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.

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

Statement of the case.

3. It is the duty of counsel, excepting to propositions submitted to a jury by the court below, to except to such propositions distinctly and severally; and although the court below may err in some of the propositions—which in this case it did—yet, if the propositions are excepted to *in mass*, the exception will be overruled, provided *one* of the propositions be correct, which was the case here.
4. Where the decision of a question depends at all upon the fact, whether the plaintiff in a suit had assented to an act which was a deviation from the actor's strict line of duty, and of a kind for which the plaintiff could hold him responsible, it is proper enough to ask what the plaintiff's attorney said *after* the act was done; the case being one where an adoption by the plaintiff of the act illegally done concluded his remedy.

ERROR to the Circuit Court for the District of Wisconsin; the case being thus:

Rogers had issued a writ of replevin in the District Court for the district above named, against a certain Remington and one Martin to replevy a quantity of lumber. By the code of Wisconsin, which was adopted in the District Court as its rule of proceeding, it was provided that on "a written undertaking executed by one or more sufficient *sureties*," approved, &c., for the prosecution of the action for the return of the property to the defendant, the marshal should take the same, and deliver it to the plaintiff, unless, &c. In the replevin suit just mentioned, the deputy marshal, one Fuller, took a bond, and delivered the property; but the bond taken by him, on suit brought upon it, was decided to be void,* and was now confessedly so. A suit—the present action, to wit, in the court below—was now brought against the *marshal* and his sureties, on his *official* bond; the ground of the suit being the mistake of the deputy marshal, Fuller, in taking a bond that was void instead of taking one that was valid. The defence set up was that the deputy, Fuller, acted in the matter under instructions from one Hopkins, *the attorney of the plaintiff in the replevin suit.* And one point involved in the suit accordingly was, whether Fuller, the deputy, had so acted.

That point rested on the testimony of the attorney, Hopkins, and the deputy, Fuller, both of whom were witnesses in the suit.

* See Martin *v.* Thomas, 24 Howard, 315.

Fuller, the deputy, swore as follows:

"After I took the lumber, Remington came to me, and inquired the form of a bond. I gave him a form, and the next day he brought a bond signed by himself and Martin. I took the bond to Mr. Hopkins, who was attorney for the plaintiff in the replevin. He said *he would not have Remington on the bond at all.* I took the bond back to Remington, and told him what Hopkins said. Remington took the bond, and the next day he returned it with the name of John Keefe on it. I took the bond to Hopkins, who said he did not know anything about Keefe, but that if I could get Andrew Proudfit's name on the bond to take it. I told this to Remington, who took the bond again, and brought it to me with Proudfit's name on it. I said to Remington, 'I cannot receive the bond, your name is on it.' He said he would take his name off, and I said that would be in accordance with my instructions by Hopkins. I handed the bond back to Remington. He went to the desk, erased his name in my presence, in all the places where it now appears erased, and brought it back to me in its present shape. No one was present when the erasure was made but myself, my clerk, and Remington."

The testimony of Mr. Hopkins was to the same general effect; he stating that when the bond was brought to him, in the first instance, he told Fuller "the statute requires the bond to be signed by *sureties:* and *I do not want Remington's name on it.*" Hopkins had never seen the bond after Fuller took it away; nor heard of the erasure until he heard of it casually, and long after it was made.

In the course of the examination of the deputy marshal, the defendant's counsel asked him (under objection, overruled, to the question), what Mr. Hopkins said *afterwards* about the bond. The witness answered,

"Mr. Hopkins told me a month afterwards, that it was necessary to have Remington's name on it; that he was then mistaken in the code; he thought it was the same as the New York code. He said the New York code did not require the defendant's name to be on the bond, and the code of this State did. He gave that as a reason why he would not have Remington's name on the bond. The marshal knew nothing about the

transaction. He was away from town at the time. I was acting under the direction of Mr. Hopkins, the attorney of the plaintiff, who had charge of the whole thing."

The evidence being closed, and it having been made to appear that Mr. Hopkins was not only attorney of the plaintiff in the replevin suit, but was also attorney for the plaintiff in the suit brought on the replevin bond, the court charged as follows:

"If the deputy marshal in the execution of the writ of replevin was in the due service of the writ in taking the bond on the part of the defendants to retain the property, and the altered bond was accepted by the deputy marshal in pursuance of instructions *or the interference* of the attorney for the plaintiff, then these defendants are not to be held liable.

