

April 1931

The Burden of Providing Payment

Leo Carlin

West Virginia University College of Law

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Civil Procedure Commons](#), and the [Evidence Commons](#)

Recommended Citation

Leo Carlin, *The Burden of Providing Payment*, 37 W. Va. L. Rev. (1931).

Available at: <https://researchrepository.wvu.edu/wvlr/vol37/iss3/5>

This Editorial Note is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.

West Virginia Law Quarterly and THE BAR

Published by the Faculty of the College of Law of West Virginia University, and issued in December, February, April and June of each academic year. Official publication of The West Virginia Bar Association.

Subscription price to individuals, not members of The West Virginia Bar Association, \$2.00 per year. To those who are members of the Association the price is \$1.50 per year and is included in their annual dues. Single copies, 50 cents.

FACULTY EDITOR IN CHARGE

JEFFERSON B. FORDHAM

MANAGING EDITOR

LOUISE FARRELL HARTLEY

FACULTY BOARD OF EDITORS

THURMAN W. ARNOLD
EDMUND C. DICKINSON
JAMES W. SIMONTON

LEO CARLIN
ROBERT T. DONLEY

DAVID F. CAVERS
THOMAS P. HARDMAN
CLIFFORD R. SNIDER

STUDENT BOARD OF EDITORS

MELVILLE STEWART, *Chairman*

HENRY K. HIGGINBOTHAM
DAVID G. LILLY
JOHN H. HOGE
AUGUST W. PETROPLUS
JEROME KATZ

ROBERT E. STEALEY
JOHN K. CHASE
BERNARD SLOVE
WILLIAM J. MOORE
DONALD M. HUTTON

SIDNEY J. KWASS
MARRS WISEMAN
JAMES A. MCWHORTER
HENRY P. SNYDER

THE BURDEN OF PROVING PAYMENT.—In a recent West Virginia case,¹ the sole defense was payment in full, asserted under the general issue, and a question arose as to who had the burden of proof. The majority opinion held that the burden rested upon the plaintiff. The correctness of the original debt was stipulated between the parties and the evidence was confined to the issue of payment; or, as perhaps the majority opinion would require it to be stated, to the issue of nonpayment. Following is the syllabus of the case:

“In the trial, under the general issue, of a notice of motion for judgment on an account, the defense being payment in full before suit brought, it is prejudicial error for the court to refuse to instruct the jury at the instance of the defendant that ‘unless the plaintiff has proven the matters set up in the motion for judgment by a preponderance of the evidence,’ they should find for the defendant.”

¹ Satterelli v. Cropper, 155 S. E. 312 (W. Va. 1930).

Since the truth and correctness of everything asserted in the plaintiff's notice of motion, except nonpayment of the debt, had been conceded by stipulation, necessarily the only effect of the instruction would have been to tell the jury that the plaintiff could not recover unless he proved nonpayment by a preponderance of the evidence, which meant that he had the burden of proof as to nonpayment. Cases which assert that the burden of proving payment rests on the defendant are distinguished by the court as cases in which the defendant had pleaded payment in a special plea. Hence the conclusion is reached that on a plea of the general issue the burden is on the plaintiff; while on a special plea, it is on the defendant. A dissenting opinion attacks the validity of this distinction and holds to the view that the burden of proving payment always rests on the defendant regardless of the nature of the plea.

Which opinion is correct?

It is believed that whatever confusion there is in the cases concerning this question arises to a great extent from a paradox which seems to involve a conflict between principles fixing the burden of proof and necessities of pleading requiring the plaintiff always to allege at least the minimum of facts necessary to show a cause of action. In some cases, a party is not required to prove a negative allegation which he has made, for the simple reason that it is a negative;² but on the other hand, he is frequently required to allege such a negative in order to show a cause of action. In all actions of debt or assumpsit on contracts for the payment of money, it is necessary to allege a breach as an element of the cause of action, and the breach is nonpayment of the money.

² 21 R. C. L. 119; 48 C. J. 681-682. It is sometimes stated to be the general rule that a party is not required to prove a negative, as in R. C. L. cited above. However, there are many instances where the party who alleges a negative is required to prove it. No attempt will be made here to compare and differentiate the numerous decisions dealing with negatives other than nonpayment. It is believed that any intelligent attempt at differentiation must take into consideration the nature of the negative itself, rather than the method of the pleading process by which it is put in issue. See 10 R. C. L. 899. Some negatives may be established by subsidiary facts which are both affirmative and concrete in nature, and are readily capable of proof. For example, the plaintiff must allege and prove lack of probable cause in an action for malicious prosecution. *Porter v. Mack*, 50 W. Va. 581, 40 S. E. 459 (1901). He may do this by showing acquittal of the charge and the various facts and circumstances connected with the prosecution of the charge. But on the other hand, if the only proof which the party can produce to establish the negative is itself negative in character and is as broad as the negative allegation, such as a plaintiff's testimony that a debt has not been paid or that slanderous words are false, then it would seem at least inexpedient, if not impracticable, to place the burden of proof upon him.

