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COMMENTS

THE BURDEN OF PROOF AS TO TESTAMENTARY CAPACITY IN WISCONSIN

The phrase burden of proof is often heard in the practice of law, but its meaning frequently seems to escape definition. Though it may often be thought of as a theoretical concept of little practical value, it may be of great advantage to the practitioner to know the exact meaning of the term. Different meanings may be given to the phrase, but in this article an attempt will be made to make the different meanings stand in sharp focus.

THE TWO MEANINGS OF THE BURDEN OF PROOF— ORTHODOX POSITION

Wigmore states that the phrase burden of proof is used in two senses, the burden in the primary sense and the burden in the secondary sense.[1] The burden of proof in the primary sense refers to the burden placed upon one party to ultimately bear the risk of nonpersuasion of the jury (or judge).[2] By the risk of nonpersuasion is meant the necessity of convincing the jury (or judge) in the last instance of the truth of one's contention. In an ordinary civil case, the judge will instruct the jury that the party with the burden in the primary sense has the burden of proving by a preponderance of the evidence the truth of his allegations. The burden of proof in this, the primary sense, never shifts.[3]

Wigmore also explains who generally has the burden of proof in the primary sense. Logically and as a good general rule, the location of the burden in the primary sense can be determined from the complaint. A party plaintiff will have the burden of proving the allegations of his complaint. If the defendant has an affirmative defense, he must prove his affirmative argument; he has the burden of proof on this issue.[4]

As opposed to this burden of proof which remains upon the same party from the beginning to the end of the case, there is the burden in the secondary sense. The burden in the secondary sense refers to the burden of going forward with evidence to meet the evidence of the opposite party or to establish a *prima facie* case.[5] Initially the burden in the secondary sense is on the party with the risk of nonpersuasion of the jury (burden in the primary sense), although he may be able to meet this secondary burden through the aid of presumption.[6] If he

[1] WIGMORE, EVIDENCE, §2485 at 270, §2487 at 278 (3d ed. 1940).
[2] *Id.* §2485 at 278.
[3] *Id.* §2489 at 285.
[4] *Id.* §2487 at 279 and 282.
[5] *Id.* at 279 and 281.
[6] *Id.* at 282-284.

produces evidence sufficient to make out a *prima facie* case, that is, evidence which in the absence of contrary evidence is sufficient to go to the jury, it is said that the burden shifts. The other party who according to the general rule will be the defendant is now required to meet the *prima facie* case of his opponent (who under our assumption will be the plaintiff). He must meet this burden in the secondary sense or risk having a verdict directed against himself. Once he has met this burden it is often said that the burden shifts back again to the party who originally had the burden in the secondary sense. But Wigmore says that this is only true when the defendant introduces evidence of such a nature that the evidence of the plaintiff is rendered non-credible. In order to shift the burden the defendant must do more than to equalize the evidence. If he introduces evidence which effectively destroys the plaintiff's *prima facie* case and if in the absence of other evidence, a verdict would have to be directed against the plaintiff, then the burden will shift again.[7]

It seems clear that the burden in the secondary sense refers, as Wigmore says, to the procedure by which the judge controls the evidence in requiring credible evidence for the jury's consideration (or for his consideration if he is trying the case).[8] The burden in the secondary sense thus is only for the judge's consideration. Once the necessary *prima facie* case has been made and there is substantial evidence upon which a reasonable jury could base a verdict, the jury will be instructed that a certain party has the burden of convincing them of the truth of his contention. But this, the burden in the primary sense, is not considered until the burden in the secondary sense has been satisfied and the case is before the court or jury for final consideration.

THE BURDEN OF PROOF AS TO TESTAMENTARY CAPACITY

As we have stated, the general rule is that the plaintiff has the burden of proof in the primary sense as to the allegations of his complaint. At first glance, then, we might expect the proponent of a will to have the burden of proving testamentary capacity. In many states it seems that this is the case. Atkinson states that in the majority of states the proponent of the will has the burden of proof in the primary sense on the issue of testamentary capacity.[9] The burden is upon the proponent since as part of his case for proving the will he must prove that the testator had the necessary capacity to make it. The contestant does not have the burden of proof, even though he alleges incapacity as a ground for denial of probate. The proponent is aided in meeting his burden by the presumption of sanity that exists in many states.[10]

[7] *Id.* at 279.
[8] *Id.* at 273.
[9] ATKINSON, WILLS §101 at 545 (2d ed. 1953).
[10] *Id.* at 546.

