there may not have been any preliminary proof whatsoever of the absence, death or incapacity of the witnesses; and yet there may have been some evidence "conducing to prove" the due execution of the instruments. And the very circumstance stated in the bill of exception, that Miller was introduced, "as a witness to prove the letter of attorney," repels the presumption that any antecedent proof had been given, which in point of law dispensed with the ordinary proofs. We think, then, that the testimony ought not to have been admitted, and that this exception is well founded.

The plaintiff having then given *primâ facie* evidence of title under a patent to Martin Pickett of 55,390 acres, and that the defendants were in possession of the land in controversy, and that the lessor of the plaintiff (Clarke), at the date of his deed, and ever since was, and had been, a citizen and resident of the state of New York, and having relied solely on the demise from Clarke, the defendants offered in evidence certain exhibits. One of these purported to be a release of 49,952 acres, by Carey L. Clarke, as attorney for James B. Clarke and John Byrant, on the 25th of November 1800, acknowledged before the surveyor of Scott county, and afterwards lodged with the auditor of public accounts. It recited, that James B. Clarke and Eleanor his wife, and John Byrant and Mary his wife, had appointed Carey L. Clarke their attorney, to sell, transfer and convey a certain tract on the waters of Eagle creek, in the county of Scott, and state of Kentucky, containing 100,192 acres, entered in the name of Martin Pickett, which tract of land was then held by Clarke and Byrant as tenants [*346 in common. It then proceeded to state, "Now, therefore, I, the said Carey L. Clarke, attorney as aforesaid, in pursuance of an act of the legislature of the state of Kentucky, authorizing claimaints of land within its commonwealth to relinquish, by themselves or their attorneys, any part or parts of their claims, to the commonwealth, do hereby relinquish to the commonwealth of Kentucky, all the right, title, interest, property, claim and demand of the said Clarke and Byrant of, in and to the hereinafter described tracts of land." Another exhibit purported to be a release dated on the 25th of November 1801, by Carey L. Clarke, as attorney in fact of John Bryant, in a similar form, and containing a similar relinquishment to the state, of certain tracts of land, except that the attestation clause was in these words: "In witness whereof, the said Bryant, by Carey L. Clarke, his attorney, hath set his hand and seal this 25th of November 1801. John Bryant, by Carey L. Clarke, his attorney. [L. S.]" The other exhibits need not be particularly mentioned.

To prove these instruments of relinquishment, or properly speaking,

that of James B. Clarke and wife, the defendants relied upon the power of attorney mentioned in the former bill of exceptions, and the original relinquishment from the auditor's office; and proved the execution thereof by the surveyor of Scott county. The plaintiff then moved the court to instruct the jury, that the instrument (of relinquishment), under the proof, did not bind the plaintiff, and could not bar his recovery. But the court overruled the motion, and instructed the jury, that the said relinquishment for the 49,952 acres, if the execution thereof was satisfactorily proved, was a bar to the recovery of all the land described in said relinquishment; and on motion of the defendants, the court instructed the jury, that if they believed the execution of the power of attorney from James B. Clarke to Carey L. Clarke, and of the relinquishment in evidence (from Carey L. Clarke, as his attorney, of the date of 25th of November 1800), then it was incumbent on the plaintiff, to maintain this action, to show that the defendants, or some of them, were, at the service of the ejectment, outside
*347] of the several parts relinquished to *the state. The opinions thus given and refused constitute the second bill of exceptions.

Various objections have been taken, in the argument at the bar, upon the matter of these exceptions. It is said, that the relinquishment to the state, which was authorized by the act of 4th of December 1794 (Littell's Laws of Kentucky 222), has not been made in such a manner as to become effectual in point of law; for there has been no entry of the relinquishment in a book in the surveyor's office of the county, as prescribed in the statute, nor has the power of attorney been there recorded; and the state cannot take but by matter of record. Upon this objection, it is not, in our view of the case, necessary to give any opinion.

It is said, in the next place, that the relinquishment purports to have been made in virtue of a power of attorney, recited in the instrument itself, to be from James B. Clarke and his wife, and John Bryant and his wife; whereas, the power produced purports to be from Clarke and his wife only, and therefore, the latter power does not authorize the relinquishment, or, in other words, it was not that under which it was made. There is great force in this objection; but on this also we do not decide.

