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STATUTORY AND COMMON LAW PRESUMPTIONS IN MONTANA*

Dennis P. Clarke**

I. INTRODUCTION

In Montana, legal presumptions are commonly thought to be found in two statutes, one covering conclusive presumptions¹ and the other, disputable presumptions.² There are, however, many more presumptions contained in other statutes, and, in addition, there are the common law presumptions created by Montana case law. These less-known presumptions are seldom used because they are difficult to find or recognize as presumptions. The purpose of this article is to help practitioners identify and utilize the more important of these less-known presumptions.

A. *Characteristics of Presumptions*

Perhaps the knowledge most useful in identifying presumptions is a clear understanding of what they are, and are not. A definition is provided by statute in Montana: "A presumption is a deduction which the law expressly directs to be made from particular facts."³ This definition emphasizes one distinguishing feature of a presumption, that the law *requires* it to be made when certain basic facts are established. The mandatory nature of presumptions sets them off from inferences, which the law permits, but does not require.

A second distinguishing feature of presumptions is illustrated by another Montana statute defining presumptions, specifically within the Uniform Commercial Code:⁴

"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.

As this definition so clearly suggests, presumptions have the effect of shifting the burden of persuasion. While inferences or rules of law may also require that certain facts must be found from the existence

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1. REVISED CODES OF MONTANA, (1947) [hereinafter cited as R.C.M. 1947], § 93-1301-6.

2. R.C.M. 1947, § 93-1301-7.

3. R.C.M. 1947, § 93-1301-3.

4. R.C.M. 1947, § 87A-1-201(32).

of other facts, they do not include a shift in the burden of persuasion. Some theories argue that presumptions do not actually shift the burden of persuasion, but only the burden of producing evidence. The distinction between presumptions and rules of law and inferences remains valid under these theories.⁵

A final distinguishing feature of presumptions is that they do not necessarily have to be based on a logical connection between the fact proved and the fact presumed. In certain instances, public policy permits a fact to be presumed from another fact without an intervening logical relationship. For example, ownership is presumed from the basic fact of possession. The policy behind the presumption favors the prior possessor and contributes to the stability of estates, but there is no logical basis for concluding that a possessor is necessarily an owner.⁶

Curiously, a presumption based on public policy rather than logic would not be a presumption under the principal Montana definition. That definition describes a presumption as a type of "deduction". "Deduction" implies a logical relationship between the fact proved and the fact presumed. A better definition, which includes both logical and public policy presumptions, is contained in Rule 301(a) of the proposed Montana Rules of Evidence, providing that "A presumption is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action."⁷

B. *Reasons for Presumptions*

There are many reasons for the creation of presumptions. Perhaps the best summary is provided by Professor Morgan,⁸ who states that there are at least seven different reasons for the creation of presumptions:

1. To make unnecessary the introduction of evidence upon an issue made by the pleadings but not likely to be subject to serious dispute. [Example: the presumption of sanity where sanity must be proven.]
2. To avoid a procedural impasse in a situation where evidence of the presumed fact is lacking. [Example: the presumption of death after seven years absence without tidings.]
3. To avoid such an impasse created by the impossibility of se-

5. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE (2d ed. 1972) 803 [hereinafter cited as MCCORMICK].

6. *Id.* at 807.

7. This definition is based upon WEST'S ANNOTATED CALIFORNIA EVIDENCE CODE, § 600(a) [hereinafter cited as CAL. EV. CODE].

8. MORGAN, BASIC PROBLEMS OF EVIDENCE (1962), 32-34.

curing legally competent evidence of the presumed fact. [Example: where survival of a common disaster is at issue, the presumption is that one person died before another.]

4. To produce a result in accord with the preponderance of probability, "common experience shows the facts to be so generally true that courts may notice the truth."

5. To require the party having peculiar means of access to the facts and evidence of the facts to make them known to the court. [Example: when freight is delivered in a damaged condition, the presumption is that the damage was done by the last carrier.]

6. To reach a result deemed socially desirable wherever the basic fact exists. [Example: long-continued possession of real property as if it were owned by the possessor results in a presumption of a lost grant to the possessor.]

7. To reach a result deemed desirable for a combination of two or more of the foregoing reasons. [Example: the presumption of the legitimacy of a child born in wedlock, supported by Numbers 3, 4, and 6.]

Most presumptions are created because the existence of the condition presumed is "so probable that it is sensible and time-saving to assume the truth of (it) . . . until the adversary disproves it."⁹ The reason for the creation of a specific presumption often dictates the quantum of proof required to overcome it as well as the effect given to it.

C. *Types of Presumptions in Montana Law*

The most basic distinction among presumptions is that between disputable and conclusive presumptions. Although the basic facts giving rise to either may be disputed by the party against whom the presumption operates, once the basic facts of a conclusive presumption have been established, it must be found, and cannot be disputed at all. In contrast, once the facts giving rise to a disputable presumption are established, it may be controverted, and must be found only if the presumption has not been overcome by the person against whom it operates.

