ABOUT PRESUMPTIONS IN CIVIL ACTIONS

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A presumption shifts the burden of persuasion to the party against whom it operates. Paraphrasing the Nebraska Unicameral.¹

The presumption that the board of equalization has faithfully performed its official duties disappears once evidence to the contrary is introduced. Paraphrasing the Nebraska Supreme Court.²

I. INTRODUCTION

The Nebraska legislature has said that in civil cases presumptions shift the burden of persuasion. The Nebraska Supreme Court regularly says that certain presumptions disappear from the case once contrary evidence is introduced. That which has shifted the burden of persuasion, can hardly be said to have disappeared from the case. This apparent conflict provides the impetus for this piece.

More precisely: in 1975 the Unicameral said that

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.³

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1. NEB. EVID. R. 301, NEB. REV. STAT. § 27-301 (Reissue 1979).
2. This paraphrases numerous cases from 1908, see text following note 54 infra, through 1983. For the cases decided during the time covered by this survey of Nebraska law, see note 4 infra.
3. NEB. EVID. R. 301, NEB. REV. STAT. § 27-301 (Reissue 1979). This rule applies to all presumptions in civil cases in Nebraska except those controlled by federal law. In that situation, see NEB. EVID. R. 302, NEB. REV. STAT. § 27-302 (Reissue 1979). Regarding presumptions against the accused in a criminal trial, see NEB. EVID. R. 303, NEB. REV. STAT. § 27-303 (Reissue 1979); NEB. JURY INSTRUCTION 14.07 (1969). See also, e.g., County Court of Ulster County v. Allen, 442 U.S. 140 (1979). This article does not cover those two situations, except incidentally.

On many occasions since, the Supreme Court has made statements similar to this:

There is a presumption that a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action, which presumption remains until there is competent evidence to the contrary. Once there is competent evidence on appeal to the contrary, the presumption disappears. . . . 4

Saying that evidence to the contrary causes a presumption to disappear indicates that the presumption has shifted the burden of going forward with the evidence. The statute, however, is quite clear: It is the burden of ultimate persuasion which is shifted. 5

Again, can a device which shifts the burden of proof be said to have disappeared upon receipt of evidence to the contrary?

II. A FIRST GLANCE

Suspecting the worst, is the court simply continuing to apply the old rule, in spite of the newer statute? Like the old shoe, the old rule is often so comfortable that breaking in the new one hardly seems worth the effort. And perhaps the old rule was created by the court itself, and is deemed scholarly through pride of authorship?

One glance confirms these suspicions. The old rule was a common-law rule and it was this: A presumption shifted the burden of going forward with the evidence and once opposing counsel put on some evidence on a presumed point, the presumption disap-


Within the period of less than one year which is covered by this year's survey of Nebraska law, that is, between July 1, 1982 to May 31, 1983, the Nebraska Supreme Court used this very same presumption five times. In addition to Beynon it was used in these cases: Richman Gordman Stores Inc. v. Board of Equalization, 214 Neb. 470, 472-73, 334 N.W.2d 447, 449 (1983); Arneson v. Cedar County, 212 Neb. 62, 64, 321 N.W.2d 427, 428 (1982); Hastings Bldg. Co. v. Board of Equalization, 212 Neb. 847, 851, 326 N.W.2d 670, 672 (1982); Potts v. Board ofEqualization, 213 Neb. 37, 43, 328 N.W.2d 175, 178 (1982). See also Beynon Farm Prod. Corp. v. Board of Equalization, 213 Neb. 815, 819, 331 N.W.2d 531, 534 (1983) ("In the absence of other evidence, proof that the guidelines provided by the Tax Commissioner were applied correctly raises a presumption that the assessment is legally proper."); Famers Co-op Ass'n v. Boone County, 213 Neb. 763, 771, 332 N.W.2d 32, 38 (1983) (same as Beynon Farm Prod. Corp., but without the word "correctly"); In re Assessment of Omaha, L & B. Ry., 213 Neb. 71, 75, 327 N.W.2d 108, 111 (1982 (per curiam) (same presumption applies to state board's valuation of railroad property).

