The court below directly charged the jury, that it was their duty to find a verdict against the plaintiff, Matilda C. Gray, which instruction was particularly excepted to, and was erroneous.

Case No. 169, in which Brignardello and others are plaintiffs in error, is affirmed with costs; and case No. 223, in which Matilda C. Gray is plaintiff in error, is reversed with costs, and remanded, and a *venire de novo* awarded.

JUDGMENT ACCORDINGLY.

BEAVER v. TAYLOR.

1. Under the *first* section of the Statute of Limitations of March 2, 1839, of Illinois, entitled "An act to quiet possessions and confirm titles to land,"—which section gives title to persons in "actual possession of land, or tenements, under claim or color of title made in good faith, and who for seven successive years continue in such possession, and during said time pay all taxes,"—the bar begins with the *possession* under such claim and color of title; and the taxes of one year may be paid in another. But under the *second* section of the same act, which section says that, "whenever a person having color of title, made in good faith, to *vacant* and *unoccupied* land, shall pay all taxes for seven successive years," he shall be deemed owner,—the bar begins *with the first payment of taxes* after the party has acquired color of title. Hence, in a trial of ejectment, when the said different sections of this statute are set up, any instructions, outside of the facts, which do not keep this distinction between the two sections in view, and by which the jury, without being satisfied as to the requisite possession under the *first* section, *might*, under the *second* section, have found for the party pleading the statute, upon the ground that the taxes had been paid for seven successive years, although the first payment was made less than seven years before the action was commenced, will be reversed, upon the well-settled principle that instructions outside the facts of the case, or which involve abstract propositions that *may* mislead the jury to the injury of the party against whom the verdict is given, are fatally erroneous.

2. To prove payment of taxes, the defendant offered in evidence two *receipts without dates;* and to prove the date offered two *letters having dates,* which letters inclosed the receipts; also to prove the date, and the agency of the person who had made the payment and written the letters, offered certain *entries in the account books of the parties* on behalf of whom the payment was alleged to have been made. These persons

residing away from the land, and the clerk who made the entries being dead, of which death and of the handwriting proof was also offered: *Held*, that the evidence was all admissible: the receipts on the plainest principles of evidence; the letters and entries on principles not *so* plain, but still admissible, as falling within the category of verbal facts; neither of them being hearsay, nor declarations made by the party offering them, and tending, both of them, to illustrate and characterize the principal fact, to wit, the transmission of the receipts, and to put that fact in its true light, and to give to it its proper effect.

THIS was an action of ejectment, brought in the Circuit Court for the Southern District of Illinois, by Beaver, the plaintiff in error, against Taylor et al., to recover premises described in his declaration. *The action was brought on the* 17*th July*, 1854. The date is important. Upon the trial, the plaintiff having shown title in himself, the defendants relied upon the first and also upon the second section of the Statute of Limitations of the State of Illinois of March 2, 1839, as making a bar.* The two sections were thus:

"*First.* Every person in the actual *possession of land or tenements* under claim and color of title made in good faith, and who shall, *for seven successive years*, continue in such *possession*, and shall also, *during* said time, *pay all taxes* legally assessed on such land or tenements, shall be held and adjudged to be the legal owner of said land or tenements to the extent and according to the purport of his or her paper title.

"*Second.* Whenever a person *having color of title made in good faith*, to *vacant and unoccupied land*, shall *pay all taxes* legally assessed thereon *for seven successive years*, he or she shall be deemed and adjudged to be the legal owner of said vacant and unoccupied land, to the extent and according to the purport of his or her paper title."

The defendants, to show color of title, gave in evidence a certain deed. The deed itself was admitted to be void, but the good faith of the defendants and the sufficiency of the deed for the purpose for which it was offered were not dis-

* "An act to quiet possessions and confirm titles to land," §§ 8 and 9 of the chapter "Conveyances," in the Revised Code of 1845.

puted. The defendants also gave evidence tending to prove possession for more than seven years before the commencement of the suit.

In making proof of the *payment of the taxes* the defendants offered in evidence two receipts, *without date*, from the collector to one Gilbert, one for the State and county taxes, and the other for the road tax, of the year 1847. They proved that the "collector had made a final settlement of the State and county taxes for the year 1847 with the proper officers;" and they gave evidence tending to prove that, *during* the years 1847 and 1848, Gilbert was the agent of Taylor & Davis (claimants of the premises under the statute) in respect of the taxes. The plaintiffs objected to the receipts as evidence, because it did not appear *when* the taxes were paid, nor that Gilbert had any connection with the color of title relied upon by the defendants. To meet the objection as to the time of payment, the defendants offered in evidence two *letters* from Gilbert to Taylor & Davis; one of the 10th of March, 1848, inclosing the receipt for the State and county taxes, and the other of the 4th of May, 1848, inclosing the receipt for the road tax. They offered also certain *entries in an account book of Taylor & Davis*, relating to the property in question and other property held by them in the same right. The letter gave an account in detail of Gilbert's debits and credits as agent in respect of the taxes, and referred particularly to the receipts in question. The books contained entries relating to the same subject and showing the recognition of his agency in the transaction. It appeared that the book was kept in Philadelphia, where Taylor resided, and that the clerk who made the entries was dead. Proof was offered of his death and of his handwriting. The letters and book were also objected to. The court admitted all the evidence, and the plaintiff excepted.