The rule is the same as to the due execution of the will; the proponent must prove due execution.[11] But the rule is different when the claim of the contestant is that the testator was subject to undue influence. Here Atkinson says that the general rule is that the burden in the primary sense is upon the contestant.[12] This may be for the reason that undue influence is a form of fraud which has always been regarded as provable by the contestant. Perhaps too it is thought that the contestant has a better chance of proving undue influence. But whatever the reason, the burden as to mental capacity and the burden as to undue influence have been treated differently by the courts and so we might expect to find Wisconsin following along with the great weight of authority.

In *Will of Faulks*[13] the Wisconsin Supreme Court seems to adopt the orthodox position *in toto*. The Court states with great vigor its belief that the contestant has the burden of proof in the primary sense on the question of undue influence.[14] The Court also explains Wigmore's definitions of the two meanings of the burden of proof and seems to accept the orthodox position here also.[15] While bringing Wisconsin law into line with the majority position on the question of undue influence, the Court also adds the dictum that the burden of proof in the primary sense as to testamentary capacity is upon the proponent.[16] This statement is clear and unambiguous, but unfortunately other cases on the subject are not clear and unambiguous.

> In the early case of *Allen v. Griffin* the Wisconsin Court stated: . . . This Court has held and we think properly that in a case where a will is contested on the ground that the deceased was insane or otherwise incompetent to make a will at the time the same was made, the burden of proof is on the contestant and that the proponent need not in making out his side of the case, make full proof of the capacity of the testator, but may content himself, by making out a *prima facie* case of capacity and introduce his further proofs on that question after the contestant has made his proof. In a case which does not disclose any facts which tend to show incompetency, slight evidence of the competency of the testator is sufficient to put the contestant to his proofs upon that question.[17]

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[11] *Id.* at 543.
[12] *Id.* at 549.
[13] 246 Wis. 319, 17 N.W. 2d 423 (1943).
[14] 246 Wis. at 358.
[15] *Id.* at 345.
[16] *Id.* at 357. The Court states "The burden of proof is upon the proponent to establish by the fair preponderance and weight of the evidence that the instrument propounded is the genuine last will and testament of the deceased *that he was competent to make a will*, and that it was duly executed and attested with the requisite formalities. . . . This burden is upon the proponent to the end of the trial. (Emphasis added.)
[17] 69 Wis. 529 at 537, 35 N.W. 21 (1887).

It is doubtful that the Supreme Court at the time of this case was clearly aware of the distinction between burden of proof in the primary and in the secondary sense. In the first portion of the quote, the Court imposes on the contestant a general burden of proof. But in the succeeding portion, the Court requires the proponent to first introduce some evidence to establish a *prima facie* case. Under the orthodox view if the contestant has the burden in the primary sense, there is no necessity for a *prima facie* case by the propenent. It seems probable that the Court is speaking of what would now be considered the burden in the secondary sense and is imposing this burden on the contestant, at least after the *prima facie* case has been made by the proponent.

After clearly stating the orthodox position by dictum in the *Faulks* case, the Court seemed to go back to a more ambiguous discussion in the fairly recent case of *Estate of Bickner.* The Court stated:

> To bar the will of a testator requires proof and the burden of proof rests with the contestant to show by clear, convincing, and satisfactory evidence that the mind of the testator was deranged. The legal presumption is in favor of sanity and sufficient capacity to make a valid will and the burden of showing such insanity or incapacity is upon the contestant.[18]

The Court seems to rely strongly upon *Will of Emerson*[19] but this case gives no further illumination. Note well, however that the Court seems to speak of a general burden of proof as in the *Allen* case, again failing to define the term at all, but it does speak of the presumption in favor of sanity which could be construed to mean that the burden in the secondary sense is the burden the Court is referring to here.