"The bond given to the deputy in the first instance, with the name of Remington on it as principal, was valid so far as it related to his being a party or obligor on said bond. *It is for the jury to determine whether the erasure was made in consequence of the interference of Mr. Hopkins, the attorney.*

"*The interference or consent of the plaintiff's counsel may be inferred in part from the fact of his afterwards acting on the bond as valid, and bringing suit thereon.*"

The bill of exceptions, after reciting this charge, as above given, proceeded in these words:

"To *which said* instructions and charge to the jury the plaintiffs by their counsel then and there, in open court, did except, *according to the course of practice of this court.*"

In regard to the form of the exceptions it is necessary here to say, that a rule of the Supreme Court* directs that "judges of the Circuit and District Courts do not allow any bill of exceptions which shall contain the charge of the court *at large* to the jury, in trials at common law, upon any *general* exception to the *whole* of such charge, but that the party excepting be required to state *distinctly* the *several* matters in law in such charge, to which he excepts, and that such mat-

* Rule 38, adopted at January Term, 1832.

ters of law and those only, be inserted in the bill of exceptions, and allowed by the court."

The questions now before this court were:

1. Did the court err in any of its instructions?

2. If so, can the plaintiff in error, in the face of the rule of court already mentioned and the practice of the court, profit of the error on a bill so *general* as the one here?

3. Was the objection to the question asked of the deputy marshal as to what Mr. Hopkins said *after* the bond was taken, and the lumber given up, rightly overruled?

Mr. Carpenter, for the plaintiff in error:

1. There is no more pretence for saying that Hopkins directed or consented to the erasure, than there is for saying that he directed the marshal to *forge* the name of Proudfit to the bond. He objected to the bond because Remington's name was on it, and because Proudfit's was not; but it was the duty of the marshal, even under these instructions, if they were instructions, to get the name of Proudfit legally upon the bond, and the name of Remington legally off from it, in other words to draw a new bond and to have Proudfit sign that. It would have been correct to charge the jury that if the plaintiff or his attorney directed the erasure to be made in the absence of the other signers, and the marshal erased it, acting under such instructions, the plaintiff could not recover. But the charge in substance was, that if the marshal made the erasure in *consequence* of the interference of Hopkins—that is, because Hopkins interfered—the plaintiff could not recover. Now it is true that in a popular sense, and as it would be understood by a jury, the erasure was made in *consequence* of what Hopkins said: that is, if Hopkins had said nothing, the marshal would not have erased the name. So, if the marshal, after the first interview with Hopkins, had *forged* Proudfit's name to the bond, it might be said that he had done so, in consequence of Hopkins desiring his name on the bond. It was in the sense we have indicated that the jury understood the charge. It must have been so intended by the judge; for there was no testi-

mony tending to prove that Hopkins directed the erasure; on the contrary the marshal rather testified that the last instructions of Hopkins were to take the bond, if Proudfit's name was obtained upon it, *waiving the objection that it was signed by Remington.*

Again, the judge charged the jury that the interference or *consent* of the plaintiff's counsel (to the erasure) may be inferred in part *from the fact of his afterwards "acting on the bond as valid, and bringing suit thereon."* This was clearly erroneous; the testimony proved that Hopkins did not consent to the erasure at all, or even know of it till long afterwards. The erasure was a fact; the legal consequence of that fact upon the validity of the bond was matter of opinion. Conceding that when months afterwards Hopkins discovered that the erasure had been made, he thought as matter of law that the bond could be recovered upon, how does that opinion even *tend* to show that he *consented to the erasure?* This is the first time that a lawyer's erroneous opinion as to the legal consequences of an act has been held competent evidence tending to prove that he consented to the commission of the act itself.

2. *As to the form of the exceptions.* The rule of this court was sufficiently observed by the judge in allowing the exceptions here. The bill does not set out the whole charge, but only "the several matters in law in such charge to which" we excepted; and the bill of exception then says: "To *which* said *instructions*," &c., "the plaintiffs, by their counsel then and there in open court, *did except*, according to the course of practice of" the District Court: that is, according to the practice prescribed by the rule; or, in other words, *did except to each of the several matters in law in said charge, which are inserted in this bill of exceptions.* The principle of this rule is, that the party excepting should call the attention of the court specifically to the matters objected to, so as to give the court below an opportunity to correct any mistake in the charge. And the party will not be permitted to except generally to the charge, and afterwards make up his mind which particular propositions are erroneous. Now

here the *three matters* which we excepted to are stated in the bill of exceptions, and it appears that to those we excepted *according to the practice of the court;* that is, severally to each.

