

BADGETT vs. MARTIN.

On a bond executed by a deputy sheriff to his principal, conditioned that he would well and truly do and perform all the duties appertaining to the office of sheriff, during the time he continued the lawful deputy—an action accrues, and the statute of limitation commences running in respect thereof, whenever the deputy fails, at the return, to pay over money collected by him on execution. It is not a mere bond of indemnity against actual loss or damage to the principal—consequently, a cause of action accrued thereon whenever the principal's liability became fixed by the failure of the deputy to pay over money according to the mandate of the writ by virtue of which it was collected, and the statute commenced running from that time.

In an action on such a bond, dated in 1837, and the breach thereof accruing in 1838, the limitation is five years—consequently pleas setting up the lapse of two and four years are insufficient; but such pleas should not be struck out on motion—they should be met by demurrer.

In order to render a plea the proper subject of a motion to strike out, it must not only fail to present a material issue, but it must also be wholly unadapted to the nature of the action—therefore, as lapse of time might in this action constitute a valid defence, it is error to strike out a plea merely because it does not show that sufficient time has elapsed to constitute a bar—such a plea should be met by demurrer, and not by motion to strike out.

In an action of this kind it was error to *strike out* a plea setting up that the deputy was not, at the time of the commission or omission of the acts charged as a breach of the bond, the lawful deputy of the sheriff—such a plea sets up matter which is appropriate in its nature as a defence to the action, though the subject matter thus presented is defectively stated, and must have been held bad on demurrer.

The deputy was estopped by his bond from denying his appointment, but he might deny its continuance at the time of the commission of the act charged against him—but such denial could not be in general terms, but must be made by setting up special matter by way of avoidance.

Error to Pulaski Circuit Court.

Debt on a penal bond determined in the Pulaski Circuit Court, in February, 1850, before Hon. WM. H. FIELD, Judge. The declaration set out a bond executed by Royster as principal, and Crutchfield, Sprague, Ashley, and Badgett, securities, to Martin

for \$50,000, dated the 5th June, 1837; which bond was subject to a condition underwritten, whereby, after reciting that Martin was sheriff of Pulaski county, and had appointed Royster his deputy to do and perform all the duties appertaining to the office of sheriff of said county; the condition was declared to be such that if Royster should well and truly do and perform all the duties appertaining to the office of sheriff of Pulaski county aforesaid, during the time he continued the lawful deputy of said Martin, sheriff of said county, then the bond was to be void, else to remain in force.

Two special breaches were assigned. The first, after setting out the recovery of a judgment in the Pulaski Circuit Court, and the issuance of a writ of *fi. fa.* thereon, which came to the hands of Royster on the 12th day of February, 1838, and whilst he was the lawful deputy of Martin, by virtue of the appointment and deputation in the condition of the bond mentioned, proceeded as follows: "And afterwards, to wit: on the day and year last aforesaid, at the county aforesaid, the said David Royster, acting as such deputy sheriff for the plaintiff, under and by virtue of the appointment and deputation aforesaid, and whilst said plaintiff was sheriff as aforesaid, then and there collected and received on that execution, before the return day thereof, by virtue of the authority therein contained and his deputation aforesaid, of and from the defendants in that execution, the said sum of two hundred and nine dollars and fourteen cents, and the interest which had accrued thereon, as well as said costs, and that he, the said Royster, both at, before and after the return day of said writ, and at all other times, utterly failed and refused to pay over or account for the said moneys so collected and received by him, as such deputy as aforesaid, to said Jacob Reider, (the plaintiff in the execution,) or any person for him, or to the plaintiff in this suit, or any person for him, although often requested so to do, and utterly failed and refused to have such moneys with said writ before the Judge of said court according to the exigency of said writ, to be rendered to said Jacob Reider or accounted for according to law. By means of which premises the condition

of said writing obligatory was broken, and the writing obligatory itself forfeited. And said plaintiff avers that at time past, to wit: before the institution of this suit, he became liable to pay, and was forced and obliged and did pay to said Jacob Reider, the said sum of two hundred and nine dollars and fourteen cents, specified in said execution, and interest which had accrued thereon, and damages which had accrued in that behalf in consequence of the breach of duty of said Royster, and the costs aforesaid—all of which payments made by the plaintiff amounted to a large sum of money, to wit: to the sum of five hundred dollars, and which has not, nor has any part thereof, been repaid at any time to the plaintiff by said Royster, or any other person, and that the same is in arrear and now due to the said plaintiff. By means of which premises, an action has accrued to the plaintiff to demand and have of and from the said defendant in this suit, the said sum of fifty thousand dollars above demanded.”