5. This is in contrast to Rule 301 of the Federal Rules of Evidence under which a presumption shifts the burden of production, but not the burden of persuasion.
The old rule fits exactly the statement quoted above from the 1983 case of Beynon v. Board of Equalization.

III. A CLOSER LOOK

One glance confirms the suspicion that the court is ignoring the statutory change in the rule on presumptions. The question, however, is worth more than a glance, and a closer look... well, a closer look leads to a different conclusion.

A. RULE 301'S PRESUMPTION AND BEYNON'S LANGUAGE ARE NOT NECESSARILY INCONSISTENT

The presumption in the statute, Rule 301 of the Nebraska evidence code, is a burden shifting device. The party taking advantage of the presumption shifts his burden of ultimate persuasion to the party against whom the presumption is directed.

In Beynon, the presumption works to the advantage of the defendant, the board of equalization, which never had the burden of persuasion in the first place. The presumption is directed against the plaintiff, the assessed taxpayer, and the burden has been the taxpayer's from the beginning. In other words, the burden of persuasion begins on the plaintiff; if the defendant brings up this burden shifting device, the burden remains on the plaintiff; and whether or not the plaintiff, in turn, introduces contradictory evidence, the burden stays with the plaintiff—right where it has been all along.

6. Prior to August 24, 1975, the effective date of the Nebraska Evidence Rules, the rule was that a presumption rebutted, disappeared, and the parties were left with their original burdens of proof. E.g., Estate of McGowan, 197 Neb. 596, 602, 250 N.W.2d 234, 238 (1977); In re Estate of Drake, 150 Neb. 568, 577, 35 N.W.2d 417, 423 (1948); Reynolds v. State, 58 Neb. 49, 52, 78 N.W. 483, 484 (1899); NEB. JURY INSTRUCTION 2.14 (1969); CONTINUING LEGAL EDUCATION COMMITTEE, NEBRASKA STATE BAR ASSOCIATION, EVIDENCE §§ 2-1 to 2-25 (D. Dow & J. North ed. 1966); Henderson, The Nebraska Rule of Evidence, 1977: Chapter 3, Presumption and Impeachment (NCLE, Inc.) ("[W]hile the presumption disappears, an inference may remain.") See also Fed. R. Evid. 301 (discussed note 5 supra).

The old rule was the "bursting bubble" theory. The presumption was the bubble; the "some evidence" was the pin. The 1975 statute changed both the rule and the simile. The new rule is that the presumption shifts the burden of proof; the more appropriate simile may be the lead balloon.


8. This would not be so unusual a result. See Allen, Presumptions in Civil Actions Reconsidered, 66 Iowa L. Rev. 843, 845 n.15 (1981).

9. The county board of equalization makes an initial determination as to the value of the property taxed. Once the board makes that determination, it stands unless it is successfully appealed to the district court. The hearing on appeal is de novo. Richman Gordman Stores, Inc. v. Board of Equalization, 215 Neb. 373, 381, 338 N.W.2d at 763 (1983). See also Farmers Co-op Ass'n, 213 Neb. at 771, 332 N.W.2d at 37.
How can we say that the presumption in **Beynon** disappears when contrary evidence is introduced? Here is one explanation: Under Nebraska’s general rule, the lingering effect of a true presumption is that it shifts the burden of persuasion to the party against whom it operates. What **Beynon** calls a presumption operates against the side which already has the burden of persuasion. Therefore, it has no lingering effect. And because it has no lingering effect, it is said to have disappeared. Fair enough? More on that momentarily, but first . . . .

So far, a closer look has told us this: Because the **Beynon** court said that a presumption disappeared does not justify a charge that it ignored the substantive changes in Rule 301. Here, by the way, is the charge it does justify: Calling this a disappearing presumption adds confusion to the law of presumptions—an area of the law otherwise sufficiently confusing. For that reason, I will get around to suggesting that in cases like **Beynon** references to presumptions should be dropped.