3. The question, "what did Mr. Hopkins afterwards say about the bond?" meant "what did he say about it, *after you had received it and redelivered the property?*" and it invited the witness to testify to what was said a month after such redelivery. This question was objectionable:

1. Because the marshal could not have been induced to take the bond by anything that was said *after* he had taken it; and

2. Because, admitting that what Hopkins said at the time he objected to the bond, was binding upon Rogers, whom he was then representing in that behalf; yet, what he *afterwards* declared or admitted about it, could not bind Rogers. While no doubt the rule is that where the acts of the agent will bind the principal, there his representations, declarations and admissions, respecting the subject-matter, will also bind him, *if made at the same time*, and constituting part of the *res gestæ;* it is equally the rule that this is so, only when such representations, &c., are made at such same time.

Mr. Lynde, contra.

Mr. Justice DAVIS delivered the opinion of the court as follows:*

1. It is unquestionably true that a marshal is answerable for the misconduct of his deputy. If Fuller, the deputy, who served the writ of replevin in the case of *Rogers* v. *Remington & Martin*, and took the statutory bond, erased the name of the principal, without the direction of some one having authority, he violated a plain duty, and his principal can justly be held liable. The officers of the law, in the execution of process, are obliged to know the requirements of the law, and if they mistake them, whether through ignorance

* Mr. Chief Justice Taney, and Messrs. Justices Wayne, Grier, and Field, had not been present at the argument.

or design, and any one is harmed by their error, they must respond in damages. But this case involves the extent of the power of an attorney to control and direct the execution of process, and the liability of the marshal where the default of his deputy has been induced by the conduct of the attorney.

The attorney is the agent of his client to conduct his suit to judgment, and to superintend the execution of final process. It is true that he cannot discharge the defendant from execution without the money is paid to him;* but his authority is complete to control the remedy which the law gives him to secure or collect the debt of his client.† And if the client suffers by the ignorance or indiscretion of the attorney, the officer shall not be prejudiced, for the attorney may give such directions to the officer as will excuse him from his general duty.‡ The attorney can give such general instructions to the officer as he may deem best calculated to advance the interests of his client, and if followed (erroneous though they be) they will bind his client and exonerate the officer.§

But it is said that Hopkins, the attorney, never instructed Fuller to erase Remington's name after the execution of the bond; which, being done without the knowledge and consent of the sureties, discharged them.

It is clear that no direct and positive instructions were given; for if there had been, in view of the power of the attorney to make the officer his agent, no controversy could have arisen. But the true question is this: Did Hopkins give such directions to Fuller as were calculated to mislead him, and must have induced the taking of the defective bonds? If he did, the marshal is not chargeable. After Fuller had taken the property in the replevin case he went to Hop-

* Jackson *v.* Bartlett, 8 Johnson, 361.

† Jenney *v.* Delesdernier, 20 Maine, 183; Kimball & Company *v.* Perry, 15 Vermont, 414.

‡ Walters *v.* Sykes, 22 Wendell, 568.

§ Crowder *v.* Long, 8 Barnewall & Creswell, 605; Gorham *v.* Gale, 7 Cowen, 739.

kins with a bond signed by Remington, the principal, and Martin or Keefe as sureties. Fuller swears that Hopkins said "he would not have Remington on the bond at all;" while the testimony of Hopkins is, that he "did not want" Remington's name on the bond. The two statements are not essentially different. Each would clearly enough convey the idea that Remington's name must not be on the bond. Hopkins excepted to the sufficiency of the surety, and told Fuller, that if he would procure Proudfit's name in addition to the name already on it, he would be satisfied. Remington was present at the interview, and took the bond away, and the following morning brought it to Fuller with Proudfit's name. Fuller told Remington that he could not receive the bond, because his name was on it. Remington said that he would take his name off, and Fuller replied that if he did so, it would be in accordance with the instructions received from Hopkins. Remington's name was then erased.