The second breach was the same as the first, except that it set out a different judgment and execution.

The suit was commenced on the 3d April, 1849. The defendant pleaded six pleas in bar: 1st, the statute of limitation of 2 years; 2d, the statute of 4 years; 3d, the statute of five years; 4th, that before the execution of the writing obligatory mentioned, to wit: on, &c., at, &c., without the knowledge or consent of defendant, it was corruptly and unlawfully agreed by and between plaintiff and Royster, (the plaintiff then and there being sheriff of said county, and said Royster then being his deputy in such office,) that said plaintiff should grant, sell and transfer said office of sheriff and the emoluments thereof and therefrom arising to said Royster from thence until the first day of October, 1838, and that said Royster, in consideration of said transfer and sale of said office, and the emoluments thereof, as aforesaid, should pay to said plaintiff the gross sum of \$450, for the use, emoluments, and profits of said office, up till the first day of October, 1837, and for the use, and the emoluments and profits thereof, up to and until the first day of October, 1838, the additional gross sum of \$250, and also that said Royster, for the

same consideration, and for the purpose of indemnifying said plaintiff against loss or damage in respect of any misfeasance or malfeasance on the part of said Royster, as such deputy, should, with sufficient security execute and deliver to said plaintiff such bond, as, in said declaration, is described. And said defendant avers that the writing obligatory, in the declaration in this behalf mentioned, was executed and delivered for the consideration aforesaid, and not for or upon any other, or different consideration whatever, and the same bond was accepted and received by said plaintiff, in pursuance of the corrupt and unlawful agreement aforesaid, and not otherwise or differently, or under any other or different circumstances, or in pursuance of any other agreement. 5th, the 5th plea after alleging the same facts stated in the 4th, avers, "that afterwards, to wit: on the 14th day of June, 1837, in further pursuance, and in confirmation and completion of such corrupt and unlawful agreement, said plaintiff executed and delivered to said Royster, a certain instrument of writing, sealed with his seal, and here to the court shown, bearing date the day and year last aforesaid, whereby said plaintiff sold and transferred said office of sheriff to said Royster, so being such deputy, for the consideration of the gross sum of \$450, for the use of the said office of sheriff up till the first day of October, 1837, and for the use of said office up to the first day of October, 1838, the additional gross sum of \$250, to be paid by the said deputy to said sheriff therefor—the said gross sums so to be paid by said deputy to said sheriff, being in lieu of all the fees accruing and arising from said office during the period for which the same was so granted and transferred; and the said Royster, by said last mentioned instrument of writing, became entitled to such fees and emoluments, and was thereby authorized and empowered to collect and receive the same; and said defendant avers that the bond declared upon by said plaintiff in this behalf, and the said instrument of writing, whereby the said office, and the fees and emoluments thereof, were sold, granted and transferred, were and are dependent obligations—were and are part and parcel of the same transaction, and were both exe-

cuted and delivered in pursuance, furtherance, and confirmation of the corrupt and unlawful agreement aforesaid, and not otherwise or differently—the said sale and transfer of said office in manner aforesaid, being the consideration of and upon which the bond in the declaration in this behalf mentioned was executed and delivered.”

6th. That Royster was not, at the time of the commission or omission of either of the acts charged in the declaration as breaches of the condition of said bond, the lawful deputy of said plaintiff in said office of sheriff, in manner and form as alleged.

The 4th and 5th pleas were verified by affidavit. The plaintiff filed a motion to strike out all the pleas, and the motion was sustained as to the 1st, 2d, and 6th, and overruled as to the others. The defendant excepted, and made the pleas stricken out, part of the record. To the 3d plea, the plaintiff replied that the cause of action did accrue within five years; and filed three replications, putting in issue all the facts alleged in the 4th and 5th pleas. The cause was tried by a jury, and a verdict rendered for the plaintiff for \$282 damages.