**B. FALSE PRESUMPTION**

I just asked, since the presumption in **Beynon** has no lingering effect, is it fair to say that it has disappeared? The answer is no. For something to disappear, it must have been seen; for it to cease to be, it must have existed. In Nebraska, the only manifestation of a Rule 301 presumption is that it shifts the burden of persuasion. In **Beynon**, the burden of persuasion never shifted. Saying that in **Beynon** a “presumption disappears” is incorrect, for no presumption ever existed in **Beynon** in the first place. And this is the second and more important reason why the presumption discussed in **Beynon** is not inconsistent with Rule 301: it is not truly a presumption.

“Presumption” is a word often used carelessly. To understand a true presumption one must be able to distinguish it from the

("[T]he property owner is afforded the opportunity in the District Court to introduce any and all relevant evidence for the purpose of establishing that the action of the county board was in error."). The burden of proof is with the one who is challenging the action of the board of equalization.

To this extent the burden of proof starts out on the board of equalization: The board of equalization has the burden of coming up with an initial evaluation. It does that in the proceeding before itself. When the board’s decision is challenged in district court, then the burden is on the taxpayer, the plaintiff. To this extent there is a “burden shift”; the burden was in a different place in the administrative proceeding than it is in the judicial proceeding. While this may have something to do with why the word presumption continues to be used in these cases, *but see* text accompanying note 50 *infra*, this clearly is not Rule 301’s sort of burden shift. In the judicial proceeding, the burden of proof begins with and stays on the one who is challenging the county board’s assessment.
three other concepts to which the word is most often wrongly applied: the legally permissible inference, the prima facie case, and the rule of law, often referred to as an "irrebutable presumption."

A legally permissible inference is not a presumption, and Rule 301 does not apply. For example, if a defendant in a civil case fails to testify to matters peculiarly within his knowledge and necessary to his defense, then it is permissible for the trier of fact to infer—and for opposing counsel to argue—that such testimony would have been against his interest. This is a legally permissible inference. It is in no sense a true presumption.

A true presumption shifts either the burden of going forward with the evidence, or the burden of persuasion, or both. The legally permissible inference does none of those things; it has only such effect on the lawsuit as it has logical or probative force. Calling it a presumption does not make it so.

A set of basic facts sufficient to constitute prima facie evidence and to get a party past a motion for a directed verdict is not a presumption, and Rule 301 does not apply. Consider the "presumption" of undue influence regarding the execution of a will, or of a deed. In an action to set aside a deed, based on the grantor's incompetence and the grantee's undue influence, a "presumption of undue influence" arises when "it is shown by clear and satisfactory evidence (1) that the grantor was subject to such influence;
(2) that the opportunity to exercise it existed; (3) that there was a disposition to exercise it; and (4) that the result appears to be the effect of such influence.'

When this "presumption" is raised, "the burden of proof remains on the plaintiff, but the burden of going forward with the evidence shifts to the defendants." Though called a presumption, what is described is a prima facie case.

The prima facie case is used by the trier of law to decide whether a case is directed out of court at the close of the plaintiff's evidence or, instead, is suitable for the trier of fact. The presumption, on the other hand, is used by the trier of fact. When the trier of law finds that a presumption applies, it is passed along to the trier of fact. The medium is an instruction on the trier of fact's options regarding the issue, and, in Nebraska, on the placement of the burden of persuasion. Use of the word "presumption" regarding the issue of undue influence just described, muddles what could be so clearly expressed as "prima facie case."

The so-called "irrebuttable" or "conclusive presumption" also is not a true presumption and is not subject to Rule 301. As an example, consider the "conclusive presumption" that the incorporation of a village is valid if no action challenging its validity is brought within one year of the incorporation. This "conclusive presumption" is really a rule of law—a statute of limitations—to be applied by the court.

Similarly, the court says that "[i]t is the duty of an agent to communicate to his principal all the facts concerning the service in which he is engaged that come to his knowledge in the course of his employment, and this duty, in a subsequent action between his principal and a third person, he is . . . conclusively presumed to have performed." Again, this is a rule of law. It is a rule of law which says that under the circumstances described actual notice to the principal is not required; actual notice to the agent is enough, as a matter of law.