Through our analysis of the old case of *Allen v. Griffin* and the comparatively recent case of *Estate of Bickner,* it is possible to arrive at a synthesis of the language of the two cases, expressing a possible interpretation of the decisions which is not at variance with the dictum in *Will of Faulks.* In the *Allen* case the Court is requiring slight evidence in speaking of the necessity of the proponent introducing some evidence to establish his *prima facie* case and thus shift the burden in the secondary sense. In the more modern *Bickner* case the presumption of sanity seems to have the effect of the slight evidence referred to in the *Allen* case, and thus the presumption shifts the burden in the secondary sense to the contestant. Then, however, the contestant must introduce much stronger proofs (the clear and satisfactory evidence of the *Bickner* case) in order to shift the burden in the secondary sense back to the proponent . But under both cases the proponent must first introduce his proofs and this should mean that the

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[18] 259 Wis. 425 at 433, 49 N.W. 2d 404 (1951).
[19] 183 Wis. 437 at 445, 198 N.W. 441 (1924).

proponent has the burden of proof in the primary sense. In other words, he ultimately has the risk of nonpersuasion of the jury or the court, though he is aided by the strong character of the evidence required of his opponent.[20]

The most damaging cases from the viewpoint of one seking to find some consistency in this area are *Will of King* and *Will of Williams.* To add to the distress both of these cases were decided after the *Faulks* case. In *Will of King,* the Court states:

> Appellant relies on mental incapacity and undue influence to defeat the will. On both issues he has the burden of proof by clear, convincing and satisfactory evidence.[21]

Will of Williams[22] repeats the ominous words that on both issues the contestant has the burden of proof. Obviously in the recent cases the Court has tended to lump undue influence and mental incapacity together.[23] Both, it seems, stand in the same position of disfavor. In view of the fact that *Will of Faulks* made it abundantly clear that when undue influence is pleaded, the burden in the primary sense is upon the contestant, it seems difficult to reconcile the dictum of *Will of Faulks* that the proponent has the burden in the primary sense to prove mental competency with recent Wisconsin case law. *Allen v. Griffin*

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[20] Will of Cole, 49 Wis. 179, 5 N.W. 346 (1880) seems contra to this interpretation. The Court states: "The legal presumption is in favor of sanity and on the issue of sanity or insanity the burden is upon him who asserts insanity to prove it. Hence in a doubtful case, *unless there appears a preponderance of proof of mental unsoundness,* the issue should be found the other way.

But in a later case the Court analyzes this case and seems to soften the wording somewhat in Will of Silverthorn, 68 Wis. 372 at 379, 32 N.W. 287 (1887) . . . Affirmative proof is required to be made of the mental soundness of the testator before the will can be admitted to probate, and that until such affirmative proof is made there is no presumption of sanity, but when a *prima facie* case of insanity is made by the proofs and some contestant makes issue of sanity, the presumption of sanity arises, and the burden of proving the testator of unsound mind is upon him who asserts it." The justice feels that some proofs are needed to establish the presumption of sanity since the Wisconsin Statutes at that time and today prescribe certain proofs for the probate of uncontested wills. He seems to feel the same requirement is necessary for contested wills although the statute does not say so. WIS. STAT. §310.06 (1957), reads: If no person shall contest the probate of a will the court may grant probate thereof on the testimony of one of the subscribing witnesses if such witness shall testify that such will was executed in all particulars as required by the statutes and that the testator was of sound mind at the time of the execution thereof. If no competent subscribing witness resides in this state at the time fixed for proving the will or if none of them, after due diligence used, can be found in this state, the court may admit the testimony of other witnesses to prove the sanity of the testator and the execution of the will and may admit proof of his handwriting and that of the subscribing witnesses. (Emphasis added.)

[21] 251 Wis. 269 at 273, 29 N.W. 2d 69 (1947).

[22] 256 Wis. 338 at 345, 41 N.W. 2d 191 (1949).