Conclusive presumptions have been called rules of substantive law,¹⁰ because there is no shifting of any burden of persuasion when they operate. For similar reasons, the distinction between disputable presumptions, inferences, and rules of law is sometimes difficult to make, because there may be no mention of burden of persuasion, and no clear-cut test for determining the burden.

Presumptions are also distinguished according to source. Thus,

9. McCORMICK, p. 807 n. 7.

10. *Id.* at 804.

there are statutory presumptions and those arising from case law, usually called common law presumptions. Four possible categories flow from these two means of distinguishing presumptions: conclusive statutory presumptions, conclusive common law presumptions, disputable statutory presumptions, and disputable common law presumptions. Only three of these categories of presumptions are recognized in Montana; conclusive common law presumptions are prohibited by statute.¹¹

The following sections will discuss the more significant of the presumptions found within Montana law which fall within these categories. The categorization of many of these presumptions is arbitrary. For example, those presumptions arising from case law which are based on essentially the same principle as statutory presumptions are included with the statutory presumptions, even though they are technically common law presumptions. It is not intended that this writing become an authority on the category in which a presumption belongs. The intention here is merely to indicate some of the presumptions which exist in Montana.

II. PRESUMPTIONS IN MONTANA LAW

A. *Statutory Conclusive Presumptions*

As noted earlier in this article, conclusive presumptions are based on statute only and are actually substantive rules of law. They are to be distinguished from other presumptions in two ways: (1) once their basic facts are established they must be found and cannot be controverted, and (2) they can only be declared by statute. The controlling statute in Montana on conclusive presumptions¹² states: "The following presumptions, and no others, are deemed conclusive . . ." and goes on to list seven subdivisions, the last subdivision¹³ stating: "Any other presumption which, *by statute*, is expressly made conclusive." [Emphasis added.] The conclusive presumptions listed there are:

1. "A malicious and guilty intent, from the deliberate commission of an unlawful act, for the purpose of injuring another." This presumption has been used to support a court's reasoning,¹⁴ but never used squarely in a holding. The only interpretation given it was *dicta* and only restated what the subdivision plainly says.¹⁵

11. R.C.M. 1947, § 93-1301-6(7). Cases construing the statute in this manner include *Hicks v. Stillwater County*, 84 Mont. 38, 46, 274 P.2d 296 (1929); *Roseneau Foods Inc. v. Coleman*, 140 Mont. 572, 577, 374 P.2d 87 (1962).

12. R.C.M. 1947, § 93-1301-6.

13. R.C.M. 1947, § 93-1301-6(7).

14. *Wray v. Great Falls Paper Co.*, 72 Mont. 461, 466, 234 P. 486 (1925).

15. *State v. Smith*, 57 Mont. 563, 581, 190 P. 107 (1920).

2. "The truth of facts recited, from the recital in a written instrument between the parties thereto, or their successors in interest by a subsequent title; but this rule does not apply to the recital of a consideration."¹⁶ This presumption has not been cited very often, and then only as *dicta*.¹⁷ In two cases the subdivision has been used not to point out that whatever is stated in a written instrument is conclusively presumed to be true, but to point out the exception, that the amount of consideration is a disputable presumption under R.C.M. 1947, § 93-1301-7(39)¹⁸ or "subject to explanation."¹⁹

3. "Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it."²⁰ This is one of the most important and often used of all conclusive presumptions. It is the statutory declaration of the doctrine of equitable estoppel.²¹ However, in cases applying the doctrine, the statutory presumption has been used only in conjunction with the following six elements required by case law:

1. There must be conduct—acts, language, or silence—amounting to a representation or a concealment of material facts.
2. These facts must be known to the party estopped at the time of his said conduct, or at least the circumstances must be such that knowledge of them is necessarily imputed to him.
3. The truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel, at the time when it was acted upon by him.
4. The conduct must be done with the intention, or at least with the expectation, that it will be acted upon by the other party, or under such circumstances that it is both natural and probable that it will be so acted upon.
5. The conduct must be relied upon by the other party and thus relying, he must be led to act upon it.
6. He must in fact act upon it in such a manner as to change his position for the worse; in other words, he must so act that he would suffer a loss if he were compelled to surrender or forego or alter what he has done by reason of the first party being permitted to repudiate his conduct and to assert rights inconsistent with it.²²

16. For a similar provision see CAL. EV. CODE § 622.

17. *Angus v. Mariner et al.*, 85 Mont. 365, 374, 278 P. 996 (1924).

18. *Dubbels v. Thompson*, 49 Mont. 550, 557, 143 P. 986 (1914).

19. *Sunburst Oil & Gas Co. v. Neville et al.*, 79 Mont. 550, 564, 257 P. 1061 (1927).