On the trial the plaintiff proved, that part of the money collected by Royster, was paid by the sheriff to the plaintiff in the executions mentioned in the breaches, on 23d January, 1846—part on 26th May, 1846, and the residue on the 17th March, 1849.

Badgett excepted to the charge given by the court to the jury, and brought error. The instructions given and refused appear in the opinion of the court.

WATKINS & CURRAN, for the plaintiff. Upon the main question presented in this case, the plaintiff in error relies upon the case of *Martin v. Royster et al.*, 3 Eng. 74, and the authorities there cited. It follows from the decision in that case that, if the sheriff's cause of action was complete on the bond of the under sheriff from the time he collected the money and failed to pay it over, the cause of action against the present plaintiff in error is barred by limitation.

S. H. HEMPSTEAD contra. There can be no doubt that the bond in suit was, in fact, a pure and simple bond of indemnity against damage; and that the well established doctrine is that actual loss must be shown; or, in other words, although there may be a right of action for nominal damages, the party cannot recover beyond that without proving actual injury. 1 *Saund.* 116, n. 1. 9 *Cow.* 693. *Douglass v. Clark*, 14 *J. R.* 177. *Aberdeen v. Blackmar*, 6 *Hill* 324. *Churchill v. Hunt*, 3 *Denio* 321. *Sedgwick on Dam.*, 311 *et seq.* *Gilbert v. Wiman*, 1 *Coms.* 550. *Chase v. Hinman*, 8 *Wend.* 456.

On bonds of indemnity against damage or where that is obviously the intention of the parties, actual injury by payment of something equivalent must be shown before the party can recover anything beyond nominal damages. The criterion is payment, and it is this which gives a right to substantial damages. 5 *Co.* 28. 8 *East* 593. 6 *Cow.* 225. 9 *Cow.* 693. 4 *J. J. Marsh.* 123. 5 *J. J. Marsh.*, 404. 12 *Leigh* 383, 565. As where a bond is given to a sheriff for "the liberties." 2 *J. C.* 208. 10 *J. R.* 563, 573. *Woods v. Roman*, 5 *John.* 42. 20 *John.* 164.

The case of *Martin v. Royster*, 3 *Eng.* 79, relied upon by the plaintiff, was between different parties, though on the same bond, and presented a different question from the one now before the court; and is not therefore conclusive of this case.

It is a settled rule that, on all promises of indemnity, or on contracts where indemnity is the object of the parties, the statute of limitations begins to run from the time when the promisee or obligee actually pays the money or damages, and not from the time when he is liable to pay it. *Angell on Lim.* 116. *Calvin v. Buckle*, 8 *Mees. & Wells.* 680. *Platt v. Smith*, 14 *John.* 368. 10 *Wend.* 500. *Hale v. Andrees*, 6 *Cowen* 230. *Reynolds v. Doyle*, 1 *M. & Granger* 753. *Powell v. Smith*, 8 *J. R.* 249. *Collenge v. Haywood*, 1 *P. & Dav.* 502. *Andrews v. Waring*, 20 *John.* 153. *Ransom v. Keyes*, 9 *Cowen* 128.

It is manifest that the court did not err in giving or refusing to give the instructions asked.

The court correctly struck out the first and second pleas, be-

cause they presented irrelevant issues—the bond in the suit not being an official bond: The sixth plea was properly stricken out, as it sought to impeach the deputation.

The payment made by Martin being after the passage of the act of limitations of December 14th, 1844, and the cause of action accruing at the time of such payments, this case is governed by that act, and consequently sufficient time has not elapsed to bar the plaintiff's remedy.

Mr. Chief Justice JOHNSON delivered the opinion of the Court.

The great and indeed the controlling question involved in this cause relates to the precise period of time at which the cause of action accrued, as upon this point hangs the fate of the defence of the statute bar. The decision of this question will necessarily turn upon the construction which shall be placed upon the obligation executed by Royster and his sureties to Martin.

The same instrument was before this court in the case of *Martin v. Royster et al.*, reported in *3d Eng.*, at page 79 *et seq.*, and its legal character was there settled. If the legal operation of the instrument, as settled in that case, be the true and legitimate one, it is conclusive upon the question here, and there is no longer any room for controversy in relation to it. We will therefore proceed to examine the doctrine of that case upon that subject, and see whether it is sustained by the authorities.