[23] Many other recent cases may be cited to illustrate how the Court has treated undue influence and mental capacity in the same manner. *Cf.* Will of Delmady, 251 Wis. 48, 28 N.W. 2d 301 (1947); Estate of Sawall, 240 Wis. 265, 3 N.W. 2d 373 (1942); Will of McLeish, 209 Wis. 417, 245 N.W. 197 (1932); In re Bauer's Estate, 264 Wis. 556, 59 N.W. 2d 481 (1953).

and *Estate of Bickner* by one interpretation and a few other old cases at least seem to lend support to the *Faulks* dictum.[24] However, it is possible that because of the light burden that the proponent of a will has, the Court looks only to burden in the secondary sense which seems to be the important burden in these cases. If this is what the Court means, then the Court's statement can be explained by the fact that as soon as the proponent makes out a *prima facie* case the burden in the secondary sense shifts to the contestant and from that time on the burden of the contestant is, for practical purposes, the same on the questions of undue influence and mental capacity.

ORIGIN AND EFFECT OF THE PRESUMPTION OF SANITY

In *Estate of Bickner* the Court makes a statement which poses an unanswered question for us. The Court states: "The legal presumption is in favor of sanity and sufficient legal capacity to make a valid will, and the burden of showing such incapacity is upon the contestant."[25] We have already stated that according to our interpretation the presumption referred to here shifts the burden in the secondary sense to the contestant and thus relieves the proponent of his burden in the secondary sense. But another question remains unanswered—does this presumption arise automatically without the introduction of any evidence. Both *Estate of Bickner*[26] and *Will of Szperka*[27] upon which *Estate of Bickner* seems to rely do not appear to require evidence to raise the presumption of sanity, and in many states, and in Wisconsin under some circumstances, no evidence is necessary to raise this presumption.[28] But Page says that evidence is necessary to raise this presumption in Wisconsin will cases.[29] *Will of Silverthorn* and *Allen v. Griffin* seem to bear out his statement, saying in effect, that a slight amount of evidence will be sufficient to give the proponent the benefit of a presumption.[30]

But these two cases are based upon an old Wisconsin Statute[31] which requires testimony by the attesting witnesses to admit an uncontested will to probate. Since our present topic involves the burden of proof as to sanity when a will is contested, it is not at all clear that the statute is in point. Thus it sems possible that both *Will of Silverthorn* and *Allen v. Griffin* are based upon a statute which is inappli-

[24] In Will of Zych, 251 Wis. 108, 28 N.W. 2d 316 (1947), the Court makes a statement which seems to place the burden in the primary sense upon the proponent. "A will may be sustained in opposition to positive testimony of one or more of the subscribing witnesses as to mental capacity if by the preponderance of the evidence from other witnesses, proof is made that the testator was of sound mind and there was a valid execution of the will."
[25] 259 Wis. 425 at 433, 49 N.W. 2d 404 (1951).
[26] *Ibid.*
[27] 254 Wis. 153 at 158, 35 N.W. 2d 209 (1948).
[28] 2 PAGE, WILLS, §771 at 503 (3d ed. 1941).
[29] *Id.* at 504.
[30] 68 Wis. 372 at 379, 39 N.W. 287 (1887); 69 Wis. 529 at 539, 35 N.W. 21 (1887).
[31] §310.06 cited in note 20 *supra.*

cable to the circumstances at hand. In fact later cases have omitted mention of the statute and thus it might be inferred that the Court has now adopted a position opposite to that stated in *Will of Silverthorn.* Even if the Court still holds to a statutory construction of doubtful validity, the language of later cases seems to have definitely modified the Court's formerly rigid position. It is not necessary to take the statement of *Estate of Bickner* as implying that the presumption of sanity arises without the introduction of evidence. *Will of Szperka,* upon which it seems to rely, appears to illustrate quite clearly how easily the presumption may arise; the mere presence of an attestation clause in the will seems sufficient to raise a presumption of sanity. The Court quotes *Will of Hawkinson* in saying:

> Attestation is *prima facie* proof of the testator's authentic signature, his volition in signing, and his mental capacity and understanding of his act.[33]