13. Id. at 79-80, 262 N.W.2d at 442.
14. Id.
15. In this regard, see State v. Dush, 214 Neb. 51, 332 N.W.2d 679 (1983), which involved Nebraska's statute on the use of breath tests to measure alcohol in a driver's bodily fluids. "The defendant argues that the statute is invalid because the effect of the statute is to create a presumption of guilt by the test. . . . Such evidence does not create a presumption of guilt, but may be sufficient to make a prima facie case on the issue of blood alcohol concentration." Id. at 54, 332 N.W.2d at 682.
18. In the very next sentence after the one quoted in the text preceding note 17, City of Gering v. Smith Co. says that "notice to an agent is notice to his princi-
In re Estate of Flider, uses the words "conclusive presumption" in a bit of a different context. It says the following:

Due execution means compliance with the formalities required by the statute in order to make the instrument the will of the testatrix. The presence of an attestation clause which recites the facts necessary to the validity of a will raises a presumption of due execution.

Upon the record in this case the proponent was entitled to a directed verdict on the issue of execution. The will being self-proved, and there being no proof of fraud or forgery, a conclusive presumption was raised as to the formalities described in [the statute]. The jury was not free to find against the proponent on the issue of execution.

The first paragraph discusses the elements of a prima facie case and concludes that they raise a "presumption." The second paragraph discusses what happens when there is no evidence to rebut the prima facie case and concludes that the "presumption" changes to a "conclusive presumption." Once again, talk of presumptions only obfuscates what is actually occurring. Instead of "a presumption," the first paragraph should say "a prima facie case," and instead of discussing "a conclusive presumption," the second paragraph should discuss the court's duty to direct a verdict. What Flider really means is that if a prima facie case is made and there is no rebuttal evidence, then the side making the prima facie case is entitled to a directed verdict. That side wins as a matter of law, without the question ever going to the jury.

Consider also the "presumption" that a deceased exercised due care, a rule which, the court says, applies only when there is no evidence on the subject. Where evidence is introduced on the issue of the deceased's due care, there is no such "presumption"; where no such evidence is introduced, this rule is applied by the judge, who resolves the issue as a matter of law. This is a rule for determining who must proceed with the evidence. (More pre-
cisely, since it only applies when there is no evidence on the sub-
ject, it determines who wins on the point when no evidence is
introduced). Whether this is categorized as a rule of law—and
since it only applies where there is no evidence, it is irrebuttable—
or as a basic fact sufficient to constitute a prima facie case or as
something else entirely, it is not a true presumption.

C. TRUE PRESUMPTIONS

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 produc-
tion, or the burden of persuasion, or both.

In civil trials in Nebraska, most presumptions impose the bur-
den of persuasion on the party against whom they are directed:
If the jury accepts the basic facts as true, then they must find the
presumed fact to be true, unless it is rebutted by a preponderance
of the evidence.

True presumptions can be created by statute or by court deci-

dion. Those created by statute include the presumption that a
child born during the marriage of the mother (the basic fact) is
legitimate (the presumed fact). A second 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

be inferred from a presumption of due care on the part of the deceased. The pre-
sumption . . . benefits the defendant as well as the deceased.”).

To instruct the jury that such a presumption arises has been held to be revers-
ible error. Sheets, 181 Neb. at 624, 150 N.W.2d at 228. But see Albrecht v. Morris, 91
Neb. 442, 447-48, 136 N.W. 48, 50 (1912); Chase v. Chicago, 86 N.E. 430, 433 (1912). Instruction on such a presumption, with further instruc-
tion that it is a rule of law which obtains only in the absence of direct or circumstan-
tial evidence, disappearing when evidence is produced, though improper, need not

Regarding presumptions against the accused in a criminal trial, and civil-
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23. But see Allen, supra note 8, at 851-52 where Professor Allen states that the
decision regarding the basic facts is not for the jury. “That determination is of the
nature of a preliminary fact, and thus it should be made by the judge.” Id. at 852.

Cases (NCLE, Inc.); Henderson, supra note 6.

25. Henderson, supra note 6, at 3.


27. Id. § 30-2207 (Reissue 1979).
proving death, to the other side, which now must persuade the trier of fact that the person involved is not dead.