It is contended that, in contemplation of law, the instrument declared upon is nothing more nor less than a pure and simple bond of indemnity against damage, and that consequently nothing short of actual damage incurred by the payment of money or its equivalent, can authorize a recovery against Royster or his sureties. It is conceded by the counsel for the defendant that if the cause of action accrued to Martin when Royster, as deputy, failed to pay over the money to Reider, and when Martin as sheriff became legally liable for the same, the present action is barred, and that the plaintiff should have the benefit of the statute. This court, in the case already referred to, where the same instrument was under examination, said, "The ground as-

sumed by Ashley, one of the defendants, is, that the bond executed by Royster to Martin, is merely a bond of indemnity, and that in order to entitle him to a recovery against Royster or his securities, he is bound to show that he has sustained actual damage. The condition of the bond is that Royster, the defendant, will well and truly do and perform all the duties appertaining to the office of sheriff of Pulaski county, during the time he should continue the lawful deputy of Martin. In looking through the cases cited at the bar, we have not been able to find any one where the condition was precisely the same as that contained in the instrument upon which this suit is founded.

In the case of *Hughes v. Smith & Miller*, reported in *5th Johnson*, p. 167, the bond was conditioned that the under sheriff should execute the office during his continuance therein, according to law, and without fraud or oppression, so that the sheriff should not be made liable for the payment of any damages or money in consequence of any act or thing, which the under sheriff should do by virtue of the office. In that case, the court held that a breach in general terms averring that Smith had collected moneys as under sheriff to the amount of \$1,000, which he had refused to account for and pay, was sufficient, and that it was admitted in order to avoid a cumbersome prolixity upon the record.

The same rule was acknowledged and applied by that court in the case of *The Post Master General v. Lackran*, 2 *John. R.* 413, and a reference was there made to the English authorities, of which *Thurm v. Farrington*, and *Barton v. Webb*, (1 *Bos. & Pul.* 646, 8 *Term Rep.* 493,) are the latest and most pointed on the subject. The language used in the instrument now under discussion, though not so specific, yet, in its legal import, it clearly covers as much ground as that in the case referred to. Royster covenants to do and perform all the duties appertaining to the office of sheriff. It will certainly be conceded that no one of the duties of the sheriff is more plain and positive than that which requires him to pay over money to the party entitled to it, when collected under an execution. There can be no doubt, but that, if the facts charged in the declaration are true, and that

they are, stands admitted by the demurrer, the condition is broken and the plaintiff's cause of action is complete."

The Supreme Court of the State of New York, in the matter of *Negus*, (7 *Wend.* 502,) said, "The first objection urged against the decision of the trustees is, that the bond executed by Negus to Sinnott is simply a bond of indemnity, and that therefore Sinnott must show that he has been damnified by payment of the debts which Negus assumed to pay, or that he has been damnified in some other way. From the whole transaction taken together, it is plain that the bond was intended as a bond of indemnity. Had Negus completed the job, and paid the debts which Sinnott was liable to pay, Sinnott would have had no further claims upon him or the job; the object of taking the bond was therefore to indemnify Sinnott; but it does not therefore follow that no action lies until actual damages have accrued. Whether an action lies or not, depends upon the true intent and meaning of the covenant; if it is simply to indemnify and nothing more, then damages must be shown before the plaintiff can recover; but if there is an affirmative covenant to do a certain act, or to pay certain sums of money, then it is no defence in such an action to say that the plaintiff has not been damnified. In such case, it is the duty of the defendant to perform his own contract; if he does not, an action lies for the breach, and the measure of damage is the amount of the sums agreed to be paid, or the injury sustained by the plaintiff, arising either from liability incurred, or advantages which would have accrued from the performance of the acts which the defendant had covenanted to perform."

The same court, in the case of *Chace v. Hinman*, (8 *Wend.* 456,) said, "There is no doubt as to the general proposition that in order to recover upon a mere bond of indemnity, actual damage must be shown. If the indemnity be against the payment of money, the plaintiff must, in general, prove actual payment; or that which the law considers equivalent to actual payment. A mere legal liability to pay is not in such case sufficient; but if the indemnity be not only against actual damage or expense, but also against any liability for damages or expenses, then the

party need not wait until he has actually paid such damages, but his right of action is complete, when he becomes legally liable for them."