20. For a similar provision see CAL. EV. CODE § 623.

21. *State ex rel. Howeth v. D. A. Davidson Co.*, 163 Mont. 355, 517 P.2d 722 (1974); *Hustad v. Reed*, 133 Mont. 211, 233, 321 P.2d 1083 (1958); *City of Billings v. Pierce Packing Co.*, 117 Mont. 255, 266, 161 P.2d 636 (1945).

22. *State ex rel. Howeth v. D. A. Davidson Co.*, *supra*; *Hustad v. Reed*, *supra*; *City of*

By requiring the common law elements of the doctrine of equitable estoppel, the construction of this subdivision has made it the best example of a rule of law that is not really a presumption at all. Once the basic facts (the six elements) are established, whatever was relied upon is conclusively presumed the truth.

4. "A tenant is not permitted to deny the title of his landlord at the time of the commencement of the relation."²³ This subdivision has not been used or construed. However, the general principle expressed by it has been announced in one case.²⁴

5. "The issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate."²⁵ This subdivision has been applied to find that a child was legitimate as against claims of illegitimacy.²⁶ It should be noted that there are two relevant disputable presumptions that concern legitimacy: R.C.M. 1947, §§ 61-101 and 93-1301-7(31). The distinction between the conclusive presumption and these latter presumptions has not been clearly stated by the Montana supreme court. *In re Wray's Estate*²⁷ noted all three of these presumptions, the court finding that the conclusive presumption required cohabitation. Since the husband and wife were not cohabiting, the subdivision did not apply. A clear distinction gained by reading these statutes is that the disputable presumptions of legitimacy apply only where there is wedlock; they are not concerned with cohabitation'

6. "The judgment or order of a court, when declared by this code to be conclusive; but such judgment or order must be alleged in the pleadings, if there be an opportunity to do so; if there be no such opportunity, the judgment or order may be used as evidence." This provision has only been cited in one case, in which it was found not to apply. However, the court did hold that a judgment or order of a court is conclusive only as to the matters involved in the proceeding.²⁸ Judgments or orders are declared conclusive in other sections of the code: for example, R.C.M. 1947, § 93-2820, giving conclusive effect to judgments and decrees where service of summons is by publication or where unknown heirs, devisees, and owners of

Billings v. Pierce Packing Co., *supra*; *Gerard v. Sanner*, 110 Mont. 71, 80, 103 P.2d 314 (1940); *Mundt v. Mallon*, 106 Mont. 242, 249, 76 P.2d 326 (1938); *Lindbloom v. Employer's Liability Assurance Corp.*, 88 Mont. 488, 494, 295 P. 1007 (1930); note that the six elements originated in the *Lindbloom* case as a quote from 2 POMEROY'S EQUITY JURISPRUDENCE (4th ed. 1918) 1644.

23. For a similar provision see CAL. EV. CODE § 624.

24. *Cook et al. v. Hudson*, 110 Mont. 263, 288, 103 P.3d 1137 (1940).

25. For a similar provision see CAL. EV. CODE § 621. See also the recently adopted Uniform Parentage Act, R.C.M. 1947, § 61-301 *et. seq.*, especially § 61-305, concerning a presumption of paternity.

26. *In re Pepin's Estate*, 53 Mont. 240, 248, 163 P. 104 (1917).

27. 93 Mont. 525, 535, 19 P.2d 1051 (1933).

28. *Hustad v. Reed*, *supra* note 19 at 224-5.

property are involved; § 93-1001-20, giving conclusive effect to judgments or orders of the courts of this state or of the United States in respect to specific matters covered; and § 91-3516, providing for settlement of accounts in probate.

There are other conclusive presumptions to be found in the Code in addition to those stated in § 93-1301-6. While some of the statutes have been construed by Montana case law, the presumptions contained in them have not. R.C.M. 1947, § 11-3914 conclusively presumes that a conveyance of any right, title or interest under the Urban Renewal Act in compliance with the provisions of the act has been executed. Section 16-4415 states that "it will be conclusively presumed that an area which is within fifteen hundred (1500) feet of a proposed or existing sanitary sewer, is contributory to the pollution of a watercourse in the proposed area". Section 45-414 conclusively presumes that a party purchasing property subject to a logger's lien is not a bona fide owner of that property unless certain conditions are met. Sections 81-430 and 81-2613 conclusively presume that if any part of their respective acts are found invalid, the remainder of the act shall be valid. Section 84-5606 conclusively presumes that all taxes paid pursuant to this section are "direct taxes on the retail consumer precollected for the purpose of convenience and facility only". Sections 92-822 and 92-1360 conclusively presume that the orders, rules, regulations, findings, decisions, and awards are reasonable and lawful. Section 92-1315(B)(1)(b)(1) creates an irrebutable presumption of total disability when certain requirements are met.

A conclusive presumption which has been used extensively, R.C.M. 1947, § 29-208, states:

Every transfer of personal property, other than a thing in action, or a ship or cargo at sea, or in a foreign port, and every lien thereon, other than a mortgage, when allowed by law, and a contract of bottomry or respondentia, is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession, and the successors in interest of such creditors, and against any persons on whom his estate devolves in trust for the benefit of others than himself, and against purchasers or encumbrancers in good faith subsequent to the transfer.