Examples of common-law presumptions include the following: the general presumption of death after a continued and unexplained absence from one's home for seven years, the presumption of the party's capacity where the celebration of a marriage is proved; the presumption of receipt of a letter properly addressed, stamped, and mailed; the presumption against death by suicide when the cause of death is unknown; and the presumption that a state of affairs shown to exist, continues.

There is a true, common-law presumption applicable in cases involving prescriptive rights to easements. "[W]here 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. The burden then falls upon the owner of the servient estate to rebut that presumption by showing the use to be permissive."

Another true presumption, one from a more recent case and worth a brief discussion because of the way the case neglects the whole concept of presumptions, is this: When a bailor proves both "delivery of property [, in good condition,] to [a] bailee . . . and failure to redeliver upon timely demand," the burden of proof shifts to the bailee, who then must "prove by a preponderance of the evidence that he has exercised due care to prevent the loss, damage, or destruction of the property." The burden of proof shifts because the "loss or injury of bailed property while in the hands of the bailee ordinarily raises a presumption of

28. Patrick v. Union Cent. Life Ins. Co., 150 Neb. 201, 203, 33 N.W.2d 537, 539 (1948). The statutory presumption of death after five years of unexplained absence, mentioned in the text accompanying note 27 supra, applies in proceedings under the probate code; this presumption applies generally.

29. Allen v. Allen, 121 Neb. 635, 639, 237 N.W. 662, 663 (1931). Here the presumption of the validity of a marriage conflicted with the presumption that a person remains alive for seven years after he is last heard from; the court held that the former prevailed. Id. at 640, 237 N.W. at 664. See Allen, supra note 8, at 848.


negligence..."35

Those two sentences, however, oversimplify the Court's treatment of the issue by putting together quotations from two different cases. Here are the details. In 1975, the Unicameral passed the evidence code, including the provision that presumptions shift the burden of persuasion. In 1977, *Nash v. City of North Platte*36 held that the "'loss or injury of bailed property while in the hands of the bailee ordinarily raises a presumption of negligence...'." The court, however, did not enforce the statute's shift in the burden of persuasion. Instead, it continued as follows: "'[G]enerally, the effect of this... rule is not to shift the ultimate burden of proof from bailor to bailee, but merely to shift the burden of proceeding or going forward with the evidence; the ultimate burden of establishing negligence is on the bailor and remains on him throughout the trial.'"37 That indicates either that this particular "presumption" is not a true presumption (and what it is instead was not discussed), or that the statute regarding presumptions was not called to the court's attention and, as a result, was not applied, discussed, or even considered.

But then, in 1983, *Knight v. H & H Chevrolet*38 overruled that last previously quoted part of the *Nash* case. *Knight* held that upon proof both that the bailor delivered to the bailee property in good condition, and that the bailee failed to redeliver upon timely demand, and in the absence of statutory or contractual provisions to the contrary, the burden of persuasion shifts to the bailee. Right there, *Knight* enforces the rule of the Nebraska statute on presumptions. It does so, however, without citing the statute, without recognizing that this is Nebraska's general rule regarding presumptions in civil cases, and, except when quoting the rule being overruled, without ever even using the word presumption.

D. BEYNON'S PREMIS ON

But, what about the presumption which started off this work? "There is a presumption that a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action, which presumption remains until there is competent evidence to the con-

37. Id. at 627, 255 N.W.2d at 54, quoting 8 C.J.S. Bailments § 50, at 518-23 (1962).
trary . . . [and then] disappears."39 Is this a true presumption? No!

As noted, a presumption is a device whereby an ultimate fact may be assumed through proof of one or more other facts. The cases which are the focus of this article state propositions such as this: "there is a well-established . . . presumption that a board of equalization has faithfully performed its official duties. . . ."40 This language, however, has nothing to do with proving an ultimate fact from proof of one or more other facts. It has nothing to do with Rule 301.