Thus though Page's statement may be correct that the presumption does not effectively arise by itself, still there is generally little practical difficulty in raising the presumption if the attestation clause gives rise to this important presumption.[34]

As can be seen from the quote above, the Court now seems to treat due execution and mental capacity in the same manner, with regard to the presumptions arising from the attestation clause. This was not always the case. Many early cases refer to the presumption of due execution arising from the attestation clause, but fail to refer to mental capacity at all.[35] *Will of Grant* gives the general rule for the presumption of due execution:

> The recitals in the attestation clause show due execution of the will, and there is a strong presumption of the truth of these recitals which must prevail unless overcome by clear and satisfactory evidence.[36]

This case shows the degree of proof required to rebut this presumption; it must be clear and satisfactory. The fact that both *Will of Hawkinson* and *Will of Szperka* seem to treat mental capacity

[32] 143 Wis. 136, 126 N.W. 683 (1910).

[34] The Court cites Corpus Juris, 68 C. J. *Wills,* §843 at 444 and American Jurisprudence, Am. Jur. *Wills,* §891 at 98, but cites no Wisconsin authority. Thus the Court seems to ignore the Wisconsin authority which is the basis for Page's statement. In this case and in all other recent cases, the Court also fails to cite §310.06 *supra* note 20; from this it is possible to infer that the Court no longer regards the statute as applicable when the will is contested. Note also how Will of Zych, *supra* note 24, and the statement of Page, *infra* note 37, allow the sustaining of a will against the claim of incapacity even though the attesting witnesses testify against the will. It seems that today the statute can no longer be read literally in its requirement of the testimony of the attesting witnesses to sustain the will.

[35] Will of Lewis, 51 Wis. 101, 7 N.W. 829 (1881); Will of Maresh, 177 Wis. 194, 187 N.W. 1009 (1922); Gilmor's Will, 117 Wis. 302, 94 N.W. 32 (1903).

[36] 149 Wis. 330, 135 N.W. 833 (1912).

and due execution in the same manner when there is an attestation clause shows that a presumption of mental capacity arises from the presence of an attestation clause in the will and leads this writer to believe that the presumption can only be rebutted by clear and satisfactory evidence. This opinion is further strengthened by the above statement in *Estate of Bickner* to the effect that the presumption is in favor of sanity and the burden is upon the contestant to prove by clear and satisfactory evidence, incapacity.

To make the proponent's burden in the primary sense even lighter, it does not seem necessary that the attestation clause contain any assertions of mental capacity. In the *Szperka* case the Court also makes the statement:

> Attestation is *prima facie* proof of all facts essential to due execution to which attesting witnesses could depose if present.[37]

This statement does not seem to require any particular assertions of mental capacity or of due execution to raise the presumptions. In addition attempts by attorneys to draw inferences from the lack of an assertion of mental competency in the attestation clause have always drawn rebuffs from the Supreme Court.[38] In *Will of Emerson* the contestant made the claim that because the attestation clause did not contain an assertion of mental competency, an inference of incompetency could be drawn. The Court rejected this thesis in strong language:

> The will contains the usual opening sentence, I Helen Emerson being of sound and disposing mind and memory do hereby make etc. We are not aware that it is customary to include in the attestation clause any assertion of mental competence or the lack of undue influence. Therefore the absence of both conveys to our mind no suggestion of infirmity in the will.[39]

Although it is true that the case does not refer to any presumption of sanity flowing from the attestation clause, still the customary assertion of mental competence by the testator, in the preamble, is probably all that any court will require and an additional assertion of competency in the attestation clause does not seem necessary.

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[37] 254 Wis. 153 at 158, 35 N.W. 2d 209 (1948). The Court also quotes a paragraph from Page which seems to imply that the statements customarily made in the attestation clause may be inferred if for some reason they may have been omitted. "If the subscribing witnesses testify adversely to the capacity of the testator, they have under oath stated that he was incompetent to make a will, while by their solemn acts in subscribing as witnesses *they have in effect formally declared that he was competent.* Accordingly their testimony adverse to the capacity of the testator is, under such circumstances of but little value. . . . Such evidence may be insufficient to overcome the presumption of sanity. 2 PAGE WILLS, 779 at 525 (3d ed. 1941). (Emphasis added.)