Another objection is, that the power of attorney produced, even if duly executed, does not justify the relinquishment. It purports to authorize Carey L. Clarke "to sell, dispose of, contract and bargain for all, or so much of said tract of land, &c., and to such person or persons, and at such time or times, as he shall think proper, and in our or one of our names, to enter into, acknowledge and execute all such deeds, contracts and bargains for the sale of the same, as he shall think proper; provided always, that all deeds for the land are to be without covenants of warranty, or covenants warranting the title to the land from the patentee, and his assigns," &c. The language here used is precisely that which would be used in cases of intended sales, or contracts of sale, of the land, for a valuable consideration, to third persons, in the ordinary course of business. In the strict sense of the term, a relinquishment of the lands to the state, under the act of 1794, is not a sale. That act, after reciting, that it is represented to the general
*348] assembly, that many persons hold tracts of land *subject to taxation, and are desirous of continuing their interest in only part thereof, and that others have claims to lands, which they wish to relinquish, without

their being subject to the expense of law-suits, proceeds to enact, that it shall be lawful for any person or persons, his heirs, or their agent or attorney, lawfully authorized so to do, to relinquish or disclaim his, her or their title, interest or claim to and in any tract or part of a tract of land that he, she or they may think proper; by making an entry of the tract, or that part thereof, so disclaimed, with the surveyor of the county in which the land, or the greater part thereof, shall lie, in a book to be kept for that purpose, which said entry shall describe the situation and boundary of the land disclaimed, with certainty, and be signed by the party, in the presence of the surveyor, who shall attest the same; and that by virtue of the aforesaid entry and disclaimer, all the interest of the party in the said tract shall be vested in the commonwealth, and shall never be reclaimed by the party, or his, her or their representatives. The object of the act is to authorize a relinquishment, either on account of the land being subject to taxation, or to avoid law-suits on account of conflicting claims.

It is not pretended, that the present relinquishment would have been authorized by the letter of attorney, on the latter account. It is supposed at the bar, to have been done on account of the taxes due on the land, though that object is not avowed on the face of the deed. There is, accordingly, spread upon the record, a transcript of the taxes laid on the land. By the laws of Kentucky (Act of 1799, § 17, 2 Litt. Laws 327), taxes constitute a perpetual lien on the land; but such taxes constitute no personal charge against non-residents. And the act of 1799 further provides, that where any person has paid, or shall, on or before the first day of December then next, pay the tax on any tract of land which shall afterwards be lost or relinquished, the person losing shall, upon application to the auditor, receive an audited warrant to the amount paid by him, with a deduction of seven and a half per cent., which shall be receivable in taxes, as other audited warrants are. The effect of the Kentucky law, then, so far as non-residents are concerned, is, that by their relinquishment, they obtain no personal discharge from any personal charge; and that *the only effect is, that, [*349
in the specified cases, if they have paid the taxes, they are, with a small deduction reimbursed.

In point of fact, then, the relinquishment gives them nothing as a compensation for the land; but restores back again only the money (if any) which they have paid. Can such a relinquishment, for the purposes contemplated by the statute, be, in any just sense, deemed a sale? We think not. It is a mere abandonment of the title; or, in the language of the act, a relinquishment or disclaimer. The letter of attorney manifestly contemplated the ordinary contracts of bargain and sale between private persons, for a valuable consideration; and conveyance by deed, without covenants of warranty. The very reference to covenants, shows that the parties had in view the common course of conveyances, in which covenants of title are usually inserted, and the clause excludes them. The statute does not contemplate any deed or conveyance, but a mere entry of relinquishment or disclaimer of record; this entry constitutes a good title in the state; the state does not buy, nor does the party sell, in such case. It seems to us, that the nature of such a relinquishment, amounting, as it does, to a surrender of title, without any valuable consideration, ought not to be inferred from any words, however general, much less from words so appropriate to

cases of mere private sales as those in the present letter of attorney. The question, whether such a relinquishment should be made or not, is so emphatically a matter of pure discretion in the owner, in the nature of a donation, that it ought not to be presumed to be delegated to another, without the most explicit words used for, and appropriate to, such a purpose. We think, that the words of the present letter of attorney are not sufficient to clothe the agent with such an authority.