In the matter of *Negus*, already referred to, the court further said that, "Where indemnity alone is expressed, it has always been held that damage must be sustained before a recovery can be had; but where there is a positive agreement to do the act which is to prevent damage to the plaintiff, there an action lies, if the defendant neglects or refuses to do such act; and where the covenant is both to do the act and to indemnify, we must resort to the intention of the parties. Whatever may be said of the case of *Douglas v. Clark*, it is sufficient that this is distinguishable: and it is difficult for me to conceive of a case where one assumes to do what was before the duty of another, where it is not the intention of the parties that the party, contracting to perform, shall perform, in the first instance according to his agreement. I presume to say that it never was the intention of the parties in such a case, that the party to be indemnified is first to be damnified."

We have looked extensively and carefully into the authorities cited by the counsel of the defendant in error, and we think that it may be safely said that no one of them calls in question the doctrine of the cases above quoted. The distinction running through all the books to which we had access, and we have given the subject a thorough examination, is between conditions for mere indemnity against actual loss or damage, and such as guard against the mere liability of damage. The true question is, what was the intention of the parties? Was it that Martin should first pay over to the plaintiffs in execution, such moneys as Royster should collect, and then to seek a re-imbusement from Royster, or was it that Royster should pay the money himself, and thereby prevent even the liability of a suit against Martin? The latter would seem to be the most reasonable construction of the covenant. Royster did not merely engage to save Martin harmless against damages, but he positively and emphatically undertook to perform a certain act, the performance of

which would not only have saved him harmless from actual damage, but it would have also prevented the slightest liability from resting upon him. He engaged well and truly to do and perform all the duties appertaining to the office of sheriff of Pulaski county, during the time he should continue the lawful deputy of Martin. By reference to the statute by which the duties of the sheriff are prescribed and enumerated, it will be seen that among the first and most prominent is that which enjoins the payment of such moneys as shall be collected upon execution. When Royster covenanted to do and perform all the duties appertaining to the office of sheriff, he most unquestionably, in contemplation of law and to all intents and purposes, engaged that he would pay over to the rightful owner, all such moneys as should come into his hands by virtue of legal process, and according to the command of the writ. If this is a legitimate interpretation of the undertaking, and that it is, we think no one will seriously dispute, we consider it perfectly clear that it is not a matter of consequence whether Martin has been damnified or not, provided he can show that Royster has failed to perform the act which he has stipulated to do. We are therefore satisfied that the construction given to this covenant, in the case referred to in 3d English, is well sustained by the principles applicable to such contracts, and that consequently, the cause of action which is now sought to be enforced, did not arise at the time of the actual payment of the money by Martin, but that, on the contrary, it accrued and became perfect the moment that Martin's legal liability became fixed by Royster's failure to pay it over according to the command of the writ.

If Royster had engaged, in so many words, to pay over on the return day of the execution, and according to the command of the writ, all such moneys as he should collect from time to time by virtue of his office of deputy sheriff, it is presumed that, in the face of the authorities cited, no one would seriously insist that it was a covenant for mere indemnity against actual damage; and if so, we consider it equally clear that the bond in suit cannot be so regarded, as its legal operation and effect are pre-

cisely the same as it would have been in case the exact words of the statute touching that official duty had been adopted. We feel perfectly satisfied therefore, both upon principle and authority, that the undertaking of Royster was not merely to re-imburse Martin such damages as he might be compelled to pay in consequence of his acts or omissions, whilst acting in the capacity of deputy, but that, on the contrary, it was to pay over all such moneys as he should collect, and thereby prevent even the possibility of loss or damage resulting to Martin.

The instrument under consideration being a joint and several obligation, it is manifest that the right of action accrued against Royster and his sureties at the same time, and that consequently Badgett, as one of those sureties, stands upon the same ground as his principal in respect to the benefit of the statute bar. It appears from the testimony that the money was collected by Royster in 1838, upon executions returnable to the April term of that year, and that the present suit was not instituted until April, 1849, showing a lapse of more than ten years.

