FIELD *vs.* RINGO.

A party contracting to perform duties requiring art and skill will be held responsible for loss or injury resulting from want of skill.

A contract to perform the duties of a deputy clerk implies a contract to perform them in a skillful and clerklike manner. A plea therefore by the principal clerk at the suit of his deputy on such contract for compensation, that he performed the duties in so careless, bungling and negligent a manner that his services were of no value to the principal is good on demurrer.

The defendant in such case cannot plead by way of set-off, that the plaintiff is indebted to him for money lent and advanced, had and received, or due on account stated: but is driven to a cross action.

An averment in the declaration that the plaintiff entered upon and performed the duties stipulated on his part, according to contract, is as broad as a direct negative of sickness or inability to perform the duties.

In an action upon a contract for a certain portion of the fees and emoluments of an office, a plea that the fees had not been collected, is a negative plea and imposes the burden of proof upon the plaintiff.

The verdict covers all the issues, and if there be no proof to sustain all the material issues, the verdict will be set aside.

Writ of Error to the Circuit Court of Pulaski County.

THIS was an action of covenant determined in the circuit court of Pulaski county at the June term A. D. 1845.

William H. Ringo sued William Field upon the following contract: "It is agreed this 23rd day of March, A. D. 1840, between William Field and William H. Ringo, both of the city of Little Rock and State of Arkansas, in manner following, to wit: The said William H. covenants and agrees to act as deputy clerk for the said William Field and perform the duties and services belonging, in and about the clerk's office of the district and circuit courts of the United States of America and for the district of Arkansas from the day and date hereof until the termination of the March term of the said circuit court and the April term of said district court, to be holden in and for the year of our Lord one thousand eight hundred and forty-one (1841) if so long both parties live. In consideration of the services as such deputy, the said William Field cov-

enants and agrees to give and allow the said William H. one half of all the fees, per diem, emoluments and profits belonging, accruing and arising in and about the aforesaid clerk's office during the time above supecified for such deputyship to last: Provided, nevertheless, that if the said William H. fall sick and be thereby rendered unable to perform the duties and services aforesaid during any portion of the above named time, he shall not be barred from having, receiving, obtaining and collecting the one half of the fees, and services and receive the fees, emoluments and profits aforesaid, up to the time of the happening of such disability, and that when the said William H. should be able to perform the duties and services andreceive the fees, emoulments and profits aforesaid, from the time of such resumption until the termination of the aforesaid March and April terms of said courts."

The declaration set out the contract, averred that the plaintiff entered upon the services and performed the duties of the office according to the agreement, and negatived the payment of the fees, &c., and performance of the contract by the defendant. The defendant demurred to the declaration, and assigned for cause, that the declaration did not negative the sickness and inability to perform the duties of the office by the plaintiff; but the court overruled the demurrer. The defendant then filed eight pleas.

1st. That he had paid the plaintiff one half of the fees, &c., and had performed the covenant.

2d. That the plaintiff had failed to discharge the duties &c., and had broken his covenant.

3d. That the plaintiff had performed the duties of the office in so careless, bungling and negligent a manner that his services were of no value or benefit to the defendant.

4th. That the plaintiff did not perform the duties of the clerk's office according to the articles of agreement.

5th. That the plaintiff while acting as deputy had received and converted to his own use more than one half of the fees, &c.

6th. That the fees &c., have not been collected by the defendant or otherwise.

7th. That the plaintiff is indebted to the defendant in a greater amount for money lent and advanced, had and received; and on account stated, and an offer to set-off.

8th. That the plaintiff was sick and unable to perform the duties of the office according to agreement.

The plaintiff filed a general replication to the 5th plea, and demurred to the others. Demurrers sustained as to the 3d and 7th pleas and overruled as to the rest. General replication to the pleas adjudged good, and issue. The cause submitted to a jury; verdict and judgment for the plaintiff: motion for a new trial by defendant; overruled by the court: The defendant has excepted and has brought the case into this court by writ of error.

HEMPSTEAD & JOHNSON, for the plaintiff. 1. The stipulations in the covenant were dependent on each other, and amount to this, that Ringo engaged to skillfully and faithfully perform the duties of deputy clerk on his part, in consideration of which Field stipulated to allow him one half of the emoluments of the office. Every thing tending to show that he did not perform the services at all or that he performed them in an improper or unskillful manner, could be pleaded and proved. The court therefore erred in sustaining the demurrer to the third plea, and also in rejecting the matters offered to be established by the plaintiff in error.

2nd. The real meaning of the covenant is that Ringo should receive one half of the profits and emolument of the office; and he was therefore bound to bear one half of the losses. He could not claim one half of fees uncollected, or, in other words, one half of fees chargeable on the books in the clerk's office, because that would be to throw the whole burden of loss on Field, and whereby Ringo would reap more than one half of the profits.

3d. The jury ought to have charged Ringo with one half of the amount due on the certificate of the Marshal, and with the whole of the amount paid Watkins; but instead of doing so they threw the whole loss on Field.

4th. The proof shows that the verdict of the jury ought not to have exceeded two or three hundred dollars and as it is a clear

matter of calculation, the court erred in overruling the motion for new trial.

RINGO & TRAPNALL, contra. The defendant in error presents and relies upon the following points, as sustaining the adjudication of the circuit court, viz:

1st. That the covenants contained in the agreement upon which this action is founded, are, in every legal view thereof, *independent* covenants.

2d. The covenants being independent, the third plea (if true) presents no bar to the action; but discloses facts constituting a right of action in the plaintiff in error for the recovery of damages, founded on the implied covenant of the defendant in that behalf, consequently the demurrer thereto was correctly adjudged: independent of which this plea is fatally defective.