But if this objection were not insuperable, there is another, which, though apparently of a technical nature, is fatal to the relinquishment. It is, that the deed is not executed in the names of Clarke and his wife, but by the attorney, in his own name. It is not, then, the deed of the principals, but the deed of the attorney. The language is, "I, the said Carey L. Clarke, attorney as aforesaid," &c., "do hereby relinquish," &c.; and the attesting clause is, "In witness whereof, the said Carey L. Clarke, attorney
*350] as aforesaid, has hereunto subscribed *his hand and seal, this 25th day of November, in the year of our Lord 1800. Carey L. Clarke. [L. S.]"

The act does not, therefore, purport to be the act of the principals, but of the attorney. It is his deed, and his seal, and not theirs. This may savor of refinement, since it is apparent, that the party intended to pass the interest and title of his principals. But the law looks not to the intent alone, but to the fact, whether that intent has been executed in such a manner as to possess a legal validity.

The leading case on this subject is *Combe's Case*, 9 Co. 75, where authority was given by a copyholder to two persons, as his attorneys, to surrender ten acres of pasture to the use of J. N.; and afterwards, at a manor court, they surrendered the same, and the entry on the court-roll was, that the said attorneys, in the same court, showed the writing aforesaid, bearing date, &c., and they, by virtue of the authority to them by the said letter of attorney given, in full court, surrendered into the hands of the said lord the said ten acres of pasture, to the use of the said J. N., &c.; and the question was, whether the surrender was good or not; and the court held it was good. "And it was resolved, that when any has authority, as attorney, to do any act, he ought to do it in his name, who gives the authority, for he appoints the attorney to be in his place, and to represent his person; and therefore, the attorney cannot do it in his own name, nor as his proper act, but in the name and as the act of him who gives the authority. And where it was objected, that in the case at bar, the attorneys have made the surrender in their own name, for the entry is that they surrendered, it was answered and resolved by the whole court, that they have well performed their authority; for, first, they showed their letter of attorney, and then they, by the authority to them by the letter of attorney given, surrendered, &c., which is as much as to say, as if they had said, we, as attorneys, &c., surrender, &c., and both these ways are sufficient. As he, who has a letter of attorney to deliver seisin, saith, I, as attorney to J. S., deliver you seisin; or, I, by force of this letter of attorney, deliver you seisin. And all that is well done, and a good pursuance of his authority. But if attorneys have power by writing to make leases by indenture for years, &c., they cannot make indentures
*351] in their own names, but in the name of him who gives the warrant." *Such is the language of the report, and it has been quoted at large, because it has been much commented on at the bar; and it points out

a clear distinction between acts done *in pais*, and solemn instruments or deeds, as to the mode of their execution by an attorney. It has been supposed, that the doctrine of Lord HOLT, in *Parker* v. *Kett*, 1 Salk. 95, and better reported in 2 Mod. 466, intimated a different opinion. But, correctly considered, it is not so. Lord HOLT expressly admits (p. 468), that the doctrine in *Combe's Case*, that he who acts under another, ought to act in his name, is good law, beyond dispute ; and the case there was distinguishable ; for it was the case of a sub-deputy steward, appointed to receive a surrender, which was an act *in pais*.

However this may be, it is certain, that *Combe's Case* has never been departed from, and has often been acted upon as good law. In *Frontin* v. *Small*, 2 Ld. Raym. 1418, where a lease was made between M. F., "attorney of J. F.," of the one part, and the defendant of the other part, of certain premises, for seven years, in a suit for rent by M. F., it was held, that the lease was void, for the very reason assigned in *Combe's Case*. Lord Chief Baron GILBERT (4 Bac. Abr., Leases and Terms for Years, I. 10, 140) has expounded the reasons of the doctrine, with great clearness and force ; and it was fully recognised in *White* v. *Cuyler*, 6 T. R. 176, and *Wilks* v. *Back*, 2 East 142. If it were necessary, it might easily be traced back to an earlier period than *Combe's Case*. 4 Bac. Abr., Leases and Terms for Years, I. 10, p. 140, 141 ; Com. Dig., Attorney, C. 14 ; Moore 70. In America, it has been repeatedly the subject of adjudication, and has received a judicial sanction. The cases of *Bogart* v. *De Bussy*, 6 Johns. 94 ; *Fowler* v. *Shearer*, 7 Mass. 14, and *Elwell* v. *Shaw*, 16 Ibid. 42, are directly in point. It appears to us, then, upon the grounds of these authorities, that the deed of relinquishment to the state was inoperative ; and consequently, the court erred in refusing the instruction prayed by the plaintiff, that it did not bind him ; and in directing the jury, that if the execution of it was proved, it was a bar to the recovery of the land described therein.