What this is, rather, is a statement of a rule of law.41 This particular rule recognizes that the challenger of the state act has the burden of proof—without condition.42

Richman Gordman Stores, Inc. v. Board of Equalization,43 discusses the "presumption that the value fixed by the board of equalization was correct," says that it "disappears when there is competent evidence to the contrary," and concludes that "[o]nce the presumption is destroyed, the burden is upon the taxpayer to show that the value of his property was arbitrarily or unlawfully fixed in an amount greater than actual value."44 The implication in

40. Potts, 213 Neb. at 43, 328 N.W.2d at 178.
41. Similar rules of law include these: The rule that "if the law of a foreign state is not pleaded and proven, it is presumed to be the same as the law of the forum," Simmons v. Continental Casualty Co., 410 F.2d 881, 884 (8th Cir. 1969).
42. It is the equivalent of the "presumption" that a judgment appealed from is correct. E.g., Flood v. Keller, 214 Neb. 797, 799, 336 N.W.2d 549, 551 (1983), as quoted in note 60 infra. It is the rough equivalent of saying that "ordinances and statutes are presumed to be constitutional, and their unconstitutionality must be clearly established." State v. Davison, 213 Neb. 173, 176, 329 N.W.2d 200, 203 (1982).
43. Richman Gordman, 215 Neb. at 381, 338 N.W.2d at 763; Beynon, 213 Neb. at 499, 329 N.W.2d at 859.
the italicized clause is that prior to "the presumption [being] destroyed," the burden of proof was somewhere else. That implication is incorrect.

And, even more directly, *Arneson v. Cedar County*\(^{45}\) says that this same "presumption" applies until there is competent evidence to the contrary, when it disappears. "[F]rom that point on," says the court, "the burden of [proof is on the challenger]."\(^{46}\) The truth is, however, that the burden has never been anywhere else.\(^{47}\)

As much as anywhere, the mistake lies in the use of the image of a thing which disappears. When that is followed by the statement that once it disappears the burden of proof is on the taxpayer, the error is compounded. Nothing in these cases disappears and the burden of proof was never anywhere but on the taxpayer.

What these cases mean to say is that on the issue of the actual value of the property the burden of production and the burden of persuasion are on the taxpayer. He has the burden of production: Unless the taxpayer introduces at least some evidence on the point, he loses, as a matter of law. He has the burden of persuasion: Unless the trier of fact finds that a preponderance of the evidence favors the taxpayer, he loses, as a matter of fact.

These cases have nothing to do with a Rule 301 shift in the burden; they concern the burden's initial assignment. And when the court says that "there is more than ample evidence to rebut the presumption of correctness of the assessed valuation . . . ,"\(^{48}\) what it really means is that there is more than ample evidence to satisfy the challenger's burden of proving that the board's evaluation was arbitrary.\(^{49}\) Since that is what is meant, that is what should be said.

Use of the word "presumption" when referring to the burden of proof in a challenge to a board of equalization's assessment is an unplanned product of the evolution of a phrase. The first Nebraska case on this subject was the 1902 case of *State ex rel. Bee Building Co. v. Savage*.\(^{50}\) It said this: boards of equalization "presumably act fairly and impartially in fixing [property values]."\(^{51}\) So far, so good.

\(^{45}\) 212 Neb. 62, 321 N.W.2d 427 (1982).
\(^{46}\) Id. at 64, 321 N.W.2d at 428. *Richman Gordman*, 215 Neb. at 381, 338 N.W.2d at 763 (1983). This part of *Arneson* is quoted in Spencer Holiday House v. County Bd. of Equalization, 215 Neb. 194, 199, 337 N.W.2d 759, 763 (1982).
\(^{47}\) In court, at least (see note 9 supra), the burden never was anywhere else.
\(^{48}\) *Richman Gordman*, 215 Neb. at 381, 338 N.W.2d at 763 (1983).
\(^{49}\) See id. at 383, 338 N.W.2d at 764.
\(^{50}\) 65 Neb. 714, 91 N.W. 716 (1902).
\(^{51}\) Id. at 722, 91 N.W. at 730.
No confusion in the second case either. In 1906, *Lancaster County v. Whedon*,\(^52\) said the following:

> When the jurisdiction of a *quasi* judicial tribunal is once established, its subsequent proceedings are presumed to be regular. And so the rule is that where a taxpayer appeals to the district court from the action of the board of equalization in the matter of the assessment of property for taxation, the burden is on the appellant to show that the decision of the board is erroneous.\(^53\)

