I. INTRODUCTION

Here is the bottom line on presumptions. They are inextricably confused devices used to move burdens from one party to another and to allow judges to comment on the value of evidence.

The burden of production and the burden of proof start somewhere. They usually follow the pleadings, that is, the party who pleads an issue has both burdens regarding its essential elements. A presumption says to the party who starts with the burden: If you prove certain things, then the system will take certain other things for granted, at least to the extent that it will lift from you the burden regarding these other things and place it on your opponent.

Presumptions recognize the value of some circumstantial evidence: its probative value; its value to judicial efficiency; its value to the process of tailoring the general rules regarding burdens, so they will better fit specific cases; its value to judicial execution of social and economic policy. Based on proof of specified circumstantial evidence of a fact, a presumption moves one or more of the burdens regarding that fact.

Which burden is moved depends: in some jurisdictions, presumptions shift the burden of production; in some, they shift the burden of proof; and in others, some presumptions shift the burden of production and other presumptions shift the burden of proof.

Additionally, presumptions can allow the judge to comment to the jury on the value of the circumstantial evidence. This judicial comment varies. At one extreme is the burden-of-proof-shifting presumption, where the judge tells the jury that if they find the basic facts to be true then the burden of proof on the presumed fact is

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2. NEBRASKA JURY INSTRUCTION 2d 2.12A comment (1989) [hereinafter NJI2d].

My favorite statement regarding the assigning of burdens is this: the burden of proof is on "the party who would lose if no evidence were presented." Auburndale State Bank v. Dairy Farm Leasing Corp., 890 F.2d 888, 893 (7th Cir. 1989).

2. See infra Part II(C).
shifted to another party. At the other extreme is the prima-facie-evidence kind of presumption, where the judge instructs the jury that they may regard the basic facts as evidence of the presumed fact, but they are not required to do so.³

II. NEBRASKA EVIDENCE RULE 301

A. THE NEBRASKA RULES REGARDING PRESUMPTIONS IN CIVIL ACTIONS

The history of presumptions in Nebraska is somewhat confusing — as is their current state.

The common-law rule was that presumptions shift the burden of production. The common-law reality was that there were two kinds of presumptions: some shifted the burden of production, some the burden of proof. (See the discussion in Part II(E), below.)

The statutory rule in civil cases is that presumptions shift the burden of proof. The reality is that there are still two kinds of presumptions in Nebraska: some shift the burden of proof, some the burden of production.

The statute reads as follows:

RULE 301. PRESUMPTIONS IN GENERAL. In all cases not otherwise provided for by statute or by these rules a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence.⁴

In response to the statute, the Supreme Court of Nebraska has said that its rule does not apply to all presumptions, that is, some are still governed by common-law rules, and the court has never identi-

³. See infra note 27 and accompanying text.
⁴. NEB. REV. STAT. § 27-301 (Reissue 1989). For ease of reference, I refer to the evidence rule number rather than the statutory section under which the rule is codified.

Cases “otherwise provided for . . . by these rules” and to which Rule 301 does not apply are these: Rule 302 provides that in state court civil actions federal law controls the effect of a presumption regarding facts that are elements “of a claim or defense as to which federal law supplies the rule of decision.” See NEB. REV. STAT. § 27-303 (Reissue 1989) (providing the rules for presumption in criminal cases).

One statute that provides otherwise is the Uniform Commercial Code. In the U.C.C., “‘Presumption’ or ‘presumed’ means that the trier of fact must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its nonexistence.” NEB. REV. STAT. U.C.C. § 1-201(3) (Reissue 1980). This is a burden-of-production-shifting presumption; it does not shift the burden of proof. See generally, J. WEINSTEIN & M. BERGER, WEINSTEIN’S EVIDENCE ¶ 300[03] (1991) (discussing generally presumptions and the U.C.C.), and W. Harold Bingham, Presumptions, Burden of Proof and the Uniform Commercial Code, 21 VAND. L. REV. 177 (1968) (discussing generally presumptions and the U.C.C.).
fied a presumption as one governed by the statute.\textsuperscript{5}

The end result is that the legislative enactment of the Nebraska Evidence Rules, with its radically different approach to presumptions as burden-of-proof-shifting devices, has had no effect on the law of presumptions in Nebraska.\textsuperscript{6} Statute or not, the court continues down the common-law path — some presumptions shift the burden of production and some shift the burden of proof — pretty much as though there were no statute.

Rule 301 surely is the single least-used substantive provision in all of the Nebraska Rules of Evidence.

B. LEGISLATIVE HISTORY OF NEBRASKA EVIDENCE RULE 301

The legislative history of Nebraska Evidence Rule 301 mostly quotes from the Advisory Committee’s Note to the proposed federal rule.\textsuperscript{7} For example, the Comment to the Nebraska rule states: “‘Any doubt as to the constitutional permissibility of a presumption imposing a burden of persuasion of the nonexistence of the presumed fact in civil cases is laid at rest by Dick v. New York Life Ins. Co., 359 U.S. 437 (1959).’”\textsuperscript{8}

Though not quoted in the legislative history of Nebraska’s Rule 301, the legislative history of its model, the proposed federal rule, explains why its authors proposed this shift in the burden of proof. The considerations that lead to shifting the burden of proof when the basic facts of a presumption are established are “[t]he same considerations of fairness, policy and probability” that lead to the allocation of the burden of the various elements of a case as between the prima facie case of a plaintiff and affirmative defenses. . . . These considerations are not satisfied by giving a lesser effect to presumptions. [Citations omitted.]

The so-called “bursting bubble” theory, under which a
presumption vanishes upon the introduction of evidence which would support a finding of the nonexistence of the presumed fact, even though not believed, is rejected as according presumptions too "slight and evanescent" an effect. [Citation omitted.]

C. Foundation

Regarding using a presumption to reallocate the burden of proof and to get favorable judicial comment on the value of your evidence, the foundation consists of introducing basic facts and then convincing the court that these basic facts create a Rule 301 presumption, convincing the court that the basic facts create more than just a legally permissible inference or evidence sufficient to make a prima facie case.

If you are asking the court to recognize a common-law presumption, then this "convincing" is done by arguing the four considerations listed immediately below. If you are asking the court to recognize a statutorily-created presumption, then this "convincing" is done by showing the court the statute. Either way, you put on sufficient evidence of the basic facts and then you convince the court, either with logic or statute, that this situation calls for the application of a presumption.

If you are arguing that the presumption appropriately applied is a Rule 301 presumption, the difficulty you face is that, while there are a handful of cases recognizing presumptions that shift the burden of proof, the Supreme Court of Nebraska has never recognized one as being based on Rule 301. The only time the court has cited Rule 301 has been to say that the presumption in the case at issue was not a Rule 301 presumption, but a common-law burden-of-production-shifting presumption. Intuitively, then, your task is more difficult if you are trying to get the court to impose a Nebraska Evidence Rule 301 burden-of-proof-shifting presumption, and somewhat less difficult if you are trying to get the court to impose a common-law burden-of-production-shifting presumption.

When trying to get the court to give you the benefit of a judicially-created presumption, argue your best combination of the following things — for they are the reasons for the creation of presumptions:

- the basic facts are highly probative of the presumed fact;
- your opponent has access to the evidence, and you do not (or, at least, your opponent's access is far superior to your own);

the presumption you are urging is an effective and fair way to bust up a procedural impasse, or the issue rarely comes up and, when it does come up, the party in your opponent’s position is the one who is interested in raising it; and social or other policy considerations support the presumption you are urging.

1. Probability

To create a Rule 301 presumption, argue this: Experience teaches that it is so probable the presumed fact follows from the basic facts “that it is sensible and time-saving to assume the truth of [the presumed fact] until the adversary disproves it.” This consideration focuses on the high probative value of the basic facts as proof of the presumed facts.

2. Access to Proof

Argue that the opposing party, the one to whom the burden would be shifted, has superior access to proof. Take, for example, the presumption of due receipt in the mail. The sender has superior knowledge of whether the letter was properly addressed, the proper postage was affixed, and it was deposited into the United States mail, and the burden of proving these basic facts is on the sender. The intended recipient most often has superior knowledge of whether the letter was actually received. The presumption works by shifting the burden of proof to the intended recipient once the sender has proved the basic facts.


This foundation has not changed much over the years. In his 1931 article, Professor Morgan stated that the assumption of the existence of one fact from the existence of others “is thus compelled because it is believed to be justified on logical grounds by human experience, or because it accomplishes a procedural convenience, or because it furthers a result deemed to be socially desirable, or because of a combination of two or more of these reasons.” Morgan, 44 HARV. L. REV. at 906.


12. Morgan, 44 HARV. L. REV. at 929-31: “The party against whom the presumption [based on probability] operates is relying upon the existence of the unusual . . . [I]n the absence of other factors . . ., why should not the trier whose mind is in equilibrium be required to find for the usual rather than the unusual?” Id. at 930. Accord, e.g., White, supra note 11, at 5.

13. 1 J. WEINSTEIN & M. BERGER, supra note 11, ¶ 300[01], at 300-7; MCCORMICK ON EVIDENCE § 343 (E. CLEARY, 3d ed. 1984). See White, supra note 11, at 5.
most likely to have the evidence.\textsuperscript{14}

3. Procedural Convenience

A presumption can be a fair and effective way to bust up a procedural impasse or to move the burden on an issue that rarely arises to the party who has the most interest in the issue.

Regarding the former, Judge White of the Supreme Court of Nebraska gives this example: “the presumption implicit in the simultaneous death statutes dealing with the survivorship of persons where there is actually no factual basis upon which to believe that one person or the other was likely to have died first.”\textsuperscript{15}

Regarding the latter, McCormick on Evidence gives the following example: “In a criminal case it is convenient to require the accused, if he wishes to raise the question of sanity, to produce evidence of his insanity. This saves the state the fruitless trouble of proving sanity in the great number of cases where the question will not be raised.”\textsuperscript{16}

4. Policy Considerations

Notions, usually implicit rather than explicit, of social and economic policies may at times prompt courts to favor one position by giving it the benefit of a presumption while disfavoring the opposing position by forcing it to rebut the presumption. In this area, presumptions are also often closely tied with pertinent substantive law.\textsuperscript{17}

A classic example, “is the presumption of ownership from possession.”\textsuperscript{18} The policy consideration is stability of estates.

A second example is the presumption that death resulted from

\textsuperscript{14} See McCormick on Evidence, supra note 13, § 343 at 969, (noting that “[r]eason: probability and the difficulty of proving delivery in any other way” supports this presumption).

Under Neb. Evid. R. 301, what is moved is the burden of proving that the letter was not received. The burden of proof is what follows the party most likely to have the evidence. Under Fed. R. Evid. 301, what is moved is the burden of producing some evidence that the letter was not received, with the burden of proof staying on the sender. The burden of production is what follows the party most likely to have the evidence.

\textsuperscript{15} White, supra note 11, at 6 (though the statute about which Judge White writes, Neb. Rev. Stat. § 30-121 (Reissue 1979), does not apply the label “presumption” and, in fact, does not create a presumption but rather a rule of law). Accord McCormick on Evidence, supra note 13, § 343.