3d. The 7th plea could not, according to the rules of law, be pleaded in such action—the damages claimed by the action being unliquidated and uncertain. The adjudication in respect thereof was correct.

4th. The new trial was properly refused: the verdict being well authorized by the testimony adduced on the trial, the sum found thereby being in fact less than in strict justice it should have been upon the testimony, or, at least, it is less than the testimony would have well warranted.

5th. The plaintiff in error has no right to complain of the court's excluding from the jury a portion of his answer to the bill of discovery filed by the defendant in error. 1st. Because that portion of said answer was previously thereto stricken out on the exceptions thereto filed and taken by the defendant, and constituted no part of the answer when the answer was read to the jury, the whole of which as it remained after it was corrected on exceptions thereto taken, was read: and the portions so stricken out, but offered to be read, and excluded from the jury, cannot, in this aspect of the case, receive any greater or different consideration, than other gratuitous and uncalled for declarations and admissions of the plaintiff in error. 2d. Because in point of law no part of

said answer was legitimate proof for the plaintiff in error, he having previously answered the petition for discovery by filing in the case certain certificates and statements, which were received by the defendant in error and the court, by consent of the parties entered on the record of the court, as a sufficient answer to said petition, which original answer had been read to the jury by the defendant in error, who had expressly refused to read the said last answer to said petition, which was wholly uncalled for and altogether gratuitous, and ought never to have had a place in the records of this court. 3d. The defendant in error declining to read said gratuitous answer and every thing connected therewith, the law will not suffer the plaintiff to read the same; and thus become a witness in his own case and give testimony in his own favor. 4th. The answer of a party to a bill of discovery (where the opposite party declines reading the same and every thing connected therewith) can in no case be introduced as testimony by the party making it—consequently the plaintiff had no right to a new trial on account of the exclusion of said matter so offered by him as testimony in this cause. 5th. The court below correctly excluded the testimony offered by the plaintiff in erorr to prove that the defendant had by mistake issued a writ of execution for $1000 less than the amount of the judgment on which it was issued; whereby the plaintiff in said execution lost said sum, and that the defendant in error was an inaccurate deputy clerk—his remedy being upon the implied covenants of defendant in that behalf. Besides, such testimony was incompetent to show that the plaintiff had suffered damages by reason of carelessness or want of skill of said defendant, or that he was incompetent to discharge the duties of said office. Hence, the new trial, as to these grounds, was correctly refused. All of which are respectfully submitted.

JOHNSON, C. J. The defendant in error by replying to all the pleas which were adjudged good upon demurrer, necessarily narrowed down the present investigation to the points raised upon the demurrer to third and seventh together with such as may present themselves upon the motion for a new trial. The substance of the

third plea is, that the defendant performed and discharged the duties pertaining to the respective clerk's office in so careless, bungling and negligent a manner that his services were of no value or benefit to him, but that on the contrary they were prejudicial. It is a well settled rule of law that when a party undertakes the performance of duties requiring art and skill, that whether so expressed or not in the contract, he will be held so to have undertaken, and if any loss or injury should result to the other party from a want of those requisites, he will be held responsible for it. If the defence set up in this plea be true in point of fact, it most assuredly was competent to be pleaded, as it might not only reduce the quantum of damages, but by possibility prevent a recovery altogether. It certainly would not be contended that where a party holds himself out to the world as a clerk and undertakes to exercise that degree of art and skill which would be necessary to a due and faithful execution of the duties of that office, and then turns out to be wholly deficient in those essential particulars, would be entitled to recover the full amount for which he stipulated and then drive the other party to a cross action. This would be a very unnecessary circuity, and one which the law would not countenance for a moment. There can be no doubt but that the defendant, though he did not so express it in the covenant, undertook that he was competent to discharge the duties of the office in a skillful and clerk-like manner, and if he has failed to fulfill that part of his engagement, he cannot with any show of justice or propriety be permitted to coerce the full sum contracted for from the plaintiff, and then to leave him to the circuitous and uncertain remedy of a cross action. It is clear therefore that the circuit court erred in sustaining the demurrer to the third plea.

The decision upon the demurrer to the seventh plea is undoubtedly correct, as the matters of defence set up are clearly inadmissible as a set-off, and could only be enforced by a cross action.

It is urged that although the pleas should be adjudged bad, yet they are sufficient for the declaration. One of the causes specially assigned, and the one upon which most reliance is placed, to quash the declaration, is that it wholly fails to negative the fact of the

sickness of the defendant, and the consequent loss of service. It will be conceded that the declaration contains no averment negativing the very words of the contract, yet it is declared that he entered upon the services of the plaintiff and performed the duties of the office as his deputy, and continued so to do according to the true intent and meaning of the articles of agreement. This averment is as broad as language could make it, and is fully equivalent to a direct negative of the terms of the covenant.

We will now pass to the points made upon the motion for a new trial. The plaintiff in his sixth plea avers that the fees, per-diem pay, emoluments and profits in the article of agreement mentioned, were not at the institution of the suit, nor at the time of pleading collected by himself, the Marshal of the district, or otherwise howsoever. This is a negative plea, and the defendant by taking issue upon the facts necessarily took upon himself the burden of proof. Upon a careful review of the bill of exceptions which purports to embody all the evidence in the cause, it does not appear that any evidence was adduced upon the trial to support the issue formed upon this plea. In the absence of record evidence that such proof was not made, the legal presumption would be in favor of the verdict, but in this case there is an affirmative showing that the issue was wholly unsupported by the proof. The verdict covers all the issues made between the parties, and it affirmatively appearing that one of those issues was found against the plaintiff in the absence of all proof, it is perfectly manifest that the verdict is contrary to or at least without evidence. The circuit court therefore clearly erred in refusing a new trial. Judgment reversed.