The statute in substance provides that where a transfer of personal property by its possessor is not accompanied by an immediate delivery and followed by an actual or continued change of possession to

the transferee, it will be conclusively presumed to be fraudulent.²⁹ The purpose of the statute is "to require notice to the world of the transfer" so that certain persons ("creditors, and purchasers or encumbrancers in good faith") may be protected. "It is designed to prevent fraud."³⁰

The effect of making this a conclusive presumption is to disallow admission of evidence on the question of fraud.³¹ Therefore the only dispute which may be made concerns the basic facts of this presumption: that the person either possessed the property, or delivered it, or that there was a continued change of possession. Once these have been established, the transfer is conclusively presumed fraudulent and is therefore void.

R.C.M. 1947, § 91A-3-406(2), part of the Montana Uniform Probate Code, provides a conclusive presumption in regard to self-proved wills:

- (2) If the will is self-proved, compliance with signature requirements for execution is conclusively presumed and other requirements of execution are presumed subject to rebuttal without the testimony of any witness upon filing the will and the acknowledgment and affidavits annexed or attached thereto, unless there is proof of fraud or forgery affecting the acknowledgment or affidavit.

The Editorial Board Comment to this section states that the conclusive presumption would apply to the question of whether the will was properly executed but not to questions of "undue influence, lack of testamentary capacity, revocation or any relevant proof that the testator was unaware of the contents of the document."

B. *Disputable Statutory Presumptions*

There are at least 175 disputable statutory presumptions.³² These can be distinguished from conclusive presumptions in that the presumptions themselves, as well as their basic facts, may be disputed, and in that the basic principles upon which they rest are stated in a statute. Because of limitations of space, only some of them will be discussed.

R.C.M. 1947, § 1301-7 contains the largest number of these presumptions, listing 39. The first is: "That a person is innocent of a crime or wrong." This classic presumption of innocence used in

29. *O.W. Perry Co. v. Mullan*, 81 Mont. 482, 485, 263 P. 976 (1928).

30. *Id.* at 486.

31. *Taylor v. Malta Mercantile Co.*, 47 Mont. 342, 346, 132 P. 549 (1913) and R.C.M. 1947, § 29-210 providing how fraud is to be determined "except as otherwise provided in section 29-208."

32. A complete list of these presumptions will be found in Appendix Table C, Proposed Montana Rules of Evidence.

all criminal cases is also contained in another section.³³ (The repetition elsewhere of presumptions found in this section is common.) It has been used often in civil cases,³⁴ in combination with other provisions of this section. For example, it has been used with subdivision 4: "That a person takes ordinary care of his own concerns";³⁵ subdivision 15: "That official duty has been regularly performed"; subdivision 33: "That the law has been obeyed";³⁶ subdivision 19: "That transactions have been fair and regular";³⁷ and with subdivision 20: "That the ordinary course of business has been followed."³⁸ This subdivision has been used in this manner only to support the court's reasoning in finding in favor of the defendant.

The second presumption is "that an unlawful act was done with unlawful intent." It has been used exclusively in criminal litigation. In one case, this disputable presumption was used with the conclusive presumption of malicious and guilty intent from an unlawful act,³⁹ and in another was used by itself in a specific factual situation (the repeated shooting into the vital parts of the human body with a deadly weapon) to establish intent.⁴⁰

The third presumption is "that a person intends the ordinary consequences of his voluntary act." It has been used to show intent to fraudulently convey property,⁴¹ to show that a motion was made for other than judicial purposes,⁴² and to show malice in a malicious prosecution action.⁴³ In criminal cases it has been used to show criminal intent⁴⁴ and the intent to waive rights, when combined with subdivision 27: "That acquiescence followed from a belief that the thing acquiesced in was conformable to the right or fact."⁴⁵

The fourth presumption is "that a person takes ordinary care of his own concerns." It has been used in civil cases, primarily as

33. R.C.M. 1947, § 95-2901.

34. *Hawaiian Pineapple Co. v. Browne*, 69 Mont. 140, 147, 220 P.2d 1114 (1923); *State ex rel. Tillman v. District Court*, 101 Mont. 176, 181, 53 P.2d 107 (1936); *Kern v. Eichhorn*, 111 Mont. 171, 176, 107 P.2d 873 (1940); same case, 112 Mont. 262, 264, 124 P.2d 311 (1942). However, the presumption is also used in criminal cases, for example, *State v. McLeod*, 131 Mont. 478, 489, 311 P.2d 400 (1957).

35. *Hansen et al. v. Johnson*, 90 Mont. 597, 609, 4 P.2d 1088 (1931).

36. *Rock Island Plow Co. v. Cut Bank Implement Co.*, 107 Mont. 117, 123, 53 P.2d 116 (1935).