\textsuperscript{16} 1 J. Weinstein & M. Berger, supra note 11, ¶ 300[02], at 300-7, (quoting McCormick on Evidence § 343, at 807 n.53 (2d ed. 1972)).

\textsuperscript{17} White, supra note 11, at 5. This is similar to the rule of constitutional law that if the party challenging state action proves that the state action either infringes on a fundamental right or draws lines using suspect criteria — if it is a core value case — then the burden of proof shifts from the challenger to the state.

\textsuperscript{18} McCormick on Evidence supra note 13, § 343, at 968.
an accident rather than suicide. The policy consideration favors allowing recovery under insurance policies, thereby protecting the beneficiary families.\(^{19}\)

D. FEDERAL RULE

The statutory Nebraska rule and the proposed federal rule are identical. The enacted federal rule and the common-law Nebraska rule are essentially identical.\(^{20}\) In other words, our statute adopted their "new" approach and their statute adopted our "old" approach.\(^{21}\)

As adopted, Federal Rule 301 states:

In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.\(^{22}\)

This, like the former Nebraska rule, is called the "bursting bubble" rule.\(^{23}\) A presumption under this rule shifts the burden of going forward with evidence on the presumed fact, but does not shift the burden of persuasion on the presumed fact. When the party against whom the presumption operates introduces evidence which, if believed, would rebut the presumption, the presumption disappears. What are left is the basic facts and whatever persuasive value they have as circumstantial evidence of the no-longer-presumed fact.\(^{24}\)

E. DISCUSSION

1. The Most Important Nebraska Cases

"A true presumption is a device whereby an ultimate fact (the presumed fact) may be assumed through the proof of one or more other facts (the basic facts). It shifts either the burden of production, or the burden of persuasion, or both."\(^{25}\) A true presumption recog-

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19. White, supra note 11, at 5; Morgan, 44 Harv. L. Rev. at 909.
21. As discussed previously, while our legislature has adopted the approach of the Proposed Federal Rules, our court has not yet done so. See supra note 7.
23. See, e.g., McGowan, 197 Neb. at 603, 250 N.W.2d at 238.
24. See id. at 603, 250 N.W.2d at 238. See also In re Estate of Garfield, 192 Neb. 461, 463, 222 N.W.2d 368, 371 (1974); Hannon v. J.L. Brandeis & Sons, Inc., 186 Neb. 122, 128, 181 N.W.2d 253, 256 (1970); In re Estate of Goist, 146 Neb. 1, 16, 18 N.W.2d 513, 521 (1945).
nizes the value of some circumstantial evidence, and honors its value in two ways. First, when the party who has the burden introduces the appropriate circumstantial evidence of the basic facts, the presumption moves one or more of the burdens regarding the presumed fact to another party. Second, the presumption allows, sometimes requires, the judge to comment on the value of the circumstantial evidence in question.

The Nebraska statute on presumptions in civil actions — Rule 301 — states that, with allowance for some exceptions, a presumption in a civil action shifts the burden of proof. The Supreme Court of Nebraska has directly addressed the applicability of Rule 301 in only four cases. One, the first, is Estate of McGowan. This case involved

which requires the existence of fact B (presumed fact) to be assumed when fact A (basic fact) is established); McGowan, 197 Neb. at 603, 250 N.W.2d at 238 (stating that "a standardized practice under which certain facts are held to call for uniform treatment with respect to their effect as proof of other facts."); First Nat'l Bank v. Adams, 82 Neb. 801, 803, 118 N.W. 1055, 1056 (1906) ("a rule of law that courts and judges shall draw a particular inference from a particular fact, or from particular evidence, unless and until the truth of such inference be disproved.").


Professors Wright and Graham, in their valuable work on the rules of evidence, take a different view. According to Wright and Graham "[w]hatever the vitality of the supposed rule against pyramiding inferences, it ought not to be taken as forbidding the use of one presumption as the mechanism for establishing the basic fact of another." C. WRIGHT & K. GRAHAM, JR., supra note 10, § 5125, at 330. In the Supplement, at n.25.1, they cite this example: "The presumption of revocation of a will is in reality a double presumption; destruction of the will is presumed from its disappearance and revocation is presumed from destruction." Id. at 330 n.25.1.

27. Professor Morgan said it well 60 years ago: "[P]resumption' may properly be used to designate the assumption of the existence of one fact which the law requires the trier of fact to make on account of the existence of another fact or group of facts, standing alone." Morgan, 44 HARv. L. REV., at 906.

28. As also recognized supra, text at note 3, when the burden shifted is the burden of proof, the court is required to comment on the value of the evidence, that is, the court must tell the jury that if they find the basic facts to be true, then the burden of proof shifts regarding the presumed fact. NJI 2d 2.14B-D (1989). See also Allen, Presumptions in Civil Actions Reconsidered, 66 IOWA L. REV. 843, 855-58 (1981). When the presumption is the prima-facie-evidence kind of presumption against the accused in a criminal case in Nebraska, the court must tell the jury that they may find, but are not required to find, the basic facts to be sufficient evidence of the presumed fact. NEB. REV. STAT. § 27-303 (Reissue 1989); PROPOSED NEBRASKA PATTERN JURY INSTRUCTIONS SECOND: CRIMINAL 2.1, 2.2 (1989) (hereinafter PROPOSED NJI 2d).

On this relationship between circumstantial evidence and presumptions: in older evidence books there was some blending together of the two concepts; it was "common to see circumstantial evidence discussed under the heading of 'presumptive evidence.'" C. WRIGHT & K. GRAHAM, JR., supra note 10, § 5122 at 561.

29. NEB. REV. STAT. § 27-301 (Reissue 1989).
a will contest on the grounds of undue influence. On appeal, the con-
testants argued that they had presented sufficient evidence to raise a
"presumption of undue influence" and, therefore, the trial court
should have instructed the jury that proof of the basic facts placed
the burden of proof on the issue on the proponent of the will.31

The court said that the "so-called 'presumption of undue influ-
ence' is not a presumption within the ambit and meaning of [Rule
301]."32 Rather, in this context, "presumption" means "prima facie
case," so that what the contestant had established was a prima facie
case of undue influence — and that, of course, does not affect the
allocation of the burden of proof.33 What the court did not do, how-
ever, was to say that the "presumption" of undue influence is not a
presumption at all. The failure to take this final step leads to today's
situation where, in Nebraska civil actions, we seem to have two
sources of "presumptions" in theory, and one source in fact: in the-
ory, we have common-law presumptions and Rule 301 presumptions;
in fact, because Rule 301 only states the effect of presumptions and
does not enact any, and because the court has never found a Rule 301
presumption, now and for the foreseeable future we have only com-
mon-law presumptions.

Of the other three cases in which the court directly addresses the
applicability of Rule 301, two of those three cases, like McGowan, in-
volved the "presumption" of undue influence and, citing McGowan,
state that this "presumption" is not covered by Rule 301.34

The fourth and most recent of the few cases recognizing that
Rule 301 exists is more troublesome. Meier v. State35 concerns an
application for state aid to the aged. The Department of Social Services
denied the application on the grounds that the applicant had gratui-
tously conveyed away property, including her family home, for the
purpose of qualifying for public assistance. The Department relied
on a regulation that provides: "The gratuitous transfer of a client's
home at any time within two years before his/her moving into a dif-
f erent facility is presumed to be a transfer of a resource to qualify for
assistance."36 The district court reversed and the Supreme Court of
Nebraska affirmed the district court.

This regulatory presumption "does not come within the ambit of

31. Id. at 601, 250 N.W.2d at 237.
32. Id. at 604, 250 N.W.2d at 239.
33. Id.
34. Anderson v. Claussen, 200 Neb. 74, 80, 262 N.W.2d 438, 441-42 (1978); Golgert
36. Id. at 382, 417 N.W.2d at 776 (citing NEB. ADMIN. CODE, tit. 469, ch. 2, § 2-
009.07B4 (1985)).
“[Rule 301],” said the Nebraska Supreme Court. The court stated that this regulatory presumption “merely establishes the burden of going forward with the evidence.” Without saying how this is the case, the court simply provides a “See” citation to McGowan and to First National Bank v. Bunn. McGowan is discussed above. First National Bank does not mention Rule 301. It deals with the presumption that a husband’s conveyance of real property to his wife is fraudulent as to existing creditors. This case is like Meier because both deal with conveyances intended to keep money out of the hands of those to whom money is or soon will be owed. There are, however, two significant differences the court does not mention.

First, the burden-of-proof-shifting presumption is a creation of Nebraska Evidence Rule 301. The Nebraska Evidence Rules “apply in all trials commenced after December 31, 1975.” The trial in First National Bank commenced well before that date, and the trial in Meier commenced well after that date.

Second, First National Bank and McGowan both involve common-law presumptions, presumptions created by the court as burden-of-production-shifting devices and, apparently, unaffected by Rule 301. The presumption in Meier is a regulatory presumption, more akin to a statutory presumption than to a common-law presumption. Even if the statute does not change the nature of presumptions created by the court, presumably it does change the nature of presumptions created by statute and their first cousins, those created by administrative regulation. Though both First National Bank and Meier involve potentially fraudulent conveyances, the former involves a court-created presumption, the latter a regulatory-agency-created presumption; the difference seems more significant than the similarity — or, at least, significant enough to warrant a word or two on the subject.

What McGowan seems to mean, and what Meier's double citation to McGowan and First National Bank seems to mean, and what all of these cases seem to mean, is this:

- presumptions that predate Rule 301 were created by the courts, some to shift the burden of production, some to shift the burden of proof
- “presumption” is just a label
- the significant feature of these devices is not that label, but its affect on the allocation of burdens
- Rule 301 has created a new animal — a statutory presumption that changes the allocation of the burden of proof

37. Meier, 227 Neb. at 384, 417 N.W.2d at 777.
38. Id.
- without a clearer indication that the legislature intended this new rule to apply to all of these preexisting burden-of-production-shifting devices, without a clearer indication that the legislature intended to change all of these burden-of-production-shifting devices to burden-of-proof-shifting devices, the court will not give it this effect.

Why the court did not give the presumption this effect in the case of the presumption created by regulation, the presumption in *Meier*, is a mystery.

There are two kinds of presumptions in Nebraska (and lots of other things, nonpresumptions, passing under the label): presumptions that shift the burden of proof (Rule 301 and common-law); and presumptions that shift the burden of production (common-law). All of the common-law presumptions that predated Rule 301 seem to keep their place in the latter category. At least one presumption created by regulation falls into the latter category. Whether statutory presumptions fit into this latter category also, is an open question. Though it does seem that a statutory presumption should fit within the statute specifying the effect of presumptions, it also seems that the court has almost entirely ignored Rule 301. Of the hundreds of cases referring to presumptions only four acknowledge Rule 301, only one really says anything about Rule 301, and none applies Rule 301. Odds seem to be against any presumption being identified as a Rule 301 presumption. The nearly seventeen-year atrophy of Rule 301 seems to have left it beyond resuscitation.