[38] Will of Emerson, 183 Wis. 437 at 445, 198 N.W. 441 (1924); Loughney and others v. Loughney, 87 Wis. 92 at 99, 58 N.W. 250 (1894).

[39] Will of Emerson, 183 Wis. 437 at 445, 198 N.W. 441 (1924).

If the proponent is aided by a strong presumption arising merely from the presence of an attestation clause in the will, his burden in the primary and secondary senses is indeed a light one. His initial burden in the secondary sense is met by the presumption and the burden is at once shifted to the contestant. It is a burden which he cannot easily shift since he must produce clear and satisfactory evidence to shift the burden again in the secondary sense. The proponent's burden in the primary sense is also easily discharged. The Court has required clear and satisfactory evidence to rebut his *prima facie* case which is made by the presumption arising from the presence of an attestation clause in the will. It is clear that though he will probably wish to introduce other evidence to bolster his contention of competency, his burden in the primary sense is considerably lightened by the character of the evidence the Court has required of his opponent — clear and satisfactory evidence. But though this does seem to be a possible explanation of the case law, we have still the problem of the nature of the presumption which is the basis for our suggested interpretation. To understand presumptions in general and presumptions in Wisconsin with relation to our topic, we will now examine the theory of presumptions, according to Wigmore and according to Wisconsin case law.

THE THEORY OF PRESUMPTIONS GENERALLY

The generally accepted theory of presumptions is that of Wigmore although Morgan and other eminent scholars have taken eloquent issue with Wigmore's theory.[40] The theory is however of venerable origin, Wigmore having acquired it from Thayer.[41] It has been adopted by the Model Code of Evidence and presumably by a majority of American jurisdictions.[42] Basically Wigmore states that a presumption is a ruling as to the duty of producing evidence, having no evidentiary force.[43] A presumption will relieve a plaintiff from the duty of making out a *prima facie* case, (thus meeting his burden in the secondary sense) but once the defendant introduces credible evidence upon which a jury could base a verdict, the presumption is rebutted and drops out of the case entirely.[44] As Wigmore says, a presumption only governs the production of evidence;that is its sole task. The question is often

[40] Laughlin, *In Support of the Thayer Theory of Presumptions,* 52 MICH. L. REV. 195 at 210 (1953). Professor Laughlin cites many articles which have criticized the Wigmore position. Among them are: Morgan, *Further Observations on Presumptions,* 16 S. CAL. L. REV. 245 (1943), *Instructing the Jury upon Presumptions and Burden of Proof,* 47 HARV. L. REV. 59 (1933); Reaugh, *Instructing the Jury upon Presumptions and Burden of Proof,* 36 ILL. L. REV. 803 at 819 (1942); Helman, *Presumptions,* 22 CAN. B. REV. 118 (1944).

[41] Laughlin, *In Support of the Thayer Theory of Presumptions,* 52 MICH. L. REV. 195 at 210 (1953).

[42] *Id.* at 211.

[43] 9WIGMORE, EVIDENCE, §2487 at 281 (3d ed. 1940).

[44] *Ibid.*

asked—what is left after the presumption disappears; the answer is that an inference will generally remain upon which the presumption was based and that after the presumption disappears, this inference may still be strong enough to allow the plaintiff to go to the jury without introducing any more evidence than the evidence which originally raised the presumption.[45] Most presumptions are based upon facts which to reasonable people generally lead to certain conclusions.[46] Thus the presumption of agency arising from the showing that an employee was driving his employer's car during the hours of his employment may be rebutted but the inference of agency will still remain and may be sufficient to allow the plaintiff to go to the jury without introducing any additional evidence.[47]