37. *Gagnon v. Jones*, 103 Mont. 365, 367, 62 P.2d 683 (1936) and *Whitney v. Northwest Greyhound*, 125 Mont. 528, 541, 242 P.2d 257 (1952) also using subd. 33.

38. *Johnson v. Kaiser*, 104 Mont. 261, 276, 65 P.2d 1179 (1937).

39. R.C.M. 1947, § 93-1301-6(1); *State v. Smith*, *supra* note 14.

40. *State v. McLeod*, *supra* note 31.

41. *National Bank of Anaconda v. Yegen*, 83 Mont. 265, 280, 271 P. 612 (1928).

42. *State ex rel. Hall v. Niewoehner*, 116 Mont. 437, 453, 155 P.2d 205 (1944).

43. *Rickman v. Safeway Stores*, 124 Mont. 451, 456, 227 P.2d 607 (1951).

44. *State v. McLeod*, *supra* note 31.

45. *Campus v. State et al.*, 157 Mont. 321, 326, 483 P.2d 275 (1971).

an aid to the determination of the existence of negligence or contributory negligence.⁴⁶ It has also been applied in an action to set aside conveyances of real estate⁴⁷ and in another dealing with the construction of a contract for sale of land,⁴⁸ in which it was held that several presumptions from this section did not apply because the evidence showed otherwise. It has not been applied when there were facts contrary to the presumption.⁴⁹

The eighth presumption is "that a thing delivered by one to another belonged to the latter." It has been used with the eleventh presumption: "That things which a person possesses are owned by him," and the twelfth presumption "that a person is the owner of property from exercising acts of ownership over it, or from common reputation of his ownership."⁵⁰

The fifteenth presumption, "that official duty has been regularly performed," is the most widely used of these presumptions. Closely related is the sixteenth presumption: "That a court or judge, acting as such, whether in this state or any other state or country, was acting in the lawful exercise of his jurisdiction." These two presumptions have been employed so often that their use has resulted in many courts referring to them without citation to the statute. Other common presumptions are:

24. That a letter duly directed and mailed was received in the regular course of the mail.
26. That a person not heard from in seven years is dead.
32. That a thing once proved to exist continues as long as is usual with things of that nature.
34. [The ancient documents rule] That a document or writing more than thirty years old is genuine, when the same has been since generally acted upon as genuine, by persons having an interest in the question, and its custody has been satisfactorily explained.

Other statutes contain presumptions covering many other areas of the law; they are so numerous that individual attention cannot be given to each one. For convenience they are divided into general areas of the law in the following discussion.

46. *Harrington v. Butte, Anaconda & Pacific Ry. Co.*, 37 Mont. 169, 172, 95 P. 8 (1908); *Meehan v. Northern Pacific Ry. Co.*, 43 Mont. 72, 80, 114 P. 781 (1911); *Doorley v. Goodman*, 71 Mont. 529, 536, 230 P. 779 (1924); *Rau v. Northern Pacific Ry. Co.*, 87 Mont. 521, 544, 289 P. 580 (1930).

47. *Johnson v. Kaiser*, *supra* note 34.

48. *Ryan v. Bloom*, 120 Mont. 443, 450, 186 P.2d 879 (1947).

49. *Osterholm v. Butte Electric Ry. Co.*, 60 Mont. 193, 202, 199 P. 253 (1921); *Roberts v. Chicago, Milwaukee & St. Paul Ry. Co.*, 67 Mont. 472, 478, 216 P. 332 (1923); *Monforton v. Northern Pac. Ry. Co.*, 138 Mont. 191, 207, 355 P.2d 501 (1960); *Knowlton v. Sundaker*, 150 Mont. 438, 449, 436 P.2d 98 (1968).

50. *Cuerth v. Arbogast*, 48 Mont. 209, 217, 136 P. 383 (1913).

1. *Contracts*

Disputable statutory presumptions concerned with the construction and determination of intent of terms are: that a written instrument shows a presumption that there was consideration;⁵¹ that words of a contract are to be construed most strongly against the party who caused the uncertainty to exist and this is presumed to be the promisor, unless that party is the government, in which case it is presumed to have been caused by the private party;⁵² that where parties unite in a promise and receive benefit, the promise is presumed joint and several;⁵³ that where a promise is made by one person but executed by several, it is presumed to be joint and several;⁵⁴ that where a contract is revised, it is presumed that all parties "intended to make an equitable and conscientious agreement";⁵⁵ and that terms of a contract are presumed to be used in their ordinary meaning or "primary and general acceptance."⁵⁶ Another presumption associated with contracts is an exception to the rule that contracts fixing damages are void:⁵⁷ where it would be impracticable or extremely difficult to fix the actual damages, the parties may agree upon an amount which is presumed to be the amount of damages sustained.⁵⁸