This aspect of the case renders it unnecessary to decide, whether, supposing the relinquishment good, it was incumbent *on the plaintiff to show, that the possession of the defendants, or some of them, was, at [*352 the time of the service of the ejectment, outside of the land relinquished. That point was before us in *Hawkins* v. *Barney's Lessee*, at this term (*post*, p. 457); and it was there decided, that where the plaintiff's title deed, as exhibited by himself, contains an exception, and shows that he has conveyed a part of the tract of land to a third person, and it is uncertain, whether the defendants are in possession of the land not conveyed, the *onus probandi* is on the plaintiff. Here, the deed of relinquishment is exhibited on the part of the defendants, to dispute the plaintiffs' title to the land possessed by them ; and it has been contended, that this creates a distinction, and throws the burden of proof on the defendants to show, that the plaintiff has parted with his title to the particular land in controversy. The case, however, does not call for any absolute decision on this point ; nor does it appear with certainty, from the evidence, that the relinquished land was within the boundaries of the land in controversy in the suit.

The third bill of exception states, that on the trial of the cause, the plaintiff having given in evidence the patent to Pickett, and by mesne conveyances, to Clarke, the lessor of the plaintiff, and proved that Clarke, at

the date thereof and ever since, was resident in the state of New York, and that the title deeds embrace the land in controversy, and that the defendants were all in possession, at the commencement of the suit, after the defendants had given in evidence the deed of relinquishment, and the court had given the instructions thereon, gave testimony conducing to prove that some of the defendants, viz., Hinton, Hughes, Vance, Gillum, Antle, Sally Courtney, &c., were not within the limits set forth in the relinquishment: and these defendants all relying in their defence upon their possession, they gave in evidence a patent to James Gibson, 1st of March 1793, under a survey of 1783, and a patent to Sterrett and Grant, 24th of October 1799, under a survey in 1792 (reciting them), and gave testimony conducing to prove, that Sally Courtney, &c., were within the boundaries prescribed by the patent of Grant and Sterrett; and Hinton, Hughes, Gillum, Vance and Antle were within the bounds of the patent to Gibson; and touching the possession within Gibson's patent, the witness stated, that in 1796,
*353] *Hinton entered within the patent of Gibson, claiming a part of the tract under that grant, and that the tenement has been occupied ever since; and at subsequent periods, the other tenants claiming under the said Hinton, had settled in the same manner, under other parcels, claimed by them as parts of Hinton's purchase; and from the time of their respective settlements, their possession had been continued. The witness knew not the extent or boundary of any of the purchases, and no title papers were produced. And touching the possession within the patent to Sterrett and Grant, the witness stated, that in 1791 or 1792, Griffin Taylor entered under that patent, that the tenements have been still occupied by Taylor and his alienees; and at periods subsequent, the other tenants had entered and taken possession, claiming under the said Taylor, within the limits of the patent to Sterrett and Grant. No written evidences of purchase were offered.

Thereupon, the plaintiff moved the court to instruct the jury: 1. That the possession of these defendants was no bar to the defendants' action: 2. That the statute of limitation could only protect the defendants to the extent that they had actually inclosed their respective tenements, and had occupied for twenty years preceding the commencement of the suit. The court overruled the motion, and instructed the jury, that adverse possession was a question of fact; that, under the adverse patents given in evidence, it was not necessary to show a paper title derived under those adverse grants, to make out adverse possession; but such hostile possession might be proved by parol; that an entry under one of the junior grants given in evidence by one of the defendants, and within the boundaries of the elder grant, without any specific metes and bounds, other than the abuttals of the grant itself, did constitute an adverse possession, to the whole extent of the abuttals and boundaries under which such entry was made. To this refusal and opinion, the plaintiff excepted; and the question now is, whether the court erred in either respect?