The evidence being closed, the counsel of the plaintiff asked the court for nine different instructions to the jury; the only ones important to be here mentioned, however, being three, which were in regard to the defence arising under the *second* section of the Statute of Limitations already

mentioned. In regard to such defence the instructions prayed for were these:

"1. That if the jury believe from the evidence that the land in controversy was vacant and unoccupied in the year 1847, they will find for the plaintiff, unless they also believe from the evidence that Taylor & Davis paid the taxes assessed on said lands for the year 1847, *before the seventeenth day of July*, 1847.

"2. That the second section of the act of 1839 does not begin to run until the payment of the first of the series of taxes required by that act, and the bar under that section is not complete *until the end of seven years from the time of the payment of the first of said series of taxes.*

"3. That to constitute a bar under the second section of said act of 1839, the payment of taxes must concur during seven successive years *prior* to the bringing of suit with the color of title; and it must also appear to the jury by the evidence that during such seven years the land was vacant and unoccupied, that such bar does not begin *until the first of such series of taxes is paid* by the person having color of title, and is not complete until the payment of taxes for seven successive years thereafter has concurred with such color of title, and that the burden of proof of such facts as constitute such bar is on defendants."

The court refused to give these instructions, and instructed the jury as follows:

"Three things must unite to give a party the benefit of this section:

"1. He must pay all taxes levied on the land for seven successive years.

"2. The land must for the same time be vacant and unoccupied.

"3. He must during the same time have color of title to the land acquired in good faith."

The court had previously charged that to bring a party within the *first* section:

"1. He must have actual possession of the land for seven successive years.

"2. He must pay all taxes levied on the land for the same seven years.

"This possession and payment must be under claim and color of title to the land made in good faith."

The plaintiff excepted to the instructions given, including those in regard to the *second* section, and to the refusal to instruct as prayed. The jury found for the defendants.

On error here the matters complained of were the admission of the evidence excepted to, and the refusal to give the instructions as asked, and the giving of those that were made.

Mr. Grimshaw, for the plaintiff in error; Mr. Trumbull, contra.

Mr. Justice SWAYNE (stating the facts) delivered the opinion of the court.

Under the *first* section of the Statute of Limitations of the State of Illinois, of the 2d of March, 1839, it was necessary for the defendants to show actual possession of the premises for seven successive years; the payment of all taxes for seven successive years; and that the possession was under "claim and color of title made in good faith." Under this section, the period of limitation begins with the possession.*

A void deed taken in good faith is a sufficient color of title.† It is not necessary that each year's taxes should have been paid within the year. The taxes "for one year may be paid in another of the seven years."‡

Under the *second* section, the defendant must show the payment of the taxes for seven successive years; that the land was "vacant and unoccupied" during that time, and that he had, during the same time, "color of title made in good faith." Under this section the bar begins with the first payment of taxes after the party has acquired color of title. Payment of taxes without color of title is unavailing.§

* Hinchman *v.* Whetstone, 23 Illinois, 185.

† Id., 187; Goewey *v.* Urig, 18 Id., 242; Woodward *v.* Blanchard, 16 Id., 424; McClellan *v.* Kellogg, 17 Id., 501; Wright *v.* Mattison, 18 Howard, 50.

‡ Hinchman *v.* Whetsone, 23 Illinois, 187.

§ Stearns v. Gittings, 23 Id., 390.

2. *As respects the evidence admitted and excepted to.*

In connection with the proof of Gilbert's agency in paying the taxes, it was clearly proper to allow the receipts to go in evidence to the jury. His agency could be proved by evidence *aliunde*. Such testimony was admissible upon the plainest principles of the law of evidence. The jury were the judges of its weight.

