MARTIN *vs.* ROYSTER ET AL.

It is a general rule, that by pleading over after demurrer to the declaration overruled, the defendant abandons the grounds taken by the demurrer, and cannot again resort to them. But this rule does not extend to a case where the declaration exhibits no cause of action whatever.

In a declaration by a sheriff upon the bond of his deputy, conditioned that he will well and truly perform all the duties appertaining to the office of sheriff, &c., a breach that the deputy collected money on execution and failed to pay it over, &c., constitutes a good cause of action.

In such action, general pleas of *non damnificatus*, and covenants performed, are not responsive to specific breaches assigned in the declaration, and therefore bad.

A plea, in such action by one of the securities in the bond that, after the execution of the bond and before a breach thereof, the principal and deputy, without the consent of the securities of the latter, entered into an unlawful and corrupt agreement by which the principal sold the entire office to the deputy, held bad, because a bond, valid and binding upon the parties, cannot be affected or destroyed by a subsequent corrupt and illegal agreement—the latter contract being a nullity cannot be enforced; and if executed, the party cannot obtain relief either in a court of law or equity.

Writ of Error to the Circuit Court of Pulaski County.

DEBT by a sheriff upon the bond of his deputy, determined in the Pulaski Circuit Court, in December, 1845, before CLENDENIN, then one of the Circuit Judges.

The declaration was in substance as follows:

"Allen Martin, by attorney, complains of David Royster, Peter T. Crutchfield, Alden Sprague, Chester Ashley and Noah H. Badgett, of a plea, &c.,

For that whereas the said defendants, on the 5th day of June, 1837, at, &c., made their certain writing obligatory, sealed, &c., &c., and thereby then and there acknowledged themselves to be held and firmly bound to said plaintiff in the sum of $50,000, &c., for the payment whereof well and truly to be made the said defendants bound themselves, &c., and then and there delivered said writing obligatory to said plaintiff.

Which said writing obligatory was, and is, subject to a certain condition thereunder written, whereby, after reciting that, whereas the said Allen Martin was sheriff of Pulaski county, and had nominated, constituted and appointed said David Royster his deputy to do and perform all the duties appertaining to the office of sheriff of said county; the condition of the said writing obligatory was, and is, declared to be such that if the said David 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 the said Allen Martin, sheriff of said county, then the above obligation to be null and void, otherwise to be and remain, &c.

And said plaintiff avers that the said David Royster, so appointed deputy, after the making of said writing obligatory, to wit, &c., commenced acting as the deputy of said plaintiff, &c., &c., and continued so to act during the plaintiff's term of office, to wit, &c.

And the said plaintiff further avers that the said David Royster, during the time he continued the lawful deputy of the plaintiff, as aforesaid, to wit, at, &c., did not well and truly do and perform all the duties appertaining to the office of sheriff of Pulaski county aforesaid, according to the true intent and meaning of the condition of the said writing obligatory, by means whereof, &c., &c."

Then follows a specific breach, alleging in substance:

That on the 13th Oct., William S. Fulton, Governor of the Territory of Arkansas, suing for the use of Reider, recovered judgment against Badgett et al. in the Circuit Court of Pulaski county, for $209.14. And on the 12th February, 1838, a *fi fa.* issued to the sheriff of Pulaski county, upon said judgment, which came to the hands of said David Royster, as deputy of the plaintiff, for execution. That Royster, as such deputy, collected the amount of the judgment on the writ, but failed and refused to pay it over to the plaintiff in the execution, or to the plaintiff in this suit, or have it, or the writ, in court on the return day. That the other defendants, the securities of Royster, had not paid over the amount so collected by him, &c.

The declaration contains another specific breach of the same character as the above, alleging the collection of money on another execution by Royster as Martin's deputy, and failure to pay over, &c.

There is no averment in the declaration that Martin had paid the money collected by Royster to the plaintiffs in the executions, or been liable in any way for his neglect of duty.