2. *Criminal Law*

Statutory presumptions in this area are important because an element of certain crimes may be established by a presumption. The crime of assault as defined by the Montana Criminal Code of 1973⁵⁹ presumes reasonable apprehension "in any case in which a person knowingly points a firearm at or in the direction of another whether or not the offender believes the firearm to be loaded." To establish criminal jurisdiction in murder cases, if the body is found in this state, "the death is presumed to have occurred within the state."⁶⁰ Two other statutes, dealing with the possession of machine guns, include a presumption that the possession or use is "for [an] offensive or aggressive purpose" upon certain conditions.⁶¹ The presence

51. R.C.M. 1947, § 13-510.

52. R.C.M. 1947, § 13-720.

53. R.C.M. 1947, § 13-725.

54. R.C.M. 1947, § 13-726.

55. R.C.M. 1947, § 17-902.

56. R.C.M. 1947, § 93-401-18.

57. R.C.M. 1947, § 13-804.

58. R.C.M. 1947, § 13-805.

59. R.C.M. 1947, § 94-5-201(1)(d).

60. R.C.M. 1947, § 95-304.

61. R.C.M. 1947, §§ 94-8-204 and 94-8-208.

of the defendant during his trial is "conclusively deemed" unless the record shows the contrary.⁶²

A presumption in favor of one class of defendants is that persons convicted under the dangerous drug act who are under 21 years of age are presumed to be entitled to a deferred imposition of sentence.⁶³ The only other presumption in favor of the defendant is the classic presumption of innocence.⁶⁴

3. Damages

Several statutes use presumptions to establish damages in certain actions. Damages for conversion are presumed to be the value of the property, with interest, or the highest market value without interest, and fair compensation for efforts to recover the property.⁶⁵ The estimation of damages for the value of a written instrument is presumed to be the equivalent value of property to which it entitles the owner.⁶⁶ Finally, it is presumed that the breach of an agreement to transfer real property cannot be adequately compensated in money damages, but that the breach of an agreement to transfer personal property can be so compensated.⁶⁷

4. Death

A person is presumed to be dead at the end of seven years if he has not been heard from, and if his "absence is not satisfactorily explained after diligent search."⁶⁸ A finding of presumed death under the Federal Missing Persons Act is *prima facie* evidence of death.⁶⁹ Further, any report issued pursuant to law by a federal officer or employee has the same effect.⁷⁰

5. Family Law

The determination of the legitimacy of a child is covered not only in the statutes on conclusive⁷¹ and statutory⁷² presumptions, but also in the Uniform Parentage Act. The Act adopts several presumptions to determine whether a man is the father of a child.⁷³

62. R.C.M. 1947, § 95-1904.

63. R.C.M. 1947, § 54-133.

64. R.C.M. 1947, § 95-2901.

65. R.C.M. 1947, § 17-404.

66. R.C.M. 1947, § 17-604.

67. R.C.M. 1947, § 17-804.

68. R.C.M. 1947, § 91A-1-107(3), effective July 1, 1975.

69. R.C.M. 1947, § 93-1001-35.

70. R.C.M. 1947, § 93-1001-41.

71. R.C.M. 1947, § 93-1301-6(5), discussed *infra*.

72. R.C.M. 1947, § 93-1301-7(31).

73. R.C.M. 1947, § 61-305.

Additionally, there is a presumption of the legitimacy of children born within ten months of the dissolution of a marriage⁷⁴ and of the legitimacy of all children born in wedlock.⁷⁵ Questions of support of the family are also covered to an extent by presumptions: all work done by a married person, other than that for spouse and children, is presumed to be for "his separate account" unless there is a written agreement to the contrary.⁷⁶ Further, while a married person is not bound to support his spouse's children from a former marriage, if he does so it is presumed that the support is given as a parent, even though this support creates no obligation.⁷⁷

6. *Immunity From Liability*

Several statutes declare that when an official acts in good faith in carrying out his duty under a particular act, he shall be immune from liability. This includes making reports under the Abused, Neglected and Dependent Children and Youth Act⁷⁸ and three acts granting immunity in the collection of stray animal stock.⁷⁹ Another statute granting immunity from liability presumes that a doctor acts in good faith in reporting a gun shot or stab wound.⁸⁰

7. *Landlord and Tenant*

Where residential property is rented for an indefinite period of time, it is presumed to be for the period of time for which the rent is paid.⁸¹ However, where commercial property is rented for an indefinite period, the term is presumed to be for one year unless otherwise expressed.⁸² If a lessee continues in possession after the expiration of a lease and if the lessor accepts rent, "the parties are presumed to have renewed" the lease on the same terms⁸³ and for the same time, not to exceed one year. Under a new law, if a leasehold agreement requires the tenant to provide a deposit to the landlord, it is presumed to be a security deposit.⁸⁴