The plaintiff interposed in the court below his three several pleas of the statute of limitations, setting up in the first a lapse of two, in the second four, and in the third five years after the accrual of the cause of action, and before the institution of the suit. The court sustained a motion to strike out the first two and overruled it as to the third. The act of the court in thus sustaining the defendant's motion to strike out the first two pleas as also the sixth, constitute one of the assignments of error. The correctness of this assignment we will now proceed to determine.

We have made a strict examination of all the statutes as well of the territorial, as the State government, touching the limitation of actions, and we have not been able to find any one which can be construed to embrace the instrument before us until the 20th of March, 1839. Prior to the passage of this act, there was no statute in force as to limitations upon such instruments. The bond declared upon, though executed by a deputy sheriff to his principal for his indemnity and security, cannot be said to be in any sense official in its character, but simply and purely private

and an individual obligation. This being the case, it cannot fall within the description of any of the several official bonds enumerated in the statute, and it is equally clear that it cannot legitimately come within any of the specified contracts or liabilities therein set forth. The eleventh section of the act referred to is the one which applies to the cause of action in question, and that declares that "all actions not included in the foregoing provisions shall be commenced within five years after the cause of action shall have accrued."

This Court in the case of *Baldwin v. Cross*, 5 *Ark. Rep.* 512, when passing upon the legal effect and operation of this act, said, "the statute of limitations took effect on the 20th of March, 1839, and this suit was brought upon the 15th of June, 1843. Prior to the passage of this act, there was no statute in force, in the territorial government, as to limitations upon foreign judgments. The operation of the act upon demands existing at the time of its passage is the same as it would be upon those accruing upon the day it took effect. All the demands existing when the act went into operation, must be sued for within the time prescribed, or they will be barred." The statute creates a new rule upon the subject, and the essence of a new rule is its application to future cases that may arise under it. In *The People v. The Supervisors of the Columbia College*, 10 *Wend.* 365, the court said, the statute of limitations like all other acts, are prospective, and so ought to be construed unless otherwise expressed, or that they cannot have the intended operation by any other than a retrospective construction. The general rule is, that no statute is to have a retrospective operation beyond its commencement. *Sayre v. Wisner*, 8 *Wend.* 663. And in *Dash v. Van Kleeck*, 7 *J. R.*, it is held that no statute can be construed retrospectively when it takes away subsisting vested rights. It cannot cut off all remedy and deprive a party of his right of action. Our revised statutes apply to limitations of actions or causes of action accruing or existing subsequent to their taking effect. The rule relates to future contracts, which would be barred according to its provisions, or to existing demands, as if they had accrued at the time

the statute commenced its operation. The demurrer to the plea relates back to the declaration, and the record shows that five years have not elapsed since the passage of the act of limitations." The instrument in suit falling within the same statute, of course the rule of construction there laid down is strictly applicable to it and, consequently the 20th of March, 1839, is the day from which the statute commenced running, and a lapse of five years from that time will form a complete bar.

In this view of the law, it is obvious that the first and second pleas tendered issues which were wholly immaterial, and that consequently they were defective as a defence to the action, yet they were not so utterly frivolous as to be struck out upon mere motion, but should have been met by demurrer. (*See Crayry v. Ashley and Beebe*, 4 Ark. R. 206, and 6 Eng. R. 480, *Wayland et al. v. Coulter et al.*) This court in the first case said, "the rule upon the subject we take to be this, that if the pleas are informal, but still go to the substance of the action, that the plaintiff will not be allowed to sign judgment, but must demur: and the reason given for the demurrer is that the defendant might obtain leave to amend, but if they are without color of truth to support them, or where they are intended as mere instruments of delay, they ought to be stricken out. (12 Wend. 196, 223; 10 ib. 624, 672,) and in the last, the following language was held, viz: "The plea interposed was very different from one that might set up one year as a bar to an action bound by the lapse of five, because in such a case, inasmuch as lapse of time properly presented would have been a bar, that plea although defective, would have been of a nature appropriate to present a defence to the action, and would therefore be properly met by a demurrer. But inasmuch as our statute of limitations does not apply to proceedings like those in the case at bar, as was settled in the case we have cited, the plea setting up that bar was totally inappropriate, and therefore might have been as well met by motion as by demurrer." The rule to be extracted from those cases is, that in order to render a plea a proper subject of a motion to strike out, it must not only fail to tender a material issue, but it must also be wholly

unadapted to the nature of the action. Lapse of time, as has already been shown, might constitute a full and valid defence to this action if well pleaded, and consequently the first and second pleas, though defective in not settling up the requisite time, were still appropriate pleas, and consequently could only be met by demurrer. The court below consequently erred in sustaining the motion to strike out the first and second pleas of the plaintiff in error.