PRESUMPTIONS IN WISCONSIN

Having examined the majority view that the presumption drops out of the case as soon as any credible evidence is introduced, we will now examine the Wisconsin position. Raymond Geraldson writing in the *Wisconsin Law Review* has examined the Wisconsin cases quite carefully and seems to have found a curious division in Wisconsin law.[48] In one set of cases headed by the *Spaulding* case and by the *Faulks* case the Wisconsin Court definitely espouses the Thayer-Wigmore doctrine that the introduction of any substantial evidence will remove the presumption forever from the case.[49] However in *Pringle v. Dunn,*[50] the Court required clear, convincing, and satisfactory evidence to rebut the presumption that a deed was duly acknowledged. In later cases the Court has required the same degree of evidence to rebut the presumption that a note was given for consideration,[51] that the agency relationship did not exist at the time in question[52] and that an attorney was authorized to perform customary legal acts.[53] In these cases and in many others, Geraldson states, the Court has allowed the presumption to affect the burden in the primary sense, a result clearly

[45] *Id.* §2491 at 290.

[46] Justice Holmes expresses it, perhaps in a better manner, in Greer v. United States, 24 U.S. 559 at 561 (1917), "A presumption upon a matter of fact, when it is not merely a disguise for some other principle, means that common experience shows the fact to be so generally true that courts may notice the truth."

[47] 245 Ala. 313, 16 S. 2d 720 at 724 (1944).

[48] Geraldson, *A Code of Evidence for Wisconsin, Presumptions and their Effect* 1945 WIS. L. REV. 374 at 380-382.

[49] Spaulding v. Chicago and North Western Railway Company, 33 Wis. 582 at 591 (1873), Will of Faulks, 246 Wis. 319 at 349, 17 N.W. 2d 423 (1943). In the latter case the Court states: "When some evidence to the contrary is received, that is evidence which if uncontradicted is sufficient to support a finding, the presumption is destroyed or removed, it then has no probative force. The matter is then to be determined upon all the facts freed from the presumption."

[50] 37 Wis. 449 at 459 (1875).

[51] Estate of Flierl, 225 Wis. 493 at 499, 274 N.W. 422 (1937).

[52] Enea v. Pfister, 180 Wis. 329 at 332, 191 N.W. 565 (1923).

[53] Mullins v. La Bahn, 244 Wis. 76 at 79, 11 N.W. 2d 519 (1943).

contrary to the Wigmore doctrine.[54] To understand how the presumption actually affects the risk of nonpersuasion, we must consider the effect of this presumption on the instructions to the jury. Taking for an example the presumption of the regularity of an attorney's acts, the jury will be instructed that the plaintiff has the burden of proving regularity of action, but that the plaintiff is aided by a presumption of the regularity of an attorney's acts and that the defendant must rebut this presumption by clear and satisfactory evidence. Thus the plaintiff can meet his burden in the primary sense on the strength of his presumption alone whereas the defendant is forced to introduce clear and satisfactory evidence to rebut the presumption and the jury will be instructed on the nature of the presumption as well as on the character of the evidence required to rebut it. As we have stated previously, the question of whether a burden in the secondary sense has been met is never submitted to a jury, but here the jury is asked to decide whether a presumption has been rebutted, normally a question of whether the burden in the secondary sense has been met.[55] Geraldson seems to feel that this type of instruction places a primary burden upon the defendant which is the only true primary burden in the case. He seems especially disturbed by the admixture of Morgan and Wigmore, since, he aserts, the presumption in Wisconsin in certain cases like that above is given the weight of evidence (if it doesn't drop out of the case at the introduction of credible evidence it has the weight of evidence), and in other cases like *Will of Faulks,* the Court specifically states that a presumption never has the weight of evidence.[56]

Now that we have discovered that strong presumptions do not drop out of the case in Wisconsin even though credible evidence has been introduced, we can set out the theoretical and practical effects of the particular presumption we are considering, the presumption of sanity arising from the attestation clause. The proponent has the burden of proving testamentary capacity in the primary sense. He is, however,

[54] Geraldson, *A Code of Evidence for Wisconsin, Presumptions and their effect,* 1945 WIS. L. REV. 374 at 382, 26 MARQ. L. REV. 115 at 122 (1942).