74. R.C.M. 1947, § 61-102.

75. R.C.M. 1947, § 61-101.

76. R.C.M. 1947, § 36-116.

77. R.C.M. 1947, § 61-117.

78. R.C.M. 1947, § 10-1306.

79. R.C.M. 1947, § 46-1606, Horse Herd Districts; § 46-1813, Abandoned Horses, and § 46-2326(S), Grass Conservation.

80. R.C.M. 1947, § 66-1051.

81. R.C.M. 1947, § 42-204.

82. R.C.M. 1947, § 42-203.

83. R.C.M. 1947, § 42-205.

84. R.C.M. 1947, § 42-301(3).

8. *Liquor*

Where it is proved that an offense against the State Liquor Control Act has been committed by any person employed by the owner of an establishment, the owner "shall prima facie be deemed to be a party to the offense committed, and shall be liable to the penalties prescribed for the offense."⁸⁵ When a court is trying a case, it is "at liberty to infer" that the liquor in question is intoxicating.⁸⁶ The statute that proscribes driving while under the influence of intoxicating liquor or drugs establishes certain amounts of alcohol in the defendant's blood as a presumption that he may be under the influence of alcohol. If there is 0.05 per cent or less alcohol in the blood it is presumed that the defendant was not under the influence; if there is between 0.05 and 0.10 per cent there is no presumption but this may be used as evidence; if there is 0.10 per cent or more there is a presumption that the defendant was under the influence.⁸⁷

9. *Negotiable Instruments*

The part of the Uniform Commercial Code dealing with commercial paper uses a number of presumptions. Many of these rest on the principle that what is written on the instrument is correct; for example, that the date is presumed correct,⁸⁸ that signatures are presumed genuine,⁸⁹ that endorsers are presumed liable in the order in which their signatures appear,⁹⁰ and that certain periods are presumed to be a reasonable time for presentment.⁹¹ Others include the presumption of creation of a guaranty when words of guaranty are added with a signature,⁹² that in an action against a drawee the measure of liability is presumed to be the face amount of the instrument,⁹³ and that evidence of dishonor is created by presumption when listed facts occur.⁹⁴ There is also a presumption of agency status of endorsing banks in the collection process⁹⁵ and that the signature on a negotiable security in any action on a security is presumed to be genuine or authorized.⁹⁶

85. R.C.M. 1947, § 4-207.

86. R.C.M. 1947, § 4-208.

87. R.C.M. 1947, § 32-2142(1), (2) and (3).

88. R.C.M. 1947, § 37A-3-114.

89. R.C.M. 1947, § 87A-3-307(1).

90. R.C.M. 1947, § 87A-3-414(2).

91. R.C.M. 1947, § 87A-3-503.

92. R.C.M. 1947, § 87A-3-416(4).

93. R.C.M. 1947, § 87A-3-419(2).

94. R.C.M. 1947, § 87A-3-510.

95. R.C.M. 1947, § 87A-4-201(1).

96. R.C.M. 1947, § 87A-8-105.

10. *Property*

Inadverse possession cases, it is presumed that the person holding title to the land is in possession of the property and that the occupation by any other person is in subordination to that title, unless the property has been held adversely for five years.⁹⁷ A Montana curative title statute states that when a deed to real property has been made prior to 1900, and the deed does not acknowledge whether the grantor had a wife, it is presumed that the grantor had no wife.⁹⁸ The statutes concerning fixtures use presumptions to determine the existence of fixtures to land⁹⁹ and to mines.¹⁰⁰

When property is conveyed several presumptions come into operation. In a conveyance of realty, the grantor is presumed to be the sole and separate owner of the property.¹⁰¹ When a person grants a thing, he is presumed to grant whatever is essential to its use.¹⁰² A grant properly executed is presumed to have been delivered at its date.¹⁰³ Fee simple is presumed to pass by a grant of real property unless the contrary is intended.¹⁰⁴ Land with boundaries along a street or road is presumed to be owned to the center thereof.¹⁰⁵

11. *Unfair Trade Practices*

Under a statute that sets out the procedure for establishing cost surveys, once the cost percentage has been established, that percentage is presumed to be the actual "cost of doing business" and "overhead expense."¹⁰⁶ The basic "cost of doing business by the retailer" is presumed to be ten per cent of the "basic cost of cigarettes" to the retailer in the absence of proof to the contrary, as provided by the Montana Cigarette Sales Act.¹⁰⁷ Any order, express or implied, made to any motor vehicle dealer by a manufacturer, that the dealer will finance sales through any person affiliated with or controlled by that manufacturer, is presumed to have been made by or at the direction of that manufacturer.¹⁰⁸ Sending unsolicited goods through the mail is deemed a gift, and the recipient is allowed

97. R.C.M. 1947, § 93-2507.

98. R.C.M. 1947, § 39-131.

99. R.C.M. 1947, § 67-209.

100. R.C.M. 1947, § 67-210.

101. R.C.M. 1947, § 9-818.

102. R.C.M. 1947, § 49-114.

103. R.C.M. 1947, § 67-1510.

104. R.C.M. 1947, § 67-1608.

105. R.C.M. 1947, § 67-713.

106. R.C.M. 1947, § 51-114.

107. R.C.M. 1947, § 51-303.

108. R.C.M. 1947, § 51-204.

to use or dispose of the goods without any obligation to the sender.¹⁰⁹ Under another act, where a home solicitation sale is cancelled and the seller does not demand possession within a reasonable time, the purchaser is no longer obligated to pay for the goods; a reasonable time is presumed to be 40 days.¹¹⁰