My crystal ball says this:

- Presumptions created by the court: The court will continue to create presumptions, at its own pace. We still have, and will have, a common law of both burden-of-proof- and burden-of-production-shifting presumptions. It does not seem likely that there will be any judicially-created Rule 301 presumptions. For largely unstated reasons, Rule 301 simply does not apply.

- Presumptions created by the Unicameral: There is some chance that the court will see a difference between how Rule 301 operates on common-law presumptions and statutory presumptions, will not apply *McGowan* to statutory

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40. See Appendix A, Parts III-VII.

41. See, e.g., C. Wright & K. Graham, Jr., supra note 10, § 5123, at 582-83. In a civil case and in a criminal case, for presumptions other than those against the accused, the applicable statute would be Neb. Rev. Stat. § 27-301 (Reissue 1989). In a criminal case, for a presumption against the accused, it would be Neb. Rev. Stat. § 27-303 (Reissue 1989).

42. It is not that reasons do not exist, just that, for the most part, they are unstated. And it is not that there are no presumptions that shift the burden of proof: there are a number of them, as shown in Part I of Appendix A.
presumptions, and will find Rule 301 burden-of-proof-shifting presumptions in statutes that use presumptions. There is some chance this will happen, but no such indication from the court. And, in fact, the only indication from the court is to the contrary, in its treatment of the regulatory presumption in Meier, above.

Presumptions created by administrative agency: Meier, the only Nebraska case involving a presumption created by an administrative agency, pursuant to statutory authority, held that it was not a Rule 301 burden-of-proof-shifting presumption. A case to the contrary would have to deal with or ignore Meier. That seems to place the chances here at somewhat greater than common-law presumptions and somewhat less than statutory presumptions. It is in the middle of a range that is microscopic to start with.

In McGowan, our court’s premier case on presumptions, the court noted that, while the statute provides that presumptions shift the burden of proof, it does not “define or prescribe what constitutes a presumption within the meaning of Rule 301.”43 The emphasized part of this quotation could mean one of two things: either there is more than one kind of presumption and Rule 301 does not apply to all of them and the court will continue to distinguish common-law presumptions and statutory presumptions; or the coverage of Rule 301 is not self-defining and the courts will have to decide what is included and what is not, and save the label “presumption” for what is included.

The second of these interpretations seems to be the appropriate one. The Nebraska statute states that, with allowance for some exceptions, a presumption in a civil action shifts the burden of proof. This seems to “restrict[] the power of the courts to create presumptions that have a greater or lesser effect than prescribed by the Rule.”44 Unfortunately, the first of these interpretations seems to be operative. The court continues to apply presumptions that have a greater or lesser effect than prescribed by the rule.45 In McGowan, the court went from the proposition that Rule 301 does not “define or prescribe what constitutes a presumption within the meaning of Rule 301” to the conclusion that “situations which have previously been referred to as presumptions [situations that, in subsequent cases, continue to be referred to as presumptions] . . . may be excluded from

43. McGowan, 197 Neb. at 603, 250 N.W.2d at 238 (emphasis added).
44. C. Wright & K. Graham, Jr., supra note 10, § 5123, at 574.
45. See Appendix A. Regarding presumptions with a greater effect than the statute’s shift of the burden of proof, see Part IV(A) of Appendix A, on the so-called “irrebuttable” or “conclusive” presumption.
the operation of the rule."

There is a certain amount of confusion caused by a legislative rule that gives presumptions one particular effect and a court rule that gives them at least half a dozen different effects (as catalogued in Appendix A). There is a certain amount of disrespect for the legislature inherent in an approach that ignores the legislative labeling and takes the words of the legislature and applies them outside the boundaries it has set. There is a certain imprecision of thought that follows taking a precise word like Nebraska-301's presumption and applying it to a half dozen or so other situations, each of which has its own more precise label. The confusion would be minimized, the disrespect avoided, and the precision of thought returned if the court would save the presumption label for Rule 301 situations and use the perfectly good other labels (again catalogued in Appendix A) for the other half dozen or so situations.

Having said all this, there are three things about presumptions that are clear: there is great confusion; this confusion is not unique to Nebraska, it is nationwide; and it is not unique to 1991, presumptions have been confusing us for centuries. Approximately three-hundred-and-fifty years ago an Italian treatise stated that ""The matter [of presumptions] is confused, almost inextricably."" Sometimes, it seems that all that has changed in the last 350 years is that we can now delete the word "almost." More recently and closer to home, 50 years ago Judge Learned Hand said this about the law of presumptions: ""Judges have mixed it up until nobody can tell what on earth it means and the important thing is to get something which is workable and which can be understood and I don't much care what it is.""

While it is true that the statutory rule regarding presumptions does not change the rules regarding legally permissible inferences, or the sufficiency and effect of the introduction of evidence sufficient to

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46. McGowan, 197 Neb. at 603-04, 250 N.W.2d at 238-39.
47. 66 IOWA L. REV. at 845.
48. How confusing is this area of the law? So confusing that Morgan once said it is in greater need of simplification than the hearsay rule. MODEL CODE OF EVIDENCE 52 (1942).
50. Gausewitz, 5 VAND. L. REV. at 324, (quoting THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 313 (1888), which, in turn, quotes an unnamed work published in 1844, which, in its turn, quotes an Italian treatise from the 1600s (which does not seem to be in our library) as follows: ""The matter . . . is confused, almost inextricably."").
make a prima facie case, or the initial assignment of the burden of proof, or the variety of rules of law passing under the label "conclusive" or "irrebuttable presumptions," it is also true that under the code these are not presumptions. In the interest of respect for the code and in the interest of promoting a body of evidence law that is as clear and as easily understandable as is possible, these other things should be labeled for what they are: legally permissible inferences; a prima facie case; assignment of the burden of proof; and rules of law.

In the area of presumptions, it seems to be particularly important to define terms. To understand true presumptions, one must be able to distinguish them from other concepts to which the word is often wrongly applied. That courts, legislatures, and regulatory agencies alike misapply the label "presumption" leads to a blurring of the concepts. In an effort to bring them back into focus and to help define the terms, Appendix A catalogues correct and incorrect uses of the word "presumption."

I hold out no hope that one day soon this area of the law will be fixed. Paraphrasing the Minnesota Supreme Court, for at least 350 years this has been a subject about which text writers, authors of legal articles, teachers of law, courts, and legislatures "have written much and clarified little." But I do hold out hope for progress — even in an eternal war, battles can be won. I do hold out hope that we can change direction and, one step at a time, move toward clarity.

Professor Ronald J. Allen, who is doing the best current work on presumptions, wants to put himself out of work: he writes that "the only sensible solution to the 'problem of presumptions' is to stop using the term and to face directly whatever evidentiary issues may be posed for resolution by our system of adjudication." The central thesis of this Article, Professor Allen has written, "is that there is no such thing as a presumption."

Professor Allen suggests solving the problem by erasing the word from the lexicon of the law. Rule 301 attempts to solve the
problem by defining the word and removing all but one of its uses from the definition. I am suggesting that courts try to wean themselves from their dependence on the word as an easy way to designate a half dozen or so different judicial functions, wean themselves one case at a time. Nothing too bold or sweeping — when a case comes up involving something that is not a true presumption, do not call it a presumption. If we just do not misuse the word presumption one day at a time, one day we will wake up and the addiction will be gone.

III. NEBRASKA EVIDENCE RULE 302

A. NEBRASKA RULE 302

RULE 302. APPLICABILITY OF FEDERAL LAW IN CIVIL CASES. In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which federal law supplies the rule of decision is determined in accordance with the federal law.

B. LEGISLATIVE HISTORY OF NEBRASKA EVIDENCE RULE 302

Nebraska Evidence Rule 302 is the mirror image of Rule 302 of the Federal Rules of Evidence. The Comment to the Nebraska rule quotes the federal Advisory Committee's Note as follows:

"A series of Supreme Court decisions in diversity cases leaves no doubt of the relevance of Erie Railroad Co. v. Tompkins . . . to questions of burden of proof. . . . In each instance the state rule was held to be applicable. It does not follow, however, that all presumptions in diversity cases are governed by state law. In each case cited, the burden of proof question had to do with a substantive element of the claim or defense. Application of the state law is called for only when the presumption operates upon such an element. Accordingly the rule does not apply state law when the presumption operates upon a lesser aspect of the case, i.e., 'tactical' presumptions.

"The situations in which the state law is applied have been tagged for convenience in the preceding discussion as "diversity cases." [This is not completely accurate.] since Erie applies to any claim or issue having its source in state law, regardless of the basis of federal jurisdiction, and does not apply to a federal claim or issue, even though jurisdic-

62. See Appendix A.
63. What to call it instead? See Appendix A. (As this article was going to press, the weaning may have begun. See infra note 95).
64. NEB. REV. STAT. § 27-302 (Reissue 1989).
tion is based on diversity. . . . Hence the rule employs, as appropriately descriptive, the phrase 'as to which state law supplies the rule of decision.'

The drafters of the Nebraska rule then sum up as follows:

The foregoing federal advisory committee note to Federal Rule 302 is applicable in a general way to Nebraska Rule 302 which states a comparable rule with respect to issues in which federal law supplies the rule of decision.

To say that the law is clear in this area is obviously untrue and the Nebraska committee therefore simply states the same broad generality used in Federal Rule 302 to the extent that it may be constitutionally required for the sake of uniformity.

C. FEDERAL RULE

RULE 302. APPLICABILITY OF STATE LAW IN CIVIL ACTIONS AND PROCEEDINGS. In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with State law.

D. DISCUSSION

Federal Rule 302 embodies the Erie Doctrine: whenever state law supplies the rule of decision on a substantive element of a claim or defense, federal courts defer to the state law; burden of proof is a substantive element; presumptions place the burden of proof (either by moving it or leaving it where it started). Therefore . . . well, therefore federal Rule 302.

The closing remarks of the Comment to Nebraska Rule 302 provide that "the Nebraska committee . . . simply states the same broad generality used in Federal Rule 302 to the extent that it may be constitutionally required for the sake of uniformity."

This is a puzzling comment. Erie is not applicable to the states; it does not dictate that states apply federal rules on presumptions respecting a fact that is an element of a claim or defense as to which federal law supplies the rule of decision. Erie is not a "broad generality," nor is it required "constitutionally" to be applied by states.

Interestingly, the Advisor's Notes to the Maine Rules of Evi-

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66. PROPOSED NEBRASKA RULES OF EVIDENCE, supra note 68, at 38.
68. PROPOSED NEBRASKA RULES OF EVIDENCE, supra note 68, at 38.
Nebraska Rule 302 would apply where a claim or defense in state court is based upon a federal statute or other federal law, and federal Rule 301 would govern the effect of a presumption. As of yet, there are no Nebraska cases applying this Rule 302. Given the rarity of this situation and given that Nebraska courts almost totally ignore Nebraska Rule 301 anyway, \(^{70}\) it is not likely Nebraska courts will apply Rule 302 any time soon.