[55] McCormick, who generally agrees with Morgan, has this to say about this practice of charging the jury that a presumption must be overcome by a certain quantum of evidence. "Accordingly the custom has persisted in many states, with surprisingly tough resistance to the criticisms of the text-writers, of charging the jury as to certain presumptions having a substantial backing of probability that the presumption stands until overcome in the jury's mind of a preponderance of evidence to the contrary. In other words, the presumption is a "working hypothesis" which works by shifting the burden to the party against whom it operates of satisfying the jury that the presumed inference is untrue. This often gives a more satisfactory apportionment of the burden of persuasion on a particular issue than can be given by the general rule that the pleader has the burden. MCCORMICK, EVIDENCE 671-672 (1954). Note that McCormick unlike Wigmore has no fear of the presumption's affecting the burden of persuasion. This is about as satisfactory an explanation of the effect of this type of strong presumption as can be given.

[56] Geraldson, *A Code of Evidence for Wisconsin, Presumptions and their effect,* 1945 WIS. L. REV. 374 at 382.

aided by a presumption of sanity arising from the presence of an attestation clause in the will. This presumption meets his burden in the secondary sense which initially rests upon him. The burden shifts to the contestant with the showing of an attestation clause in the will; his burden is a heavy one since he must rebut the proponent's *prima facie* case by clear and satisfactory evidence. It is unlikely that he will be able to shift the burden in the secondary sense to the proponent, since far more than credible evidence must be introduced to shift this burden. Theoretically the proponent will have the burden of persuading the judge in the last instance that the testator was sane.[57] But assuming that the *prima facie* case has been made by the proponent, the contestant must first show by clear and satisfactory evidence that the testator was insane. He must rebut the presumption of sanity by clear and satisfactory evidence, theoretically, a secondary burden. In fact the contestant will have a burden very similar to the burden in the primary sense. He must present clear and satisfactory evidence to rebut the presumption of competence and the proponent need only stand upon his presumption. Practically speaking, the proponent would not rely solely upon his presumption, but theoretically, at least, this seems all that the Court is requiring him to do. In reality the proponent's burden in the primary sense is a burden in name only. In the last analysis the judge must decide whether the presumption has been rebutted. If it has, then the proponent has not met his burden, but if the presumption has not been rebutted he has met his burden in the primary sense and thus has proved his case.

CONCLUSION

In most states, the burden in the primary sense to prove testamentary capacity is upon the proponent of the will.[58] Atkinson says that this is logical since mental competence is one of the first requirements for a valid will.[59] In many states, it is true, the proponent is aided by a presumption of sanity, but as soon as credible evidence is introduced the presumption disappears. In these states the proponent has a practical as well as a theoretical burden. In Wisconsin the burden of the proponent seems to be purely theoretical. The strong character of the presumption of sanity in Wisconsin will cases is to a great extent responsible for the light primary burden of the proponent. Although there may be good policy reasons for giving the presumption of sanity in Wisconsin a special force, confusion is engendered by the fact that

[57] In Wisconsin the judge is the trier of fact on the question of mental capacity and a jury verdict is merely advisory. However, since an advisory verdict may be desired, it is important to know how the jury should be instructed. See Loughney v. Loughney, 87 Wis. 92 at 101, 58 N.W. 250 (1894). See also cases cited there.

[58] ATKINSON, WILLS, §101 at 545-546 (2d ed. 1953). Note in 6 MISS. L. JOUR. 403 (1934).

[59] *Id.* at 548 and 403.

it does not seem to have this special force in other areas outside the field of will contests.[60] There is also displayed in the case law a great variety of opinion on the location of the burden of proof as to testamentary capacity in will contests. As can be seen much of the language of these cases is difficult to reconcile. It is the belief then of the writer that some clarification of the case law in line with the *Faulks* dictum would aid the profession greatly in reconciling the cases in this area.

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[60] See Guardianship of Farr, 169 Wis. 451 at 454, 171 N.W. 951 (1919) in which the Court states that a finding of insanity by a court will refute the presumption of sanity. No special type of evidence seems required to rebut the presumption.