

BLASS *v.* LAWHORN.

Opinion delivered November 27, 1897.

BURDEN OF PROOF—PAYMENT.—In a suit upon an account, the burden is upon the defendant to show payment.

Appeal from Saline Circuit Court

ALEXANDER M. DUFFIE, Judge.

*Tom M. Mehaffey*, for appellant.

The verdict is clearly without evidence to support it, and should be reversed. 34 Ark. 632. The burden is on the party alleging payment to prove it. 16 Ark. 651; 57 Ark. 270.

*Jno. Barrow*, for appellee.

The presumption, in this court, will be that the proof was sufficient to sustain the verdict, unless there is an *entire* absence of evidence on which to base the verdict. 46 Ark. 67; 46 Ark. 141; 47 Ark. 196; 51 Ark. 467.

WOOD, J. Appellant brought suit before a justice of the peace against appellee on an account for merchandise amounting to \$25.80. There were no written pleadings, and we can only determine the issue joined by the evidence adduced. The goods were sold on a credit in 1892. The correctness of the account as to items and amount was not disputed, but appellee claimed that the account had been paid. There was no presumption of payment, and the burden to show it was upon the appellee. *Pelham v. Moreland*, 11 Ark. 442; *Wheat v. Moss*, 16 *id.* 243; *Mann v. Scott*, 32 *id.* 593; Wood, Practice Evidence, 213; *McKinney v. Slack*, 19 N. J. Eq. 164; *McLendon v. Hamblin*, 34 Ala. 86; *Buzzell v. Snell*, 25 N. H. 474; *Caulfield v.*

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*Sanders*, 17 Cal. 569. Therefore the court should have instructed the jury, as requested by appellant, that "the burden of proof is upon the defendant to show that he has paid the \$25 alleged to have been paid by him."

Reversed and remanded for new trial.

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