Hence it is necessary to allege nonpayment in order to show a cause of action.³ Ordinarily, a plaintiff does not have to allege what he does not have to prove; and conversely, the burden is on him to prove what he must allege. But there are exceptions to the general rule.

In *Holman v. Criswell*,⁴ the court, explaining the necessity of alleging nonpayment as a breach, speaks as follows:

“The only difficulty in holding that the averment of breach is in all cases an essential portion of the statement of the cause of action, consists of this, that in some cases it is not incumbent on the plaintiff to prove the breach of non-performance of the contract or covenant. Its execution being established and its maturity passed, its breach will be presumed.

“There is no doubt, that as a general rule, the plaintiff cannot be compelled to assert more facts than on a general denial he would be bound to prove in order to sustain his case. We have repeatedly held that he cannot prove what he has not alleged, and as a general rule he ought not to be compelled to allege that he is not bound to prove. But there is another general rule of like cogency and pervasive influence in pleading, which is specially applicable to the question at issue, and that is, the plaintiff must allege such facts in his petition as would, were they admitted to be true, entitle him to a judgment; and this certainly he could not demand unless he complained that some wrong or injury had been done him or that some right had been withheld.”

The same distinction between the necessities of pleading and principles fixing the burden of proof was recognized by our own court in *Douglass v. Central Land Company*,⁵ where the court discusses the nature of the plea of payment:

“Sometimes it is necessary that in order that a pleading may be good, that the pleader should insert in his declaration, or plea, a negative allegation, which, because it is a negative, he is not bound upon the trial to prove, but the burden of proving the opposite is upon his opponent.”

³ *Douglass v. Central Land Company*, 12 W. Va. 502 (1878); *Smoot v. McGraw*, 48 W. Va. 144, 35 S. E. 914 (1900).

⁴ 13 Texas 38, SUNDERLAND, CASES ON COMMON LAW PLEADING, 346 (1854).

⁵ *Supra* n. 3. “Of course in a complaint on a promissory note, or other obligation to pay money, there must be an averment that the money has not been paid. But it is a non sequitur to say that because such negative averment is necessary in the complaint therefore it is necessary for the plaintiff to prove it. The general rule is that party is not called upon to prove his negative averments, although they may be necessary to his pleading.” 21 R. C. L. 119.

“The most frequent application of this rule is found in actions on

The negative which the court referred to in the last case was the averment of nonpayment in the declaration, the specific question involved being whether a special plea of payment should conclude with a verification or to the country, and, consequently, whether a replication to the plea was essential in order to make up an issue. It was decided that an issue resulted from the averment of nonpayment in the declaration and the averment of payment in the plea, and hence that a replication was not necessary.

In cases where the scope of the general issue is confined to its logical limits, as in actions of trespass, it puts in issue only matters which the plaintiff is bound to prove in order to establish his case.⁶ Hence, in such cases, a fair test of the plaintiff's burden of proof is whether the matter in question is put in issue by the general issue. But it is notorious that the general issues of *nil debet*, *non assumpsit* and not guilty in case are extremely broad (the latter two unnaturally so), and that they put in issue many matters as to which the burden of proof rests on the defendant. Under *nil debt* and *non assumpsit*, for instance, such defenses as a release, failure of consideration and infancy are put in issue, but nobody doubts that, under the general issue, the burden of proof as to these defenses rests with the defendant, although, like payment, they may be pleaded specially if the defendant desires to do so. Hence the mere fact that the defendant elects to assert the defense of payment under the general issue is no criterion as to where the burden of proof rests.

The authorities seem to be almost uniform to the effect that a plaintiff does not have to prove his allegation of nonpayment, when nonpayment is alleged as the breach in his declaration, but that the burden is on the defendant to prove payment, regardless of whether the matter is put in issue by the general issue or by an affirmative plea.⁷ In *Melone v. Ruffino*,⁸ the court says:

“The question is not one of pleading, but of evidence; not what must be alleged, but where the burden of proof lies. The general rule is that a party is not called upon to prove his negative averments, although they may be necessary to his pleading.”

allegations for the payment of money, in which it is held that the fact of payment is an affirmative defense, and the proof of nonpayment is not necessary to establish a cause of action even though a formal allegation of nonpayment is included in the bill, petition or complaint.” 48 C. J. 681-682.