IV. NEBRASKA EVIDENCE RULE 303

A. NEBRASKA RULE 303

Rule 303. Presumptions in criminal cases; scope; submission to jury; instruction to jury. (1) Except as otherwise provided by statute, in criminal cases, presumptions against an accused, recognized at common law or created by statute, including statutory provisions that certain facts are prima facie evidence of other facts or of guilt, are governed by this rule.

(2) The judge is not authorized to direct the jury to find a presumed fact against the accused. When the presumed fact establishes guilt or is an element of the offense or negates a defense, the judge may submit the question of guilt or of the existence of the presumed fact to the jury, if, but only if, a reasonable juror on the evidence as a whole, including the evidence of the basic facts, could find guilt or the presumed fact beyond a reasonable doubt. When the presumed fact has a lesser effect, its existence may be submitted to the jury if the basic facts are supported by substantial evidence, or are otherwise established, unless the evidence as a whole negatives the existence of the presumed fact.

(3) Whenever the existence of a presumed fact against the accused is submitted to the jury, the judge shall give an instruction that the law declares that the jury may regard the basic facts as sufficient evidence of the presumed fact but does not require it to do so. In addition, if the presumed fact establishes guilt or is an element of the offense or negates a defense, the judge shall instruct the jury that its existence must, on all the evidence, be proved beyond a rea-
B. LEGISLATIVE HISTORY OF NEBRASKA EVIDENCE RULE 303

Once again, Nebraska Rule 303 is identical to the proposed, but unadopted, federal rule and the Comment to the Nebraska Rule quotes extensively from the federal Advisory Committee's Note.

"Subdivision (a). [This] rule... spells out the effect of common law presumptions as well as those created by statute, cases involving the latter are no doubt of more frequent occurrence. Congress has enacted numerous provisions to lessen the burden of the prosecution, principally though not exclusively in the fields of narcotics control and taxation of liquor. Occasionally, in the pattern of the usual common law treatment of such matters as insanity, they take the form of assigning to the defense the responsibility of raising specified matters as affirmative defenses, which are not within the scope of these rules... In other instances they assume a variety of forms which are the concern of this rule....

"Differences between the permissible operation of presumptions against the accused in criminal cases and in other situations prevent the formulation of a comprehensive definition of the term "presumption," and none is attempted. Nor do these rules purport to deal with problems of the validity of presumptions except insofar as they may be found reflected in the formulation of permissible procedures.

"The presumption of innocence is outside the scope of the rule and unaffected by it.

"Subdivision (b) and (c). It is axiomatic that a verdict cannot be directed against the accused in a criminal case, ... with the corollary that the judge is without authority to direct the jury to find against the accused as to any element of the crime.... Although arguably the judge could direct the jury to find against the accused as to a lesser fact, the tradition is against it, and this rule makes no use of presumptions to remove any matters from final determination by the jury.

"The only distinction made among presumptions under this rule is with respect to the measure of proof required in order to justify submission to the jury. If the effect of the presumption is to establish guilt or an element of the crime or to negative a defense, the measure of proof is the one widely accepted by the Courts of Appeals as the standard for measuring the sufficiency of the evidence in passing on motions for directed verdict (now judgment of acquittal): an acquittal should be directed when reasonable jurymen must

71. NEB. REV. STAT. § 27-303 (Reissue 1989).
have a reasonable doubt. [Citations omitted.] If the presumption operates upon a lesser aspect of the case . . . , the required measure of proof is the less stringent one of substantial evidence, consistently with the attitude usually taken with respect to particular items of evidence.

"The treatment of presumptions in the rule is consistent with United States v. Gainey, [supra], where the matter was considered in depth. After sustaining the validity of the provision . . . that presence at the site is sufficient to convict of the offense of carrying on the business of distiller without giving bond, unless the presence is explained to the satisfaction of the jury, the Court turned to procedural considerations and reached several conclusions. The power of the judge to withdraw a case from the jury for insufficiency of evidence is left unimpaired; he may submit the case on the basis of presence alone, but he is not required to do so. Nor is he precluded from rendering judgment notwithstanding the verdict. It is proper to tell the jury about the "statutory inference," if they are told it is not conclusive. The jury may still acquit, even if it finds defendant present and his presence is unexplained. To avoid any implication that the statutory language relative to explanation be taken as directing attention to failure of the accused to testify, the better practice, said the Court, would be to instruct the jury that they may draw the inference unless the evidence provides a satisfactory explanation of defendant's presence, omitting any explicit reference to the statute."72

The drafters of the Nebraska rule then finish their Comment as follows:

The Final Report of the National Commission on Reform of Federal Criminal Laws § 103(4) and (5) (1971) contains a careful formulation of the consequences of a statutory presumption with an alternative formulation set forth in the Comment thereto, and also of the effect of a prima facie case. In the criminal code there proposed, the terms "presumption" and "prima facie case" are used with precision and with reference to these meanings. In the federal criminal law as it stands today, these terms are not used with precision. Moreover, common law presumptions continue. Hence it is believed that the rule here proposed is better adapted to the present situation until such time as the Congress enacts legislation covering the subject, which the rule takes into account. If the subject of common law pre-

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sumptions is not covered by legislation, the need for the rule in that regard will continue.

The Rule requiring a possible finding of guilt beyond a reasonable doubt with respect to a presumed fact in a criminal case is supported by Ballard v. State, 19 Neb. 609, 28 N.W. 271 (1886) and Shellenberger v. State, 99 Neb. 370, 156 N.W. 777 (1916). 73

C. FOUNDATION

The “foundation” here is the same as under Rule 301. If the presumption has been enacted by the legislature, you show the court the statute that enacts it. (And, especially in criminal law, many presumptions are created by statute.) If you are attempting to get the court to create a presumption, you do the same thing whether it is a Rule 303 presumption against the accused in a criminal case, a Rule 301 presumption, or a common-law presumption: you argue your best combination of the following four things — because, as discussed more fully above, 74 they are the reasons for the creation of presumptions:

- the basic facts are highly probative of the presumed fact;
- the accused has access to the evidence and the prosecutor does not (or, at least, the accused's access is far superior to the prosecutor's);
- the presumption the prosecutor is urging is an effective and fair way to break up a procedural impasse or the issue rarely comes up and, when it does come up, the accused is the one who is interested in raising it; and
- social or other policy considerations support such a presumption against the accused.

To this must be added the constitutional protection afforded the accused on this issue of burdens of proof.

D. FEDERAL RULE

Proposed federal Rule 303, from which Nebraska Evidence Rule 303 was taken, was rejected by the United States Congress. Congress has not enacted a general rule on the effect of presumptions in criminal cases. Federal common law controls. United States Supreme Court cases on the subject are discussed in Part IV(E), immediately below.

73. PROPOSED NEBRASKA RULES OF EVIDENCE, supra note 68, at 40-41.
74. See supra Part II(C) of text.
E. DISCUSSION

Rule 303 does not govern all presumptions in a criminal action, only presumptions against the accused. Presumptions against the state are governed by Rule 301 and the common law.

In so far as it does apply, Rule 303 applies to and treats alike all presumptions, those created by statute and those recognized at common law. Furthermore, the Rule governs statutory provisions that establish certain facts as prima facie evidence of other facts. Though the Comment to the Rule states that no "comprehensive definition of the term 'presumption' . . . is attempted," the Rule itself does make it clear that it governs any statute regarding proof of facts that creates more than just a permissible inference against an accused in a criminal case.

75. The constitutional limitations underlying Rule 303 apply only to the case against the accused. See, e.g., 1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE, ¶ 303[01] at 303-08 (1991).

Notice also in the legislative history, quoted above, that "The presumption of innocence is outside the scope of the rule and unaffected by it." This exclusion is consistent with the Rule's limitation to "presumptions against an accused," in that the presumption of innocence (which, of course, is not a true presumption anyway, see Appendix A, Part IV(B)) in no way operates "against" the accused.

76. Nebraska Evidence Rule 301 applies to presumptions in civil cases and Nebraska Evidence Rule 303 applies to presumptions against the accused in criminal cases. No rule mentions presumptions against the prosecutor in criminal cases. Surely that hole will be plugged with the same mix of burden-of-proof-shifting presumptions and burden-of-production-shifting presumptions and nonpresumption presumptions as are found in civil cases. See the discussion in Part II, above, and the examples in Appendix A, below.

77. Examples include: Upon mailing of written notice that a lease or rental agreement has expired and failure to return the leased or rented property within ten days of such notice, it shall be presumed that the failure to return was with intent to deprive, which is an element of the crime of theft by unlawful taking. Neb. Rev. Stat. § 28-511 (Reissue 1989). Where service is usually paid for immediately upon its being rendered, refusing to pay or leaving without paying or offering to pay "gives rise to a presumption that the service was obtained by deception as to intention to pay." Neb. Rev. Stat. § 28-515 (Reissue 1989). See in/bra note 82.


80. The Supreme Court of Nebraska has indicated that it may apply even then — even to a statute that creates a permissible inference. In Stalder, the court said "Whether [Rule 303] be construed to refer to presumptions or to permitted inferences." Stalder, 231 Neb. at 905, 438 N.W.2d at 504. The court suggested that the ques-
Here is the effect of a presumption against the accused in a criminal case in Nebraska (and, remember, it is also the effect of any statute that establishes proof of certain facts as prima facie evidence of other facts).

If the presumed fact establishes guilt, or is an element of an offense, or negatives a defense:

1. the court may use the presumption as its basis for sending the point to the jury if, and only if, considering all of the evidence (the basic facts and beyond) a reasonable juror could find the point made beyond a reasonable doubt; and,

2. if it does go to the jury, the court shall instruct them that the existence of the presumed fact must, considering all of the evidence in the case (the basic facts and beyond), be proved beyond a reasonable doubt.

If the presumed fact is of a lesser effect:

1. the court may use the presumption as its basis for sending the point to the jury if the basic facts are sufficiently well established and the presumed fact has not been negated; and,

2. if it does go to the jury, the court shall instruct the jury that they may regard the basic facts as sufficient evidence of the presumed fact, but they are not required to do so.

Rule 303 tells the trial court how to use presumptions against the accused when making two legal decisions: it tells the court how to use the presumption when it decides whether the case goes to the jury; and, if it does go to the jury, it tells the court how to instruct the jury on the issue.

Jury instruction is the real problem in this area. It is jury instruction that leads to citation of Rule 303, and to reversal of convictions. Three Nebraska cases have cited the rule. One held the rule did not apply, and the other two reversed convictions because the interpretation of the Rule’s application to permissible inferences is an open question. But how could the rule apply to permissible inferences? The Rule requires specific jury instruction regarding those things it covers. Presumably every piece of evidence in a case carries permissible inferences. Yet this particular jury instruction cannot apply to each permissible inference. Neither, it seems, can it apply to all permissible inferences mentioned in statutes (if there are any). What the court must have had in mind is the Rule’s application to “statutory provisions that certain facts are prima facie evidence of other facts or of guilt,” Neb. Rev. Stat. § 27-303(1) (Reissue 1989). And, making this interpretation of Stadler more probable, the case itself did involve a “prima facie evidence” statute, Neb. Rev. Stat. § 28-1212 (Reissue 1989) (firearm in motor vehicle “prima facie evidence” it is in possession of all occupants of motor vehicle).