In considering the points growing out of this exception, it may be proper to advert to the doctrine, which has been already established in respect to the nature and extent of the rights growing out of adverse possession.
*354] Whether an entry *upon land, to which the party has no title, and claims no title, be a mere naked trespass, or be an ouster or disseisin of the true owner, previously in possession of the land, is a matter of fact,

depending upon the nature of the acts done, and the intent of the party so entering. The law will not presume an ouster, without some proof; and though a mere trespasser cannot qualify his own wrong, and the owner may, for the sake of the remedy, elect to consider himself disseised, yet the latter is not bound to consider a mere act of trespass to be a disseisin. If a mere trespasser, without any claim or pretence of title, enters into land, and holds the same adversely to the title of the true owner, it is an ouster or disseisin of the latter. But in such case, the possession of the trespasser is bounded by his actal occupancy; and, consequently, the true owner is not disseised, except as to the portion so occupied. But where a person enters into land, under a deed or title, his possession is construed to be co-extensive with his deed or title; and although the deed or title may turn out to be defective or void, yet the true owner will be deemed disseised, to the extent of the boundaries of such deed or title. This, however, is subject to some qualification. For, if the true owner be, at the same time, in possession of a part of the land, claiming title to the whole, then, his seisin extends, by construction of law, to all the land which is not in the actual possession and occupancy, by inclosure or otherwise, of the party so claiming under a defective deed or title. The reason is plain; both parties cannot be seised, at the same time, of the same land, under different titles, and the law therefore adjudges the seisin of all, which is not in the actual occupancy of the adverse party, to him who has the better title. This doctrine has been on several occasions recognised in this court. In *Green* v. *Liter*, 8 Cranch 229–30, the court said the general rule is, that if a man enters into lands, having title, his seisin is not bounded by his occupancy, but is held to be co-extensive with his title; but if a man enters without title, his seisin is confined to his possession by metes and bounds. Therefore, the court said, that as between two patentees in possession, claiming the same land under adverse titles, he who had the better legal title, was to be deemed in seisin of all the land not included in the actual close of the other patentee. The same doctrine was held in **Barr* v. *Gratz*, 4 Wheat. 213, 223; where the court said, that where two persons are in possession, at the same time, under different [*355 titles, the law adjudges him to have the seisin of the estate, who has the better title. Both cannot be seised, and therefore, the seisin follows the title. And that where there was an entry, without title, the disseisin is limited to the actual occupancy of the party disseising. And in the reference to the facts of that case, the court held, that in a conflict of title and possession, the constructive actual seisin of all, the land, not in the actual adverse possession and occupancy of the other, was in the party having the better title. In the *Society for Propagating the Gospel* v. *Town of Pawlet*, 4 Pet. 480, 504, 506, which came before the court upon a division of opinion, upon a state of facts agreed, the court held, that where a party entered as a mere trespasser, without title, no ouster could be presumed, in favor of such a naked possession; but that where a party entered under a title adverse to the plaintiffs, it was an ouster of, or adverse possession to, the true owner.

It appears to us also, that the doctrines, thus recognised by this court, are in harmony with those established by the authority of other courts; and especially, of the courts of Kentucky, in the cases cited at the bar. See also Johnson's Digest, Ejectment, V, *b*; Bigelow's Dig., Seisin and Disseisin, A, B, C, D.

It remains to apply these questions to the present exception. The court was called upon, in the first instruction, to declare, that the possession of the defendants was no bar to the action. This obviously required the court to give an opinion upon matters of evidence proper for the consideration of the jury, and which might be fairly open to controversy before them. It was, therefore, properly denied. The second instruction required the court to declare, that the statute of limitations could only protect the defendants to the extent, that (they) had actually inclosed their respective tenements, and occupied, for twenty years preceding the commencement of the suit. The difficulty upon this instruction is, that no evidence was adduced, or, if adduced, it was not competent for the court to decide upon it, that either Pickett, the patentee, or the lessor of the plaintiff, at the time of the entry and ouster by the defendants, had any actual seisin or possession of any part
*356] of the land included in *the patent; so as to limit their possession to the bounds of their actual inclosures or occupancy. The entry of the defendants was certainly under a claim of title, under the patents of Gibson and Sterrett, and Grant. If Pickett, or his grantees, were then in possession under his patent, the defendants, upon the principles already stated, would have been limited, as to their adverse possession, to the bounds of their actual occupancy. But that not being shown, the question resolves itself into this, whether a party entering into land under a patent, but without showing a paper title to any particular portion of the land included in that patent, is not to be deemed as claiming to the abuttals of the patent, against adverse titles held by other parties, not then in seisin or possession under their titles.