The trouble begins in *Western Union Telegraph Co. v. Dodge County*,\(^54\) the third case:

> The rule of law seems to be quite well settled that, in the absence of evidence to the contrary, the presumption is that public officials faithfully and legally perform their legal duties, and that in making an assessment the board of equalization proceeded upon sufficient and competent evidence to justify its action . . . . In *Lancaster v. Whedon*, ... it was held that, where a taxpayer appeals from the action of the board of equalization in the matter of assessment of property for taxation, the burden is upon the appellant to show that the decision of the board is erroneous. It would follow that the presumption obtains that the value fixed by the board of equalization of Dodge County was correct, in the absence of evidence to the contrary. *The burden of proof* being upon the appellant to satisfy the trial court that the board of equalization had erred in fixing the valuation of its property, the appellant is not in position to complain, unless it has produced evidence to *overcome the presumption*.\(^55\)

There, in one sentence, the final sentence quoted, the court begins by discussing what it calls “[t]he burden of proof” and ends by calling the same thing “the presumption.”\(^56\) That is where the trouble began. The last three words of that quotation, “overcome the presumption,” would better have been “satisfy its burden.”\(^57\)

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52. 76 Neb. 753, 108 N.W. 127 (1906).
53. Id. at 758, 108 N.W. at 128-29 (emphasis in original).
54. 80 Neb. 23, 117 N.W. 468 (1908).
55. Id. at 27-28, 117 N.W. at 470 (emphasis added) (citations omitted).
56. This use of the word presumption and the phrase burden of proof almost in the same breath continues today. For example, *In re Assessment of Omaha, L & B. Ry.*, 213 Neb. at 75, 327 N.W.2d at 111 (citation omitted) says this: “This presumption that a valuation made by a board of equalization is correct applies to the valuation of railroad property made by the state board. ... The burden of showing the assessment was improper is on the complaining party.” See also note 43 and accompanying text supra.
57. There is a considerably more recent case where the court has done the same thing: from one case to another changed a word here and there and ended up using the language of presumptions to address the original placement of the burden.
Reference to “presumptions” would better be left out of these cases altogether. Instead, the idea should be expressed more precisely as what it actually is: assignment of the burden of proof in the first place. The point would be less confusing if stated this way:

Actions taken by boards of equalization are considered legitimate until proven otherwise.

Or this:

In a challenge to an assessment by the board of equalization, the burden of proof is on the challenger.

Or this:

One who pleads that the assessment was in error has the burden of proving it.58

Or, if the word “presumed” is still to be used—and it is used all of the time regarding the “presumption of constitutionality”59—at least the disappearing act should be given the hook, and the point should be stated as follows:

Actions taken by boards of equalization are presumed to be legitimate and the burden is on the challenger to prove otherwise.60

58. Or even this: “The burden of proof is upon a taxpayer to establish his contention that the value of his property has not been fairly and proportionately equalized with all other property, resulting in a discriminatory, unjust, and unfair assessment.” Arneson, 212 Neb. at 64, 321 N.W.2d at 428.

59. See note 42 and accompanying text supra.

60. See Flood, 214 Neb. at 799, 736 N.W.2d at 551 (citations omitted): “A judgment of the district court brought to this court for review is supported by a presumption of correctness, and the burden is upon the party complaining of the action of the district court to show by the record that it is erroneous.” There is, however, no need to characterize this process as a presumption either.

In the interest of promoting the discipline of using the word “presumption” only when referring to true presumptions such references should be dropped whether the appeal is from the board of equalization to the district court or from the district court to the supreme court.

It should also be dropped in the context of “irrebuttable” or “conclusive pre-
IV. CONCLUSION

Things would be simpler were the first apparent meaning the correct one.

For example, the quotation in the text preceding note 14 supra would better be expressed as suggested in the text preceding note 15 supra.

If this sort of discipline is not developed, we can expect to see "presumptions" used more and more in situations which have nothing to do with true presumptions. See, e.g., note 57 supra.