The first thing to note about the jury instruction is this: if the existence of a presumed fact against the accused is submitted to the jury, the statute requires that the judge give certain specific instruction to the jury. In this situation, the statute is mandatory. It requires instruction on the point.

The second thing to note is that the instruction required is of a specific sort. What instruction must be given depends on whether or not the presumed fact establishes guilt or is an element of the offense or negatives a defense, but the point of the rule is that the judge shall instruct the jury that the presumption is not conclusive — they may take the basic facts as sufficient evidence of the presumed fact, but they are not required to do so — and that essential elements must be proved beyond a reasonable doubt. The presumption may not move the burden to the defendant and it may not weaken the prosecution's burden.

This is all by way of protecting the defendant's constitutional rights regarding the placement and strength of the burden of proof in a criminal case. Rule 303 writes defendant's rights into our statutes.

Even without this section of the evidence code, instructions of the sort involved here must take care not to shift the burden of proof to the defendant. The United States Supreme Court has said that the due process clause of the fourteenth amendment prohibits states from using language in jury instruction that relieves the state of the burden of persuasion—beyond-a-reasonable-doubt—of any essential element of a crime. The Supreme Court of Nebraska has followed that lead: the court must protect the assumption that the defendant in a criminal trial is innocent and that the burden of proving otherwise is on the state; if not, a conviction

82. Jasper, 237 Neb. at 766-67, 467 N.W.2d 863; Stalder, 231 Neb. at 905-06, 438 N.W.2d at 594-95. This problem is not, of course, limited to Nebraska. See infra note 84.

83. In addition to the discussion in the text, infra, see the following. “A trial judge in a criminal case involving a presumption relating to guilt must avoid two pitfalls. First, the judge must not tell the jury that the presumption is conclusive. Second, the judge must not tell the jury that the presumption shifts the burden of proof to the defendant.” State v. Janssen, 239 N.W.2d 564, 566 (Iowa 1976). “[T]he burden of persuasion as to the basic fact and the presumed fact always remains with the government.” 1 J. Weinstein & M. Berger, supra note 78, at 303-20.

84. Such an instruction is unconstitutional. Yates v. Aiken, 484 U.S. 211, 214 (1988); Francis v. Franklin, 471 U.S. 307, 313 (1985); Sandstrom v. Montana, 442 U.S. 510, 524 (1979). The use anywhere in the instructions of language that could cause a reasonable juror to place the burden of proof on the defendant is error. The error, however, may be harmless: if the trial record considered as a whole establishes the defendant's guilt beyond a reasonable doubt, then this constitutional error is harmless beyond a reasonable doubt and the conviction may be affirmed. Rose v. Clark, 478 U.S. 570, 576 (1986).
violates the defendant's constitutional due process guarantee of a fair trial.\textsuperscript{85}

Regarding taking care not to shift or weaken the burden of proof on an essential element of a crime, the Supreme Court of Nebraska has made it clear that the safest bet for trial courts is to use the language of Rule 303.\textsuperscript{86}

And, if I may state the point once again, these warnings apply not only to what we traditionally think of as presumptions, but also to criminal statutes that speak in terms of prima facie evidence.\textsuperscript{87} The reason for stating this again is to set up this warning regarding such a statute and jury instruction: In this situation, the court must take care not to instruct in the language of the statute which describes what constitutes "prima facie evidence," but rather to instruct in the words of Nebraska Rule 303. Rule 303 covers "statutory provisions that certain facts are prima facie evidence of other facts or of guilt." An instruction that incorporates the "prima facie evidence" language will violate Rule 303 unless the instruction also tells the jury (1) that it is not required to find the presumed fact and (2) that the basic fact, which is prima facie evidence of the presumed fact, must be proved beyond a reasonable doubt. The Rule makes this clear; \textit{State v. Stadler} makes this clear.\textsuperscript{88}

Furthermore, given the trial court's duty to instruct the jury properly on the applicable law of the case whether the trial court is instructed to do so or not, the court has to get this right even if there is no objection.\textsuperscript{89}

\footnotesize{\textsuperscript{85} Jasper, 237 Neb. at 765, 467 N.W.2d at 862-64. As Professor Josephine Potuto has written, "[u]nder the due process clause of the Constitution of the United States the state must prove beyond a reasonable doubt every element essential to constitute the crime charged. . . . The state therefore may not describe an element as material to a crime, presume the existence of the element, and shift to the defendant the burden to disprove it. PROPOSED NJI 2d: Criminal 2-1, at 18 (1989). See NEB. REV. STAT. § 27-201(7) (Reissue 1989), which similarly provides that the court "shall instruct the jury to accept as conclusive any fact judicially noticed" in a civil action and that they may, but are not required to, "accept as conclusive any fact judicially noticed" in a criminal case. \textit{Id.}"

\footnotesize{\textsuperscript{86} Jasper, 237 Neb. at 766, 467 N.W.2d at 863; Stalder, 231 Neb. at 906, 438 N.W.2d at 505 (stating "[w]e note the court's failure to follow the requirements of [Rule 303(3)] as plain error.")."


\textsuperscript{88} Stadler, 231 Neb. at 904-06, 438 N.W.2d at 505.

\textsuperscript{89} Id. at 904, 438 N.W.2d at 504. For more on this subject of presumptions against the accused in criminal cases, and particularly on instructing the jury on the subject, see the work of Professor Josephine Potuto and the Nebraska Supreme Court Committee on Practice and Procedure at PROPOSED NEBRASKA PATTERN JURY INSTRUCTIONS SECOND: CRIMINAL 2.1, 2.2 (1989).}
V. CONCLUSION

In conclusion, let me go back to something I said earlier in this article. I hold out no hope that one day soon this area of the law will be fixed. I do hold out hope that we can reverse course and, one case at a time, move towards clarity. When a case comes up involving something that is not a true presumption, let's not call it a presumption. If one case at a time we do not misuse the word presumption, one day we will wake up and this 350-year-old confusion will be gone.

APPENDIX A

NEBRASKA PRESUMPTIONS LISTED

To understand presumptions, one must be able to separate out four concepts:
I. True presumptions, which I define as civil-action presumptions that, in line with, if not exactly pursuant to, Nebraska Evidence Rule 301, shift the burden of proof.
II. Evidence sufficient to establish a prima facie case, that is, Nebraska common-law presumptions that shift the burden of production.
III. Legally permissible inferences from relevant evidence.
IV. Rules of law, which themselves come in many types:
   A. So-called "irrebuttable" or "conclusive" presumptions.
   B. The rules assigning initial burdens as between the plaintiff's case and the affirmative defenses, that is, the rules establishing which party has the initial burden of proof regarding each essential element of each issue in the case.
   C. Rules governing the interpretation of statutes.
   D. Rules governing the interpretation of legal documents.
   E. Presumptions imposed as a matter of constitutional law.

This Appendix will list a sampling of uses of the word presumption by the courts, the Unicameral, and regulatory bodies of Nebraska, grouped under the four concepts just listed. That will be followed by:
V. Uses of the word where it cannot be determined whether the presumption is a Rule 301 presumption or a common-law presumption.
VI. Situations where it has been held that no presumption is to be applied.
VII. Uses of the word that are not anything and, therefore, cannot be placed in any of the above categories.

90. See supra notes 58-63 and accompanying text.
I. PRESUMPTIONS THAT SHIFT THE BURDEN OF PROOF

The court has never identified a presumption as governed by Rule 301, that is, there are presumptions that the court has said shift the burden of proof, and, therefore, behave the way a Rule 301 presumption would, but Rule 301 has not been mentioned in connection with any of them.

BAILMENT — LOSS OF BAILED PROPERTY: “[Absent] statutory or contractual provisions to the contrary, once bailor proves delivery of property to bailee in good condition and failure to redeliver upon timely demand, the burden is irrevocably fixed upon bailee to prove . . . that he has exercised due care to prevent the loss, damage, or destruction of the property.” Knight v. H & H Chevrolet, 215 Neb. 166, 172, 337 N.W.2d 742, 745-46 (1983). This presumption shifts the burden of proof for reasons of “[l]ogic as well as fairness,” and without citing Rule 301. Id. at 171, 337 N.W.2d at 745. In an earlier case, the court had said that “‘loss or injury of bailed property while in the hands of the bailee ordinarily raises a presumption of negligence.’” Id. at 169, 337 N.W.2d at 744 (quoting Nash v. City of North Platte, 198 Neb. 623, 627, 255 N.W.2d 52, 54 (1977)). In Nash, however, the court had shifted only the burden of production, not the burden of proof. Knight overruled Nash with respect to its “holding as to the burden of proof.” Knight does not identify what it is doing as a burden-shift and it does not characterize the burden shifting device as a presumption. It does, however, say that if bailor proves two facts, the burden on the issue of due care is on the bailee: the court does not label it a presumption, but it has all of the features of a presumption. See Fenner, About Presumptions in Civil Actions, 17 Creighton L. Rev. 307, 315-16 (1984).


DEATH, OTHER THAN THE PROBATE CODE: Outside of the probate code, discussed immediately below, there is a “general presumption of death after a continued and unexplained absence from one’s home for seven years.” Fenner, About Presumptions in Civil Actions, 17 Creighton L. Rev. 307, 315 (1984) (citing Patrick v. Union Cent. Life Ins. Co., 150 Neb. 201, 203, 33 N.W.2d 537, 539 (1948)).

DEATH, PROBATE CODE: “[An] example of a statutory presumption is the probate code's presumption of death after five years of unexplained absence. Once the claimant convinces the trier of fact of the truth of the basic facts, five years of unexplained absence, then death is presumed and the burden of persuasion on the issue shifts. It
shifts from the claimant, who had the burden of proving death, to the other side, which now must persuade the trier of fact that the person involved is not dead.” Fenner, *About Presumptions in Civil Actions*, 17 CREIGHTON L. REV. 307, 314-15 (1984), (referencing NEB. REV. STAT. § 30-2207 (Reissue 1989)).

**DUE RECEIPT IN THE MAIL:** Evidence that an envelope was properly addressed, stamped, and mailed, raises a presumption that it was received in due course. This presumption shifts the burden of proof. Rule 301 is not mentioned. Troy & Stalder Co. v. Continental Casualty Co., 206 Neb. 28, 32-33, 290 N.W.2d 809, 812 (1980). *See also*, Waite Lumber Co. v. Carpenter, 205 Neb. 860, 863, 290 N.W.2d 655, 657 (1980); NJI 2d 2.14C comment (1989). Presumably, there is an equivalent presumption of delivery from evidence that a telegraph company was instructed to transmit a properly addressed message. *See* Perry v. German-American Bank, 53 Neb. 89, 91, 73 N.W. 538, 538 (1897).