On oyer prayed, the bond sued on was filed, and the condition thereof follows:

"The condition of the above obligation is such, that whereas the above named Allen Martin has been and is now at this time the sheriff of, within, and for the county of Pulaski, in the State of Arkansas; and whereas the said Allen Martin, as said sheriff of Pulaski county aforesaid, hath nominated, constituted and appointed the above bounden David Royster his lawful deputy, to do and perform all the duties appertaining to the office of sheriff of Pulaski county aforesaid; now if the said David Royster shall well and truly do and perform all the duties appertaining to the office of sheriff of Pulaski county aforesaid, during the time he continues the lawful deputy of the said Allen Martin, sheriff of said county aforesaid, then the above obligation is to be null and void; otherwise the same is to be and remain in full force and virtue in law. Signed, sealed," &c.

The defendants demurred to the declaration, on the grounds that the plaintiff, in assigning breaches to the condition of the bond sued on, had failed to show that he had been compelled to pay, or had in any manner paid, the sums of money alleged to have been collected by Royster as such deputy, to the plaintiff in the executions; or that he had been in any way damnified by the alleged neglect or failure of Royster to pay over said money, &c. The court overruled the demurrer. The defendant, Ashley, then filed three pleas as follows:

1st. "The said defendant comes, &c., and craves oyer, &c., and says that the said plaintiff, his action aforesaid thereof against him ought not to have or maintain, because he says that after the execution of the said obligation and before the commission or omission by the said Royster of any of the acts as charged in said declaration as breaches of the said condition thereof, to wit, on the fourteenth day of June, A. D. 1837, at &c., the said plaintiff, sheriff of said county, and the said Royster, his deputy, without the consent of this defendant, did then and there make and enter into, a corrupt and unlawful covenant, contract and agreement, whereby said sheriff sold and trans-

ferred said office of sheriff to his said deputy for the consideration of the sum of four hundred and fifty dollars for the use of said office 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 sum of two hundred and fifty dollars, to be paid by the said deputy to the said sheriff therefor. And this defendant avers that the said Royster from and after the fourteenth day of June, 1837, and during the continuance of office of the said plaintiff, to wit, in said county, used, held and possessed and exercised said office of sheriff, and received the entire profits and emoluments thereof, under and by virtue of the said corrupt and unlawful sale and transfer of said office, without this that the said Royster was at any time on, or after the said fourteenth day of June, 1837, to wit, in said county, the lawful deputy of the said plaintiff, and this the said defendant is ready to verify, wherefore he prays judgment," &c.

2d. A general plea of *non damnificatus.*

3d. A general plea of covenants performed.

The plaintiff demurred to the pleas upon the ground that they were not responsive to the specific breaches assigned in the declaration, and constituted no answer thereto. The court overruled the demurrer, and, the plaintiff declining to reply to the pleas, gave judgment for Ashley. Whereupon final judgment discharging the other defendants was rendered.

HEMPSTEAD, for plaintiff. 1. The substance of the breach of the bond as assigned is that Royster as deputy sheriff, collected money on execution, and failed to pay it over either to the plaintiff in execution or the plaintiff in this suit. The bond is in effect one of indemnity against liabilty; and the rule in such cases is, that the right of action in the obligee becomes perfect and complete when he becomes *legally liable,* for damages or expenses occasioned by the neglect of duty on the part of the deputy. *Chase* v. *Hinman,* 8 *Wen.* 452. *Ex parte Negus,* 7 *Wen.* 499. And he need not wait until he has made payment. *Rockfeller* v. *Donnelly,* 8 *Cow.* 623.

The conversion of money by a deputy sheriff, is a breach of the condition of a bond for executing his office according to law. *Hughes* v. *Smith,* 5 *J. R.* 168. *Stevens* v. *Boyce,* 9 *J. R.* 292.