The only remaining question relates to the propriety of striking out the sixth plea. This is a general denial of the existence of the deputyship of Royster, at the time of the alleged default. It is contended that this plea was properly stricken out, as the same matter of defence had been previously set up in other pleas. This is not true in point of fact, as neither the fourth nor the fifth pleas deny the existence of the deputyship; but, on the contrary, they both expressly admit it, but seek to defeat the action by impeaching the consideration of the bond as being against the policy of the law. It did not lie in his mouth to deny the original appointment of deputy as recited in the bond. From this, he was most clearly estopped by his deed. (*See Outlaw et al. v. Yell Governor, &c.*, 3 Eng. 351, and *Sullivan v. Pierce et al.*, 5 Eng. 502.) But he is not so estopped to deny its continuance down to the time of the failure of duty which is now charged upon him, and upon the truth or falsity of which his liability is made to depend. According to the terms of the bond, Royster is only to be held responsible to Martin under it for the acts or omissions of the former whilst he acts under the authority of the deputyship conferred by the latter. It is therefore clear that, although Royster could not deny the original appointment in consequence of the legal estoppel, yet either he or his sureties could show that such authority had ceased before the commission of the act charged against him. That Royster acted during the continuance of his authority as deputy and by virtue of it, is of the very essence of the charge, and as a matter of course to show that the falsity of such charge must be of the essence of the defence. This plea therefore sets up matter which is appropriate in its nature as a

defence to the action, though it must be admitted the subject matter thus presented is defectively stated, and would have been held bad upon demurrer. He having admitted the original appointment, or which is tantamount to the same thing, being estopped to deny it, he could not in general terms deny its continuance, but could only do so by setting up special matter by way of avoidance. This plea, therefore, though defective in form, is of a nature appropriate to present a defence to the action, and consequently could not be stricken out upon mere motion, but could only be met by demurrer. The court below consequently erred also in striking out the sixth plea.

We come now to consider of the instructions, given and refused by the court. The first one asked by the plaintiff in error was, "that the plaintiff's cause of action in this behalf accrued to him, whenever Royster as his deputy committed default, or in other words, whenever Martin as sheriff became legally liable for damages or expenses occasioned by the neglect of duty on the part of Royster, as his deputy." This instruction was clearly right, and consequently the court erred in refusing to give it in charge. The second is "that so soon as Royster, as Martin's deputy, collected money on execution Martin became liable to the party entitled to the money, and at the same time his cause of action on the bond here sued on, would be complete, and the statute of limitations would commence running from that period. This was properly overruled for two reasons. In the first place, Martin's legal liability was not fixed the instant the money was collected by Royster, but his failure to pay it over on the return day of the execution, and according to the command of the writ fixed his liability to a suit; and secondly, the statute did not commence running from that time as there was none in existence that could operate upon it, but from the 20th March, 1839, the day that the act went into operation. The third is that, "if the jury are satisfied from the evidence that Royster received the money and failed to account for it, and that Martin became liable to the party entitled to the money collected by Royster, as his deputy, more than five years next before the institution of the suit,

they are bound to find for the defendant Badgett on the issue to his third plea." This was properly overruled as it looked to the time that fixed the liability of Martin, and not to the passage of the act of the 20th March, 1839, as forming the period from which the statute commenced running. The court then instructed the jury on the motion of the plaintiff below that "although the plaintiff might have had a right of action for nominal damages, yet that the causes of action in the declaration did not accrue, nor did the statute of limitations commence running until the payment of the money by the plaintiff to the said Jacob Reider. This was manifestly wrong, as the cause of action did commence running long before the actual payment of the money by Martin to Reider.

We are satisfied then that there is error in the judgment of the circuit court in this case rendered, and that therefore the same ought to be and the same is hereby reversed, annulled and set aside with cost, and it is ordered that this cause be remanded to said circuit court, to be proceeded in according to law and not inconsistent with this opinion, and also that both parties have leave to amend their pleading or file additional pleas, if they shall desire to do so.