The opinion of the circuit court was (as the instruction given shows), "that adverse possession was a question of fact" (which might be true, as applicable to the case before it, though it is often a mixed question of law and of fact); "that under the adverse patents given in evidence, it was not necessary to show a paper title, under those adverse grants, to make out adverse possession, but that such hostile possessions might be proved by parol" (which, as a general proportion, is certainly true, as adverse possession may exist independent of title); and what is the material part of the instruction, "that an entry under one of the junior grants given in evidence by the defendants, and within the boundaries of the elder grant of Pickett, made by one claiming under such junior grant, without any specific metes and bounds, other than the abuttals of the grant itself, did constitute an adverse possession to the whole extent of the abuttal and boundaries, under which the entry was made." The prayer of the plaintiffs, then, was, or might have been, rejected, because it assumed the decision of a question of fact; that is, that the defendants entered without any claim of title by metes and bounds: and the instruction given was, that an entry under the junior grants, by one claiming under them, by no other abuttals than those of the grants, was to be deemed an entry and adverse possession to the extent of those abuttals. This decision is fully supported by the cases in 2 A. K. Marsh. 18, and 1 Ibid. 376. Looking, therefore, to the instruction, in the qualified manner in which it is given, and with
*357] reference to the fact that no *seisin was shown in Pickett, or the lessors of the plaintiff, in any part of the tract included in his patent, at the time of the entry of the defendants, it seems to us, that, according to

the local decisions, the refusal was right, and the instruction given was correct in point of law.

We think it proper to add, that no notice has been taken of the fact, that Clarke, the lessor of the plaintiff, was a non-resident; because it does not appear, that any of the instructions were asked or given, in reference to the legal effect of his non-residence.

The judgment is, therefore, reversed, for the errors stated in the first and second bills of exception; and the cause remanded to the circuit court, with directions to award a *venire facias de novo.*

BALDWIN, Justice, dissented, as to the possession.

THIS cause came on, &c.: It is considered by the court here, that there was error in the circuit court in admitting the testimony of Moses L. Miller, under the circumstances set forth in the first bill of exceptions. And that there was error in the circuit court in refusing to instruct the jury, upon the motion of the plaintiff, that the instrument stated in the second bill of exceptions, under the proof, did not bind the plaintiff, and could not bar his recovery; and in instructing the jury, that the relinquishment stated in the same bill of exceptions for 49,952 acres, if the execution thereof was satisfactorily proved, was a bar to the recovery of all the land described in said relinquishment, as set forth in the same bill of exceptions. But there is no error in the court, in refusing to instruct the jury, on the motion of the plaintiff, that the possession of the defendants was no bar to the plaintiffs' action; and that the statute of limitations could only protect the defendants to the extent that (they) had actually inclosed their respective tenements, and occupied for twenty years preceding the commencement of the suit, as set forth in the third bill of exceptions; and that there was no error in the court, in giving the instruction to the jury, set forth in the same bill of exceptions, in the manner and under the circumstances therein set forth. And, &c.

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*JOHN TAYLOE, Plaintiff in error, *v.* EDWARD THOMSON'S Lessee, [*358
Defendant in error.

Lien of judgment.—Execution.—Insolvency.

It seems, there is no act of assembly of Maryland which declares a judgment to be a lien on real estate, before execution issued and levied; but by an act of parliament of 5 Geo. II., c. 7, lands in the colonies are subject to execution as chattels, in favor of British merchants; this statute has been adopted and in use in Maryland, ever since its passage, as the only one under which lands have been taken in execution and sold.

It is admitted, that though this statute extends in terms only to executions in favor of British merchants, it has long received an equitable construction, applying it to all judgment-creditors; and that this construction has been uniform throughout the state.

As congress has made no new law on this subject, the circuit court were bound to decide this case according to the law of Maryland, which does not consist merely of enactments of their own, or the statutes of England, in force or adopted by the legislature; the decisions of their courts; the settled and uniform practice and usage of the state in the practical operation of its provisions, evidencing the judicial construction of its terms; are to be considered as a part of the statute, and as such, furnish a rule for the decisions of the federal courts; the statute and its interpretation form together a rule of title and property, which must be the same in all courts. It is enough for this court, to know, that by ancient, well-established and uniform usage,