**EASEMENTS, RIGHTS TO:** In cases involving prescriptive rights to easements, “where a claimant has shown open, visible, continuous, and unmolested use for the prescriptive period, the use will be presumed to be under a claim of right.” This presumption shifts the burden of proof to the land owner. Masid v. First State Bank, 213 Neb. 431, 435, 329 N.W.2d 560, 563 (1983). *Accord, e.g.*, Werner v. Schardt, 222 Neb. 186, 188, 382 N.W.2d 357, 359 (1986); Biegert v. Dudgeon, 213 Neb. 617, 620, 330 N.W.2d 897, 899-900 (1983).

**INTERSPOUSAL TRANSFER OF REAL PROPERTY:** See Appendix A, Part V, below.

**JURY SEQUESTRATION:** Where the sequestration of the jury in a criminal case is mandated by statute and it is shown that the jury was allowed to separate, without the consent of the defendant, error is established and the burden of proving whether or not the error was fatal to the conviction shifts to the state, which must prove it was harmless. State v. Robbins, 205 Neb. 226, 231, 287 N.W.2d 55, 58 (1980). Conceptually, this is a real Rule 301 presumption: the defendant has the burden of proving prejudicial error; on proof of the basic facts of separation in violation of a statute and lack of consent from defendant, that burden shifts to the state.

**LEGITIMACY OF CHILD BORN DURING WEDLOCK:** “Legitimacy of children born during wedlock is presumed and this presumption may be rebutted only by clear, satisfactory, and convincing evidence.” Younkin v. Younkin, 221 Neb. 134, 141, 375 N.W.2d 894, 898 (1985). This presumption is followed by a rule of incompetency: declarations by
the husband or the wife are not competent to bastardize a child born during wedlock. *Id. See also* NEB. REV. STAT. § 42-377 (Reissue 1988).

**Licensing of Insurance Agents:** If in excess of 10% of the total fees or commissions received by an insurance agent during one year come from specified policies insuring the agent, specified relatives of the agent, or the agent's employers or employees, said agent shall be presumed to have obtained his or her agent's license for the purpose of circumventing the Nebraska statute prohibiting insurance company rebates as inducement to insurance. NEB. REV. STAT. § 44-631.01 (Reissue 1988) (if in excess of 30%, the presumption is conclusive; see Appendix A, Part IV(A), below).

**Livestock, Injury to, on a Rail Carrier:** In an action to recover damages for loss of or injury to livestock, proof that the stock was in good condition when delivered to the railroad and was in bad condition when delivered by the railroad "shall be prima facie evidence of injury or damage by such railroad company, and the burden of proof shall rest upon the railroad company" to disprove its negligence. NEB. REV. STAT. § 74-709 (Reissue 1990). As a prima-facie-evidence burden-of-proof shifting presumption, this one is most unusual.91

**Real Estate, Possession of a Deed Presumes Delivery:** "[I]n the absence of opposing circumstances," whatever that means, possession of a deed by the grantee raises a presumption of delivery "and the burden of proof is on him who disputes this presumption." Hansen v. Ladenburger, 178 Neb. 571, 576, 134 N.W.2d 249, 253 (1965); Kellner v. Whaley, 148 Neb. 259, 264, 27 N.W.2d 183, 186-88 (1947)(quoting Roberts v. Swearingen, 8 Neb. 363, 371, 1 N.W. 305, 308 (1879)). Another Rule 301 presumption that pre-dates Rule 301.

**II. Presumptions that Shift the Burden of Production — Evidence Sufficient to Establish a Prima Facie Case**

**Public Assistance, Qualifying for by Gratuitously Transferring One's Home:** Meier v. State, 227 Neb. 376, 417 N.W.2d 771 (1988), discussed *supra* notes 30-34 and accompanying text.

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91. This part of Appendix A deals with the word "presumption" misapplied to "evidence sufficient to prove a prima facie case." There is at least one instance of the words "prima facie case" being misapplied to evidence that shifts the burden of proof. In an action to recover damages for loss of or injury to livestock, proof that the stock was in good condition when delivered to the railroad and was in bad condition when delivered by the railroad "shall be prima facie evidence of injury or damage by such railroad company, and the burden of proof shall rest upon the railroad company" to disprove its negligence. NEB. REV. STAT. § 74-709 (Reissue 1990). See Appendix A, Part I, "Livestock, Injury to, on a Rail Carrier."
UNDUE INFLUENCE: The basic facts that give rise to a presumption of undue influence in the making of a will or transferring of a deed are not specific or definite or uniform from case to case. Estate of McGowan, 197 Neb. 596, 604, 250 N.W.2d 234, 239 (1977); Scholting v. Scholting, 183 Neb. 850, 860, 164 N.W.2d 918, 925-26 (1969). Nonetheless, there is such a presumption that applies "if the facts and circumstances of a case show such a confidential, fiduciary or trust relation that it would be inequitable to sustain the deed [or the will] in question." Scholting, 183 Neb. at 860, 164 N.W.2d at 925-26. This presumption shifts the burden of going forward with the evidence. Estate of Novak, 235 Neb. 939, 947, 458 N.W.2d 221, 224 (1990); McGowan, 197 Neb. at 604, 250 N.W.2d at 239; Scholting, 183 Neb. at 860, 164 N.W.2d at 925-26.

UNIFORM COMMERCIAL CODE: In the Uniform Commercial Code, "'Presumption' or 'presumed fact' means that the trier of fact must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its nonexistence." NEB. REV. STAT. U.C.C. § 1-201 (Reissue 1980). This, of course, is not a misuse of the word presumption; it is simply a different statutory scheme enacting a different kind of presumption. A turn of events anticipated and allowed by Rule 301. See infra note 4.

III. LEGALLY PERMISSIBLE INFERENCES

FAILURE OF PARTIES IN CIVIL CASES TO TESTIFY TO MATTERS PECULIARLY WITHIN THEIR KNOWLEDGE RAISES INference TESTIMONY WOULD BE AGAINST INTEREST: "In the trial of a civil action, after the plaintiff has introduced evidence tending to prove his case, if the defendant fails to testify to matters peculiarly within his knowledge necessary to his defense, a presumption exists that his testimony, if produced, would militate against his interest, which presumption may be considered by the court or jury trying the case in determining facts proved." First National Bank v. First Cadco Corp., 189 Neb. 553, 573, 203 N.W.2d 770, 783 (1973), appeal after remand, 191 Neb. 678, 217 N.W.2d 93 (1974). See NJI 2d 1.51 (1989).

92. C. WRIGHT & K. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5124, at 587 (1977). "[T]he chief thing that [a presumption] is not is an inference." Gausewitz, Presumptions in a One-Rule World, 5 VAND. L. REV. 324, 326 (1952). "[A]n inference is not a presumption because an inference is not a matter or rule of law but a matter or rule of logic and experience." Id. With legally permissible inferences, "[t]he fact decided is properly referred to as the 'inferred fact' and not the 'presumed' fact." CONTINUING LEGAL EDUCATION COMMITTEE, NEBRASKA STATE BAR ASS'N, EVIDENCE § 2-1 (D. Dow & J. North ed. 1969).
IV. RULES OF LAW

A. "IRREBUTTABLE OR CONCLUSIVE PRESUMPTIONS"93

AGENT’S KNOWLEDGE: An agent has a duty to communicate to his or her principal all facts concerning the agency relationship and is "conclusively presumed" to have done so. Professional Recruiters, Inc. v. Oliver, 235 Neb. 508, 517, 456 N.W.2d 103, 108-09 (1990); Nichols v. Ach, 233 Neb. 634, 636, 447 N.W.2d 220, 223 (1989); Modern Woodmen of America v. Colman, 68 Neb. 660, 664, 94 N.W. 814, 816 (1903).

CONFIDENCES SHARED WITHIN A LAW FIRM: Confidences possessed by an attorney are presumptively possessed by the other members of the attorney’s firm. State ex rel. Freezer Services, Inc. v. Mullen, 235 Neb. 981, 988, 458 N.W.2d 245, 250 (1990) (when an attorney leaves one firm for another, this presumption has two levels: the attorney is presumed to have acquired confidences at the first firm, and the attorney is presumed to share those confidences with the new firm). As a general rule, it seems this presumption is rebuttable. The burden to rebut seems to be on the attorney, not on the party moving for disqualification. This may be a true presumption: once the party moving to disqualify establishes that the attorney was with firm number one; firm number one represented party number one; the attorney moved to firm number two; firm number two represents party number one’s opponent; then the burden shifts from the party moving for disqualification to the attorney, who must prove the nonexistence of a conflict of interest. However, on the facts of this case, “We therefore hold that when an attorney who was intimately involved with the particular litigation, and who has obtained confidential information pertinent to that litigation, terminates the relationship and becomes associated with a firm which is representing an adverse party in the same litigation, there arises an irrebuttable presumption of shared confidences, and the entire firm must be disqualified from further representation.” Id. at 993, 458 N.W.2d at 253.

LICENSING OF INSURANCE AGENTS: If in excess of 30% of the total fees or commissions received by an insurance agent during one year come from specified policies insuring the agent, specified relatives of the agent, or the agent’s employers or employees, said agent “shall be conclusively presumed to have obtained” his or her agent’s license for the purpose of circumventing the Nebraska statute prohibiting insurance company rebates as inducement to insurance. NEB. REV. STAT. § 44-631.01 (Reissue 1988) (if in excess of 10%, but less than 30%, the presumption is rebuttable; see Appendix A, Part I, above).

93. C. Wright & K. Graham, Jr., supra note 10, § 5122 at 562, § 5124 at 588.
B. INITIAL ASSIGNMENT OF THE BURDEN OF PROOF\textsuperscript{94}

**Administrative Agency Action:** "A presumption of validity attaches to the actions of administrative agencies. While the presumption is rebuttable, the burden of proof rests with the party challenging the agency's action." United Telephone Co. v. City of Kimball, 230 Neb. 747, 750, 433 N.W.2d 502, 504 (1988).

**Appellate Procedure, Effective Assistance of Counsel, Criminal Case:** In a criminal case, "if a conflict of interest arises in the representation of more than one defendant, the mere existence of such conflict raises a presumption of prejudice and reversal is automatic." State v. Bishop, 207 Neb. 10, 16, 295 N.W.2d 698, 702 (1980). Accord, e.g., State v. Anderson, 229 Neb. 427, 432, 427 N.W.2d 764, 768 (1988). See, e.g., State v. Stevenson, 200 Neb. 624, 632, 264 N.W.2d 848, 853 (1978). This is simply a statement of the essential elements of an appeal on the grounds of ineffective assistance of counsel: if appellant establishes that the same attorney represented him or her and at least one other defendant in the same criminal trial and that there was an actual conflict so as to result in conduct by counsel detrimental to the defense, the appeal is won, the conviction is reversed and the case is remanded.