The letters and account stand upon a different footing, and their competency is not so free from doubt; but after the fullest consideration, we are all of opinion that there was no error in admitting them. It was proper for the agent to transmit the receipts to his principals. What was said and done in that connection was a part of the *res gestæ*. The contents of the accompanying letters relative to the receipts are within the rule upon that subject. The entries in the books of Taylor & Davis, after the receipts came to hand showing their action, were admissible for the same reasons. Both the letters and entries belong to the same category with what are called "verbal facts," and neither fall within the rule which excludes "*res inter alios acta*,"—hearsay and declarations made by the party offering them in evidence. The principal fact was the transmission of the receipts. The other facts so illustrate and characterize it, as to constitute the whole one transaction, and render the latter necessary to exhibit the former in its true light and give it its proper effect.

It is, perhaps, not possible to lay down any general rule as to what is a part of the *res gestæ* which will be decisive of the question in every case in which it may be presented by the ever-varying phases of human affairs. The judicial mind will always be compelled frequently to apply the general principle and deduce the proper conclusion. The circumstances to which we have just adverted furnish the tests by the light of which the question, whenever it arises, must receive its solution.*

* Bruce *v.* Hurly, 1 Starkie, 20; Murray *v.* Bethune, 1 Wendell, 196; Cox *v.* Gordon, 2 Devereux, 522; Enos *v.* Tuttle, 3 Connecticut, 250; Allen *v.* Duncan, 11 Pickering, 309; B. & W. R. R. Corp. *v.* Dana, 1 Gray, 83;

3. After the evidence was closed, the plaintiff's counsel submitted numerous prayers for instructions to the jury. The learned judge refused to give them, but submitted the facts with instructions according to his own views. This was proper, provided the instructions given were correct.* We find nothing in these instructions which calls for remark, except what related to the second section of the statute. [His honor here repeated this portion of the instructions, as already given.] In regard to these there is a material difference between the instructions refused and those given. The former directed the attention of the jury particularly to the proposition, that, as regards this section, the statute did not begin to run until the first payment of taxes was made, and that seven years must have elapsed after that time to render the bar complete; while the latter overlooked this point, and made no distinction between the payment of taxes under this section and the preceding one. The language, he "must pay all taxes levied on the land for seven successive years," is substantially the same with that used by the learned judge in regard to the first section. Under that section, as we have shown, the bar begins with the time of the possession, and the taxes for the seven years "may be paid in one year for another." This was an error.

But it is said that the bar was complete under the first section, and that what was said as to the second section was needless, and in the nature of an abstract proposition. We cannot so regard it. The bill of exceptions purports to contain all the evidence. The action was commenced on the 17th of July, 1854. To raise a bar under the second section, the first payment of taxes must have been made as early as the 17th July, 1847. There is no proof of any payment earlier than that referred to in the first letter of Gilbert. That letter bears date on the 10th of March, 1848, and shows

Lund *v.* Tyngshorough, 9 Cushing, 36; Sessions *v.* Little, 9 New Hampshire, 271; Thorndike *v.* Boston, 1 Metcalf, 242; Mitchell *v.* Planters' Bank, 8 Humphrey, 216; Robertson *v.* Smith, 18 Alabama, 220; Clealand *v.* Huey, Id., 343.

* Law *v.* Cross, 1 Black, 533.

the payment to have been made prior to that time. How much earlier it was made does not appear. It is clear that so far as this section is concerned the plaintiff was entitled to recover, and the court should have so instructed the jury. The defence rested wholly upon the first section.

Under that section, as before remarked, there must be possession for seven years prior to the commencement of the suit. The first payment of taxes may be later than the beginning of that period. As the jury were instructed, they may not have been satisfied as to the requisite possession under the first section, and have found for the defendants under the second section, upon the ground that the taxes had been paid for seven successive years, although the first payment was made later than seven years before the action was commenced.

The law, as to instructions outside of the facts of the case, or involving abstract propositions, is well settled. If they *may* have misled the jury to the injury of the party against whom their verdict is given, the error is fatal.*

The judgment below is reversed, and a

VENIRE DE NOVO AWARDED.

ROGERS *v.* THE MARSHAL.

1. The marshal is not responsible on his official bond for the act of his deputy in discharging sureties on a replevin bond, in any case where the attorney of the plaintiff in that suit, though he gave no direct and positive instructions to the deputy, has still done that which was calculated to mislead the deputy, and to induce his erroneous act. And in the consideration of a question between the deputy and attorney, it is to be remembered that the former is but a ministerial officer, unacquainted with the rules which discharge sureties from their obligations, while the latter, in virtue of his profession, is supposed to be familiar with them.
2. Where an instruction, though not in the best form of words, is sufficiently intelligible, and has been rightly interpreted by the jury, in reference to the evidence, a reversal will not be ordered in the indulgence of a nice criticism.

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* Clarke *v.* Dutcher, 9 Cowen, 674; Wardell *v.* Hughes, 3 Wendell, 418.