2. The defendant, Ashley, demurred to the declaration, and contended that the plaintiff ought to have shown actual payment. The demurrer was overruled and he plead to the action, and according to numerous cases decided by this court, he abandoned that matter of defence and cannot now insist upon it. *Buckner* v. *Greenwood,* 1 *Eng.* 206. *Hawkins* v. *Watkins, ib.* 291. The second and third pleas are obviously bad, and as the demurrer which was joint and several (Rev. Stat., sec. 62, p. 628), extended to them, it ought to have been sustained as to their pleas, without regard to the legal sufficiency or insufficiency of the first plea, and for this error alone the judgment must be reversed. Where there are several counts, some good, and some bad, a demurrer to the whole declaration will be overruled. 1 *Chitty's Pl.* 643. 13 *East.* 76. But under our statute, where the demurrer is joint and several it must be sustained as to part and overruled as to part.

3. The first plea is no defence to the action. It shows that Royster was constituted deputy sheriff by the plaintiff and gave the bond in question on the *5th of June,* 1837; that the contract alleged to be illegal, was made between the plaintiff and Royster on the *14th day of the same month,* and it is not averred or pretended in the plea, that there was any connection between the contract and the bond. The bond was valid, legal, and binding when it was made, and the real question involved is whether it became void by matter *ex post facto.* This I deny. The question is not whether the plaintiff could maintain an action on the agreement of the 14th of June to pay him certain sums of money. Admit that he could not, still his right of action on this bond could not be affected by that agreement. Admit that the agreement is void as against public policy, on what principle is it that it avoids a prior distinct contract which was lawful and binding? It is not averred in the plea (for indeed the thing itself would be impossible) that the bond was founded on the consideration that Royster was to pay the plaintiff the sums of money mentioned in the agreement of the 14th of June. All pleas must be most strongly construed against the party pleading. The authorities with regard to the sale of an office do not apply to this case at all. If this action instead of being upon the bond was upon the agreement made on the 14 of June, then they would apply. The attempt here is to destroy a valid con-

tract, by matter *ex post facto.* Thus in usury where the contract was originally valid no subsequent contract to take illegal interest will invalidate it. *Comyn on Usury,* 187. 1 *Saund.* 294. 3 *Salk.* 390. All the cases cited by the defendant prove that the consideration to support the deputation was the sale of the office. A sheriff may lawfully appoint a deputy and take security for his indemnity. *Lewis* v. *Knox,* 2 *Bibb* 454.

A contract between a sheriff and his deputy that the latter shall pay the former a certain sum per annum in consideration of his appointment is legal. *Brainerd* v. *DeForest,* 2 *Day* 528.

WATKIN & CURRAN, contra.

JOHNSON, C. J. The defendant, Ashley, insists in his argument that, although his pleas may be wholly insufficient for a good declaration, yet, as the one filed in this case is manifestly bad, they constitute a full and complete answer to it. It has been repeatedly ruled by this court, that a party pleading over after a demurrer to the declaration has been overruled, abandons the matters of defence contained in his demurrer, and cannot afterwards rely upon them to question the sufficiency of the declaration. But it is urged that the declaration in this case utterly fails to disclose any cause of action, and that therefore it does not fall within the general rule. We are free to admit that the proposition, though general in its terms, is not designed to be carried to the extent to include declarations which are mere nullities, as containing no cause of action whatever. This brings us to the first point legitimately raised in the case, and that is, not whether the declaration contains a cause of action that is defectively stated, but whether it exhibits any cause whatever. The plaintiff assigns special breaches and points out the instances, and names the causes in which he had sustained injury by the acts of Royster. The ground assumed 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 deputy, 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* against *Smith* and *Miller*, reported in 5th *John. R.* at page 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 avowing that Smith had collected moneys, as under sheriff, to the amount of 1000 dollars, 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. Rep,* 413, and a reference was then 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.