⁶ Fuller v. Rounceville, 39 N. H. 554, SUNDERLAND, CASES ON COMMON LAW PLEADING, 563 (1854).

⁷ 48 C. J. 680-681; 21 R. C. L. 119.

⁸ 129 Cal. 514; 62 Pac. 93, 79 Am. St. Rep. 127 (1900).

In this case the court adverts to the fact that, when the plaintiff introduces a promissory note in evidence, owing to the prima facie presumption of nonpayment that attaches to the possession of the note, he does establish a prima facie case of nonpayment. This presumption is generally accepted and frequently alluded to in the cases. Hence the universal practice, when notes are sued on, of introducing them in evidence, regardless of the nature of the issues, may have contributed to an assumption that one of the objects of so doing is to establish nonpayment of the note. But the court in the case last cited asserts that such should not be so, explaining that any such evidentiary consequence is only a coincidental effect which results from the plaintiff's possession of the note apparent when he produces it for the purpose of introducing it in evidence. In other words, the note is not produced or introduced in evidence because of any supposed necessity of proving nonpayment, but for the purpose, when necessary, of proving other matters, and in some cases for no purpose of proof at all, but merely in order to surrender the note. If such reasoning is correct, any such evidentiary effect tending to establish nonpayment should have no application at that stage of the trial when the plaintiff is undertaking to make a prima facie case for recovery—to prove his cause of action—but should operate in the plaintiff's rebuttal evidence as tending to counteract the defendant's proof of payment.

It is believed that analysis will show that there is nothing in the nature of a special plea of payment that should cause it to impose upon the defendant any burden of proof that he would not have otherwise. Its pleading function is practically the same as that of the general issue as to the part of the declaration which it covers. In most instances where a defendant has an option to assert a defense under the general issue or to plead it specially, as in the case of a release or an accord and satisfaction, if he adopts a special plea he sets up new matter in the plea not mentioned in the declaration and confesses the declaration; in other words, his plea does not contradict anything alleged in the declaration. But this is not true of the plea of payment. It contradicts and puts in issue the allegation of nonpayment in the declaration. It really functions as a common, or specific, traverse, rather than as a plea in confession and avoidance, and in this respect it is a misnomer to call it a special plea. That this is the essential nature of the plea has been clearly recognized and demonstrated by our own court in *Douglass v. Central Land Company*, hereinbefore dis-

cussed,⁹ where the court decided that such a plea should conclude to the country and that a replication to it is not necessary in order to arrive at an issue. It is believed that it will be admitted that, in any case where the general issue will place the burden of proof on the defendant, a common, or specific, traverse directed to the same matter will have a like effect. Wherefore it is believed that a determination as to who has the burden of proof as to payment or nonpayment must be reached on some other basis than a distinction between pleas.

As in *Melone v. Ruffino*,¹⁰ hereinbefore quoted, the rationale of the rule placing the burden of proving payment on the defendant is based by the courts on the general rule, applicable to a certain class of cases, to the effect that a party should not be required to prove a negative.¹¹ It is believed that the logic of this rule, properly restricted, is sound. It is often impracticable to prove a negative with satisfactory evidence, or with that fair preponderance which ought to be available to a party if he is to carry the burden of proof. Ordinarily, except in the few cases where the defendant may have made admissions in writing or in the presence of others, all that the plaintiff could do to sustain such a burden as nonpayment would be to say that the debt had not been paid, a mere negative assertion as broad as the negative allegation which it was intended to sustain—a mere verification of his pleading. He could assert no fact bearing the minimum descriptive elements of time and place. He could offer nothing capable of corroboration on his part, or of specific refutation on the part of the defendant. Payment is what discharges the debt. It is an affirmative fact possessing the qualities of time and place. These two elements, always present, are capable not only of corroboration but also of definite refutation. Moreover, the defendant is ordinarily in possession of a great variety of other affirmative elements of proof, such as receipts and canceled checks, as in the principal case. In brief, the defendant is in possession of all the affirmative, tangible facts appropriate and necessary to the inception of a practicable and intelligible proof process.¹²

—LEO CARLIN.

⁹ *Supra* n. 5.

¹⁰ *Supra* n. 8.

¹¹ See note 2, *supra*.

¹² *Idem*.