**Appellate Procedure, Evidence Considered Below:** On appeal of a bench trial, the appellate court will presume that the trial court considered only the evidence that was competent and relevant, State v. Jahan-Shahi, 237 Neb. 543, 545, 466 N.W.2d 795, 796 (1991), and that the trial court decided controverted facts in favor of the winning party, Bruning Seeding Co. v. McArdle Grading Co., 232 Neb. 181, 182, 439 N.W.2d 789, 790 (1989). There are many more cases supporting this presumption. As my research assistant, Matt Effken, said: "This 'presumption' comes up more often than the sun." This is not really a presumption: it really is no more than a rule of law that says: On appeal, burden of persuasion is on appellant.\textsuperscript{95}

**Appellate Procedure, Trial Court Resolution of Questions of Fact:** "In an action at law, tried without a jury, [the appellate court] . . . will presume that the trial court resolved any controverted facts


\textsuperscript{95} As this article was going to press, the Supreme Court handed down State v. Lomack, 239 Neb. 368, — N.W.2d — (1991). Judge Shanahan's opinion for the court recognizes that the so-called "'presumption' that a trial court disregarded inadmissible evidence in a case tried without a jury is not a presumption, i.e., a fact inferred from another known or proved fact or facts, but is really a principle of appellate procedure which requires an appellant to show that the trial court actually used erroneously admitted evidence for the judgment or decision against the appellant." Id. at 370, — N.W.2d at —.
in favor of the successful party.” Norfolk Iron & Metal Co. v. Behnke, 230 Neb. 414, 419, 432 N.W.2d 18 (1988). This simply assigns the burden on appeal to the appellant.

**Arbitration:** It is presumed that arbitrators followed the arbitration agreement. Simpson v. Simpson, 194 Neb. 453, 458, 232 N.W.2d 132, 137 (1975); Sides v. Brendlinger, 14 Neb. 491, 495, 17 N.W. 113, 114 (1883). This simply says that the one challenging an arbitration award has the burden of proof. There is no burden shifting involved, and no real presumption.

**Bridges Presumed Safe:** In Hansmann v. County of Gosper, 207 Neb. 659, 300 N.W.2d 807 (1981), the syllabus by the court contains this entry: “Bridges: Presumptions. A person using a bridge has a right to assume that the bridge is sufficient in the absence of knowledge that it is unsafe.” This is really just a roundabout way of saying that contributory negligence and assumption of the risk are affirmative defenses. If the driver proves the negligence of the party responsible for the bridge, then that party has the burden to plead and prove affirmative defenses. It also expresses this rule: “‘A person has no duty to anticipate negligence on the part of others, and, in the absence of notice or knowledge to the contrary, is entitled to assume, and to act on the assumption, that others will exercise ordinary care.’” NJI 2d 3.01 authorities (1989) (quoting Matson v. Dawson, 185 Neb. 686, 692, 178 N.W.2d 588, 592 (1970)).

**Checking Accounts Are General Deposit Accounts:** The Court's headnote to Miracle Hills Centre Limited Partnership v. Nebraska National Bank, 230 Neb. 899, 899, 434 N.W.2d 304, 305 (1989), under the heading “Presumptions,” states: “Absent evidence to the contrary, it will be presumed that a deposit to a customer's checking account is a general deposit, not a special deposit.” The opinion, however, does not use the language of presumptions. It says the burden of proving a deposit was a special deposit is on the party who makes the claim. In the headnote, this “presumption” sounds like a common-law presumption, shifting the burden of production. In the text, however, it is a rule of law assigning the initial burden of proof to the party who raises the issue.

**Child Support, Persistence of Amount:** If a child support award for multiple children is given as a single amount payable monthly, then the full amount of the award is presumed to continue until the youngest of the children reaches the age of majority. The only way to change this is to have the court that entered the decree modify it on the basis of changed circumstances. Ferry v. Ferry, 201 Neb. 595, 601, 271 N.W.2d 450, 454 (1978) (record here contains “no evidence to
rebut the presumption"); In re Application of Miller, 139 Neb. 232, 235, 27 N.W.2d 91, 92 (1941). This is a rule of law, not a presumption. The amount of such an award may only be reduced by court decree based on a change in circumstances. Ferry, 201 Neb. at 601, 271 N.W.2d at 454.

**CONSENT TO MEDICAL TREATMENT:** Absent fraud or misrepresentation, consent to medical treatment is presumed. *E.g.*, Flynn v. Bausch, 238 Neb. 61, 64, 469 N.W.2d 125, 128 (1991); Jones v. Malloy, 226 Neb. 559, 564, 412 N.W.2d 837, 841 (1987) (chiropractor); Mosslander v. Armstrong, 90 Neb. 774, 780-81, 134 N.W. 922, 925 (1912). This is a statement of the rule of law that lack of consent is an element of plaintiff’s case; all burdens remaining on plaintiff throughout; two ways plaintiff can meet the burden are by proving either fraud or misrepresentation.

**DECEASED EXERCISED DUE CARE:** Absent evidence on the subject, it will be presumed that a deceased was exercising reasonable care. *NJI* 2d 3.06 (1989); Stauffer v. School District, 238 Neb. 594, 597-98, 473 N.W.2d 392, 395 (1991); Oldenburg v. State, 221 Neb. 1, 6, 374 N.W.2d 341, 344 (1985) (rule applies beyond deceased to others who cannot testify through lack of memory or other disability). This is a rule of law that sets “who should proceed with the evidence and who wins on the point if no evidence is introduced.” *NJI* 2d 3.06 comment (1989).

**FIRE NOT ARSON:** “[T]here is a presumption that a fire is not of criminal origin.” State v. McDonald, 230 Neb. 85, 90, 430 N.W.2d 282, 286 (1988). *Accord*, Harms v. State, 147 Neb. 857, 860, 25 N.W.2d 287, 288 (1946). These are criminal arson prosecutions and the “presumption” is just a recognition that the state has the burden of proving all of the essential elements of the crime.


**INTENDED RESULTS OF ACTIONS — CRIMINAL CASES:** This is a bit different than “presumptions” assigning the initial burden of proof. This use of the word states the elements of the prosecutor’s case in criminal actions. An actor is presumed to intend the obvious and probable consequences of his or her actions. For general intent crimes, this is a “conclusive presumption,” in other words, intent is not an element of the crime. For specific intent crimes, it is a rebut-
table presumption; it satisfies the prosecutor’s burden of production; in other words, intent is an element of the crime. State v. Vosler, 216 Neb. 461, 468, 345 N.W.2d 806, 811 (1984). This is just another way of saying that liability attaches for general intent crimes on the occurrence of some prohibited outcome, whereas for specific intent crimes the actor must intend some result beyond the action taken. (Regarding specific intent crimes, there can be constitutional problems with jury instructions that use the word presumption. This is discussed above, in Part IV(E) of the main text to which this is an Appendix.)

JURORS PRESUMED COMPETENT: “[T]he competency of a juror is generally presumed, and the burden is on the challenging party to establish otherwise.” State v. Rice, 231 Neb. 202, 204, 435 N.W.2d 889, 892 (1989). This simply assigns the initial burden regarding jury challenges.

MARRIAGE: “‘A marriage is presumed valid, and the burden of proof is upon the party seeking annulment.’” Edmunds v. Edwards, 205 Neb. 255, 265, 287 N.W.2d 420, 425 (1980). This simply assigns the burden of proof to one who challenges the validity of a marriage. There is no proof of basic facts followed by a shift of one burden or another to another party. Whoever files the suit to challenge the validity of a marriage has the burden from the beginning.

SERVICES RENDERED TO FAMILY MEMBERS ARE PERFORMED GRATUITOUSLY: “Where there is a family relationship between a decedent and a claimant seeking compensation for services rendered the deceased, the claimant must rebut by competent evidence the presumption that the services were rendered gratuitously.” Estate of Krueger, 235 Neb. 518, 523, 455 N.W.2d 809, 813 (1990); Estate of Haddix, 211 Neb. 814, 816, 320 N.W.2d 745, 747 (1982). Accord Estate of Baker, 144 Neb. 797, 801, 14 N.W.2d 585, 589 (1944). This is not a presumption. It is a statement of a rule of law that the one claiming the money has the burden of proving that he or she was to be paid: the burden of proving the contract is on the one who claims it exists. See Estate of Baker, 144 Neb. at 801, 14 N.W.2d at 589.

C. RULES GOVERNING THE INTERPRETATION OF STATUTES

ACQUIESCENCE IN JUDICIAL CONSTRUCTION OF STATUTE: “[W]here a statute has been judicially construed and that construction has not evoked an amendment, it will be presumed that the Legislature has acquiesced in the court’s determination of its intent.” Muller v. Thaut, 230 Neb. 244, 250, 430 N.W.2d 884, 888 (1988).

CODIFICATION OF JUDICALLY DEFINED CONCEPT: “When Congress codifies a judicially defined concept, it is presumed, absent an express
statement to the contrary, that Congress intended to adopt the interpretation placed on that concept by the courts.” Davis v. Michigan Department of Treasury, 489 U.S. 803, 813 (1989).

FEDERAL PRE-EMPTION OF STATE LAW: “[A]ppellees must overcome the presumption against finding pre-emption of state law in areas traditionally regulated by state law.” California v. ARC America Corp., 490 U.S. 93, 101 (1989). This is simply a particular expression of the general rule of statutory interpretation that when Congress is acting at the edge of its authority, unless its intent to push the edge is clear, the court will prefer an interpretation of the statute that pulls away from the edge.

TAX EXEMPTIONS: Because the state's power to tax is presumed, tax exemption provisions are strictly construed; they will not be extended by judicial construction. Ev. Lutheran Good Samaritan Society v. Buffalo County Board of Equalization, 230 Neb. 135, 141, 430 N.W.2d 502, 505 (1988).

D. RULES GOVERNING THE INTERPRETATION OF DOCUMENTS

CONTRACTS, TIME FOR PERFORMANCE: “[W]here a contract is silent with respect to time of performance, a reasonable time for performance will be presumed.” Gustav Thieszen Irrigation Co. v. Meinberg, 202 Neb. 666, 669, 276 N.W.2d 664, 666 (1979). This is a term imposed by law. NJI 2d 15.40 (1989).

EMINENT DOMAIN, CONDEMNATION PETITION: “It is a principle of law, or a 'presumption,' in eminent domain that a condemnor will exercise all rights acquired and use the property appropriated to the full extent.” Sorensen v. Lower Niobrara Natural Resources District, 221 Neb. 180, 199, 376 N.W.2d 539, 552 (1985). “This means that '[a]ny limitation of a right acquired and consequent use must be expressed in [the] condemnation petition.' Id. at 197, 376 N.W.2d at 551. The plaintiff’s compensation is to be based on the full extent of the taking, the full extent of the rights actually acquired by the defendant. Id. at 194, 376 N.W.2d at 549. Evidence that the defendant will exercise less than all of the right acquired is inadmissible to the issue of compensation. Id. at 197, 376 N.W.2d at 552.” NJI 2d 13.01 comment (1989).

MORTGAGES: The intent of the mortgagee controls the construction of a mortgage and, if no intent is expressed, the court will presume the construction most favorable to the mortgagee. Dupuy v. Western State Bank, 221 Neb. 230, 233, 375 N.W.2d 909, 912 (1985).