Now it is true that Hopkins did not direct Fuller to erase Remington's name from the bond, after it was executed, without the knowledge and consent of the sureties. But it should be remembered that Fuller was a ministerial officer and unacquainted with the rules which discharged sureties from their obligations, while Hopkins was supposed to be familiar with them. Fuller knew that Hopkins objected to the retention of Remington's name, while he was satisfied with Proudfit's in addition to that of Keefe, and, as the bond complied with the wishes of Hopkins, he had a reasonable right to infer that it was satisfactory. That Fuller acted under this belief is evident from the fact that he did not, until some length of time, say anything further to Hopkins; and there is nothing in the record to question the *bonâ fides* of either Fuller or Remington.

Hopkins had the right to refuse to direct Fuller at all in relation to the manner in which the bond should be executed, but he had no right to say anything which would necessarily tend to mislead him. If he had told Fuller, I will give you no instructions or advice; you are the officer, and must determine for yourself all questions that arise in

the performance of your duty, *then* Fuller, having been properly cautioned, could have no right to complain. And it is fair to infer that he would at once have sought legal advice, and thereby avoided the difficulties that occurred. But Hopkins chose another course, and what he said was well calculated to mislead Fuller. Any officer of common mind, and unacquainted with legal proceedings, would have concluded, from the conversation, that the bond would be satisfactory, if the additional surety was obtained and Remington's name left off; and it is clear, from Fuller's testimony, that Hopkins mistook the requirements of the Wisconsin code. Hopkins thought the New York and Wisconsin codes were alike, but afterwards ascertained his error, and that the Wisconsin code required the name of the principal on the bond, while the New York code did not. This admission relieves the case of all difficulty. It explains the reason of Hopkins in refusing the bond with the name of Remington on it, and accounts for the erasure which was made under the direction of the officer. If Hopkins chose to direct at all about the manner in which the bond should be executed, it was his duty, both to his client and the officer, to have taken the entire supervision of it. Having thought proper, as an attorney, to exercise his right to direct what names should go on the bond, he cannot, nor can his client, complain that the officer, in literally fulfilling his wishes in that regard, mistook the law and destroyed the efficacy of the instrument. When Fuller produced the bond with Remington's name on it, and Hopkins told him that he must have another surety, and would not have Remington's name on the bond, why did he not also inform him that the validity of the bond required that no erasures should be made after it was signed? This principle of law he doubtless well knew, and it is reasonable to infer that Fuller was in ignorance of it. The direction which Hopkins did give, and his failure to direct further, caused the loss which followed, and his client should suffer, and not the marshal.

These views are decisive of this case. The court charged the jury that it was their province to determine whether the

erasure was made "in consequence of the interference of Hopkins, the attorney," and the charge was right. It would have been better to have used the words "direction" or "instruction" instead of "interference," but, applying the evidence in the case, it is manifest that the jury rightfully interpreted the charge. A nice criticism of words will not be indulged when the meaning of the instruction is plain and obvious, and cannot mislead the jury.

2. But it is said that if the court was right in one proposition, it erred in submitting others to the jury.

This is true, but the plaintiffs in error cannot avail themselves of their exception, which was general and not specific. In *Johnston* v. *Jones** this court say, "It is well settled that if a series of propositions be embodied in instructions, and the instructions are excepted to in mass, if any one of the propositions be correct, the exception must be overruled."

3. It is urged that the court was in error in permitting the defendants to ask the witness (Fuller) what Hopkins said about the bond after Fuller had accepted it and given an order for the lumber. The exception is to the question, and not the answer. The question was pertinent and proper. If Fuller had deviated from the strict line of his duty, yet if Hopkins adopted what was done, his client cannot hold the marshal responsible.† And if Hopkins, after being informed of the circumstances under which Fuller took the bond, assented to it, his client is concluded.‡ It was surely important, then, to ascertain whether that assent was given. The answer to the question, even if improper testimony, cannot be complained of here, because no exception was taken to it in the court below. The answer, however, could not have affected the verdict, and it is not necessary to discuss its pertinency. On the whole, we find no error in the record, and are not disposed to disturb the finding of the jury.

JUDGMENT AFFIRMED WITH COSTS.

* 1 Black, 220. † Corning & Horner *v.* Southland, Sheriff, 3 Hill, 552.

‡ Stuart *v.* Whitaker, 2 Carrington & Payne, 100; Bevnon *v.* Garrat, 1 Id., 154.