Having thus adjudged the declaration to contain a good cause of action, we now come to consider the sufficiency of the pleas interposed by Ashley. The second and third are no answer to the declaration,

and are consequently bad. The plaintiff in conformity to the Statute (*R. S. chap.* 112, *sec.* 3) assigned his breaches specifically, and a plea, to amount to an answer to such assignments, must directly respond to them. These two pleas do not pretend to respond to the breaches assigned, but amount to nothing more than the general pleas of *non damnificatus* and of *conditions performed.*

The first plea sets up that, after the execution of the bond and before the commission of any act amounting to a breach by Royster, he and Martin, without the consent of Ashley, entered into an unlawful and corrupt agreement, by which Martin sold and transferred the entire office to Royster, and concludes by averring that from that time he ceased to be the lawful deputy of Martin. This is an attempt to destroy the legal efficacy of an instrument confessedly good and binding in law upon the parties, by one subsequently made and which is expressly alleged to be founded upon an illegal and corrupt consideration. The case of *Lewis* v. *Knox,* reported in 2 *Bibb, p.* 453, was an action upon a bond given by a deputy sheriff and his securities, to the principal, conditioned that the deputy would faithfully perform the duties of the office, so as to keep his principal indemnified, and to pay to his principal the sum of seventy-five dollars, at the expiration of a year, and the like sum at the expiration of the principal's term of office. Upon the plea of "conditions performed," the plaintiff had a verdict and judgment in his favor, to which the writ of error was prosecuted. In that case the court, in passing upon the validity of the bond, say that "so far as the condition of the bond is to perform the duties of the office of sheriff, and keep the principal indemnified, there is clearly nothing in it illegal; for as the sheriff may lawfully appoint a deputy, it would be unreasonable not to permit him to take security for his indemnity against any violation of the duties of the office by the deputy. The objection to the validity of the bond must depend, therefore, upon the illegality of the condition so far as it is for the payment of seventy-five dollars, at the expiration of a year, and a like sum at the expiration of the sheriff's term of office. There can be no doubt that a bond or other agreement for a gross sum of money—as a consideration for the sale or deputation of any office which concerns the administration of justice, is illegal and

void. But to take advantage of an objection of this sort. the consideration must appear upon the face of the condition of the bond, or be averred in the pleading. In this case, the consideration is not expressed in the bond or condition, nor is it apparent from any pleadings in the cause. For aught that appears to the court, the money may be due for a valid consideration, and we cannot presume a fact out of the record for the purpose of avoiding the bond." It is not contended here that the bond recites any unlawful consideration, nor is it averred in the plea that the amount, specified in the subsequent contract, constituted any part of the consideration of that instrument. But it is contended that the last contract, being illegal and void as against the policy of the law, and amounting to an entire sale and transfer of the office of sheriff, that therefore, from the date of that contract, Royster ceased to be the lawful deputy of Martin, and as such could not be liable for any breach of the conditions of his bond. Whether the contract, that is relied upon, as amounting to a sale of the office, really is such or not in point of law, we do not deem it necessary to determine. If it was not a sale, then it is clear, that it could not affect the legal operation of the bond, as no reference is made to it, nor is there any thing inconsistent with it. But if, on the other hand, it should be construed into a sale, then for reasons equally cogent, would it not be affected by it, as it would be, to all intents and purposes, a mere nullity, and utterly incapable of being enforced in a court of justice. If then, the contract set up in the first plea constitute a sale of the office, it is clearly and absolutely void, and both parties standing *in pari delicto,* so long as it remains isolated and unconnected with any other lawful contract, it cannot in any manner affect or impair its force and obligation. The law in such a case will not lend its aid to either party—but will leave them precisely where it finds them. But it is contended by the defendant that the agreement for the sale of the office, being a contract executed, although illegal and void in law, yet it is binding upon the immediate parties to it. If Royster has paid the consideration, the contract is executed, and he being a party to the fraud, the law would not aid him in an attempt to recover back the money so paid; neither would it assist Martin, should he attempt to enforce the performance

of that contract, in case the consideration has not been paid. To this extent it is unquestionably binding upon the parties, but as touching any other legal contract, even between the identical parties, it is utterly inoperative and void. We think it clear, therefore, that this plea is wholly insufficient, as it is no answer to the declaration. If these views of the principles involved be correct, and that they are, we think, cannot admit of a doubt, all the pleas interposed by the defendant, Ashley, are bad, and as a necessary consequence, the Circuit Court erred in overruling the demurrer to the pleas.

Judgment Reversed.