TENANCY IN COMMON: “‘A conveyance to two or more persons not acting in a fiduciary capacity will be presumed to create a tenancy in
common, and not a joint tenancy.'" Volkmer, *Nebraska Law of Concurrent Ownership*, 13 CREIGHTON L. REV. 513, 520 (1979) (quoting Maxwell v. Higgins, 38 Neb. 671, 671, 57 N.W. 388, 388 (1894)). *Accord* Estate of Steppuhn, 221 Neb. 329, 333, 377 N.W.2d 83, 86 (1985). This is simply a rule for the interpretation of ambiguous documents of conveyance. (As Professor Volkmer’s article points out, this “presumption” has not been limited to conveyances of real property.)

**WILLS, MEANING OF WORDS:** The testator is presumed to understand the meaning of the words used in the will. Youngblood v. The American Bible Society, 227 Neb. 472, 475, 418 N.W.2d 554, 556 (1988); Estate of Schmitz, 214 Neb. 28, 31, 332 N.W.2d 666, 668 (1983).

**E. PRESUMPTIONS IMPOSED AS A MATTER OF CONSTITUTIONAL LAW**

**PRIOR RESTRAINTS ON SPEECH PRESUMED UNCONSTITUTIONAL:** Prior restraints on speech are presumed to be unconstitutional. J.Q. Office Equipment Co. v. Sullivan, 230 Neb. 397, 399, 432 N.W.2d 211, 213 (1988); State v. Simants, 194 Neb. 783, 794, 236 N.W.2d 794, 801 (1975) (“a mere presumption”), *rev’d sub nom*; Nebraska Press Association v. Stuart, 427 U.S. 539 (1976). This is much like a true Rule 301 presumption: when state acts are in question, the burden starts with the challenger; if the challenger proves the state act is a prior restraint on speech, then the burden of proof shifts to the state to justify what it has done. It is not a true presumption, however, because the decision regarding this first amendment burden-of-proof shift is made by the judge, as a matter of law; the question of whether the basic facts are proven is not one for the jury. This burden shift is a function of the compelling state interest test as applied to the first amendment by the United States Supreme Court as a matter of federal constitutional law.


**V. BURDEN-OF-PROOF SHIFTING? OR BURDEN-OF-PRODUCTION SHIFTING?**

**CERTIFICATE OF PUBLIC NECESSITY:** This case involved an applicant’s
authority to transport anhydrous ammonia in bulk, by truck. Applicant had operated in Nebraska "under color of right," believing it had all of the authority it needed from the federal government. Its application for authority from the state was denied by the Public Service Commission. The Supreme Court of Nebraska reversed the Public Service Commission and, in the process, found this presumption: when an applicant has been operating the proposed service under color of authority, it will be presumed that the public convenience and necessity require continuation of the service in question. Dilts Trucking, Inc. v. Peake, Inc., 197 Neb. 459, 471-72, 249 N.W.2d 732, 738-39 (1977). The commission was reversed and the case remanded without saying which burden was shifted by this presumption.

CORPORATE OFFICERS' ACTS: The acts of officers and agents of a corporation, including its board of directors, that "fall within the scope of the powers conferred upon and usually exercised by them as part of the ordinary business of the corporation" are presumed to be authorized by the corporation. Val-U Construction Co. v. Contractors, Inc. 213 Neb. 291, 294, 328 N.W.2d 774, 776 (1983). See Koepplin v. Pfister Hybrid Co., 179 Neb. 423, 426, 138 N.W.2d 637, 639 (1965).

FIREFIGHTER, DEATH OR DISABILITY OF: Whenever any firefighter who has served five years dies or is disabled as a result of hypertension or heart or respiratory defect or disease, there is a rebuttable presumption that the death or disability resulted from cause while in the line of duty. NEB. REV. STAT. § 18-1723 (Reissue 1987).

HISTORICAL WORKS, BOOKS OF SCIENCE OR ART, AND PUBLISHED MAPS OR CHARTS: "Historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, are presumptive evidence of facts of general notoriety or interest." NEB. REV. STAT. § 25-1218 (Reissue 1989).

INSURANCE CONTRACT, FORMATION OF: Approval of application, delivery of policy, and acceptance of premium give rise to a presumption that all conditions precedent to the formation of an insurance contract have been met. Ortega v. North American Co. for Life & Health Insurance, 187 Neb. 569, 573, 193 N.W.2d 254, 256-57 (1971). This seems to be a true Rule 301 presumption. I hesitate to classify it as such because the cases on point were decided prior to the effective date of Rule 301. At that time, it seemed only to shift the burden of production.

INTERSPOUSAL TRANSFER OF REAL PROPERTY: A conveyance of real property from one spouse to another is presumptively fraudulent as to existing creditors. First National Bank v. Bunn, 195 Neb. 829, 241 N.W.2d 127 (1976). Nebraska Evidence Rule 301 did not apply at the
time of the trial of this case. At one point, the court states that this presumption disappears once rebuttal evidence is introduced. *Id.* at 831, 241 N.W.2d at 128. At another point, it says that the presumptively invalid transfer will be set aside unless the good faith of the transaction is established by a preponderance of the evidence, which is a shift in the burden of proof. Theoretically, this seems to be a true Rule 301 burden-of-proof-shifting presumption. That seems to be borne out by a later case, United States National Bank v. Rupe, 207 Neb. 131, 296 N.W.2d 474 (1980): “A conveyance of the interest of one spouse to the other is presumptively fraudulent as to existing creditors unless the good faith of the transaction is established by a preponderance of the evidence.” *Id.* at 134, 296 N.W.2d at 476. Though the court did not determine who had the burden of persuasion, the quotation does indicate that the burden of proof is shifted to the party against whom the presumption operated. *But see* Meier v. State, 227 Neb. 376, 417 N.W.2d 234 (1977) (discussed in Part II(E)(1) of the main text, which involves a similarly worded regulatory presumption and finds that it shifts only the burden of production).

**MOTOR VEHICLE WARRANTIES:** If the manufacturer or dealer is unable to conform a motor vehicle to its warranty after a reasonable number of attempts, the buyer must be given another car or given his or her money back. *Neb. Rev. Stat.* § 60-2703 (Reissue 1988). There is a presumption that a reasonable number of attempts have been made on proof that within the earlier of the warranty term or one year: the same nonconformity has been subject to repair four times and the nonconformity continues; or repairs have kept the vehicle out of service for a cumulative total of at least forty days. *Neb. Rev. Stat.* § 60-2704 (Reissue 1988).

**OWNERSHIP OF PERSONAL PROPERTY:** “There is a presumption of ownership created by the fact that an individual has exclusive possession of personal property. . . . Evidence must be offered to overcome the presumption.” In re Estate of Severns, 217 Neb. 803, 810, 352 N.W.2d 865, 870 (1984).

**VI. SITUATIONS WHERE IT HAS BEEN HELD THAT NO PRESUMPTION IS TO BE APPLIED**

**AIRPLANE CRASH — WHO WAS PILOTING THE PLANE?:** Plaintiff argued that the pilot of a plane during takeoff be presumed to be the pilot at the time of an unexplained crash during the flight. The court rejected the presumption, on the facts of the case, as speculation; the court seemed to be saying that, on the facts, there is no reasonable basis for a presumption. The facts were that it was a small plane equipped with dual controls, both persons in the plane were pilots,
and the crash occurred more than an hour after takeoff. The widow of the one not flying at takeoff had sued the widow of the one flying at takeoff. Mitchell v. Eyre, 190 Neb. 182, 206 N.W.2d 839 (1973).

**Branded Animals:** Where title to branded animals is in issue, Neb. Rev. Stat. § 54-109 (Reissue 1988) provides that the brand "shall be prima facie evidence of the ownership of such animals by the person possessing such animals." (Yes, that is what it says!) The effect of this statute "is not to create a true presumption of ownership, but to shift the burden of going forward with the evidence." Broken Bow Production Credit Association v. Western Iowa Farms Co., 232 Neb. 357, 361, 440 N.W.2d 480, 482 (1989). This question arose because the predecessor to this statute provided a brand was prima facie evidence of ownership by the owner of the brand and the court held that this predecessor statute did create a presumption, Whiteside v. Whiteside, 159 Neb. 362, 371, 67 N.W.2d 141, 147 (1954), that shifted the burden of proof in true Rule 301 fashion (though the cases on point preceded the enactment of Rule 301). Coomes v. Drinkwater, 181 Neb. 450, 456, 149 N.W.2d 60, 64 (1967). The old statute created a presumption, the new statute does not. Why? Perhaps because the new statute is an "absolute absurdity." Broken Bow Production Credit Association, 159 Neb. at 363, 440 N.W.2d at 484 (Shanahan, J., dissenting).

**Child Custody:** The former presumption granting custody of to the mother of children born out of wedlock has been abandoned. There is no presumption as to custody in such a case. State ex rel. Laughlin v. Hugelman, 219 Neb. 254, 260, 361 N.W.2d 581, 583-84 (1985).

**Negligence is Never Presumed:** Negligence is never presumed. Burns v. Veterans of Foreign Wars, 231 Neb. 844, 851, 438 N.W.2d 485, 490 (1989); Kliewer v. Wall Construction Co., 229 Neb. 867, 871, 429 N.W.2d 373, 376 (1988); Gilbert v. Archbishop Bergan Mercy Hospital, 228 Neb. 148, 156, 421 N.W.2d 760, 765 (1988). See also, NJI 2d 2.01 and Part V of the Authorities thereto (1989). That is to say, the party alleging negligence, accident, and injury must prove all three and proof of accident or injury or both does not shift any burdens regarding the issue of negligence.

**VII. Uses of the Word That Are Not Anything And, Therefore Cannot Be Placed in Any of the Above Categories**

**Statements Taken from Injured Adverse Party:** There is a rebuttable presumption that a statement taken from an injured adverse party, within 30 days of the date of the injuries, was taken under duress. "[This presumption] may be rebutted by evidence," says the
statute. "It shall be deemed rebutted as a matter of law if the ad-
verse person taking the statement discloses" whom he or she repre-
sents, that the injured person may have counsel present, and that a
free copy of the statement is available. NEB. REV. STAT. § 25-12,125
(Reissue 1989). (I put this in this category because in so far as I can
see this presumption is meaningless.)

TESTAMENTARY CAPACITY: If the proponent of a will makes a prima
facie case of lawful execution of the will and testamentary capacity of
the testator, then the contestant has the burden to produce evidence
sufficient to overcome the presumption arising therefrom that the
will is valid. If the contestant does so, the burden "devolves upon the
proponent." Estate of Camin, 212 Neb. 490, 496-97, 323 N.W.2d 827,
366, 372 (1948)); Estate of Schoch, 209 Neb. 812, 815, 311 N.W.2d 903,
906 (1981). This "presumption" really is not anything and, therefore,
cannot be placed in one of the above categories. This "presumption"
does no more than awkwardly state the following: In the ordinary
case, regarding each essential element of the case and the affirmative
defenses, the burden of proof and the burden of going forward (a.k.a.
burden of production) are assigned to a party; once that party makes
a prima facie case, the burden of going forward shifts to the opposing
party; if the opposing party introduces no evidence, he or she loses,
and if the opposing party produces some evidence, the issue goes to
the trier of fact, with the burden of proof still where it was when it
started.