12. *Water Rights*

An appropriation is deemed abandoned if the appropriator intends to abandon or to cease complying with terms of that right.¹¹¹ Under this statute if an appropriator ceases to use his rights and there was water available for a period of ten years, there is a *prima facie* presumption that he has abandoned his right.¹¹² All acts of the commissioners of drainage districts are presumed regular, as they are declared to be public officers.¹¹³ Under the Floodway Management and Regulation Act, the distinction between "drainway" and "watercourse" is whether either gives direction to a current of water more than or less than nine months of the year;¹¹⁴ in case of doubt, a presumption exists in favor of the current being a watercourse. Under this act, where wrongful failure to comply with the act is shown, a presumption is created that an obstruction was the proximate cause of flooding.¹¹⁵

13. *Workman's Compensation*

There are several presumptions used in the Workman's Compensation Act. It is presumed that an employee has elected to be bound by the particular provisions of the Act unless he affirmatively declines to be bound.¹¹⁶ The same presumption carries over to workers when the employer procures work to be done by contract.¹¹⁷ Under the Occupational Diseases Act, certain diseases are presumed to render a worker totally disabled, and under certain conditions, contracting a disease will be presumed to be work-connected.¹¹⁸

109. R.C.M. 1947, § 67-1706.1.

110. R.C.M. 1949, § 85-506.

111. R.C.M. 1947, § 89-894(1).

112. R.C.M. 1947, § 89-894(2).

113. R.C.M. 1947, § 89-2815.

114. R.C.M. 1947, § 89-3503.

115. R.C.M. 1947, § 89-3514.

116. R.C.M. 1947, § 92-209.

117. R.C.M. 1947, § 92-605.

118. R.C.M. 1947, §§ 92-1303, 93-1315.

C. *Disputable Common Law Presumptions*

Many presumptions stated in cases are based on a statutory principle which may or may not be a presumption. One example of this is found in R.C.M. 1947, § 93-1301-7(15), stating that official duty is presumed performed; case law adopts this principle and finds that proceedings are presumed regularly carried out and that all necessary requirements are met.¹¹⁹ A large number of common law presumptions closely related to this principle involve the principle that on appeal the conduct of a trial is assumed in all respects to have been proper. Included are the following presumptions: that all evidence necessary to support the judgment will be presumed on appeal;¹²⁰ that in a non-jury case, it will be presumed that the judge considered only competent evidence in reaching his findings;¹²¹ that a judgment or order will be presumed proper;¹²² and, conversely, that error will not be presumed, but must be affirmatively shown by appellant.¹²³ When a motion for new trial is granted without specification of the grounds, the presumption arises that the court in its discretion granted the motion on grounds of insufficient evidence to justify the verdict.¹²⁴ The same type of presumptions apply to the appellate process. For example: it will be presumed that an appeal bond is sufficient where no exception is taken.¹²⁵ Proceedings dealing with bills of exceptions are presumed to be regular.¹²⁶

The presumption of correctness does not apply in several instances: where judgments are obtained by constructive service,¹²⁷ and where the trial court has lost jurisdiction.¹²⁸ Further, where a record of testimony is available, the presumption that the testimony

119. *In re Horemann's Estate*, 108 Mont. 386, 394, 91 P.2d 394 (1939) found that requirements were met in adoption proceedings; *State ex rel. Hamilton v. District Court*, 102 Mont. 341, 348, 57 P.2d 1227 (1936) found that parties are presumed to be of full age.

120. *Story v. Black*, 5 Mont. 26, 41, 1 P. 1 (1883) and a long line of cases.

121. *Montana Ore Packing Co. v. Butte & Boston Consolidated Mining Co.*, 25 Mont. 427, 432, 65 P. 420 (1901) and a long line of cases.

122. *Rumney Land & Cattle Co. v. Detroit and Montana Cattle Co.*, 19 Mont. 557, 559, 49 P. 395 (1897) and a long line of cases.

123. *State v. Matt*, 29 Mont. 292, 307, 74 P. 728 (1903); *Swain v. McMillan*, 30 Mont. 433, 441, 76 P. 943 (1904) and a long line of cases.

124. *Norton v. Great Northern Railway Co.*, 78 Mont. 273, 285, 254 P. 165 (1927) and *Brennan v. Mayo*, 100 Mont. 439, 447, 50 P.2d 245 (1935).

125. *O'Neil v. State Savings Bank et al.*, 34 Mont. 521, 527, 87 P. 970 (1906).

126. Since Rule 46, MONTANA RULES OF CIVIL PROCEDURE, no longer requires bills of exceptions, this presumption is presented as an example of how a principle has been applied. See, *Montana Ore Purchasing v. Lindsey*, 25 Mont. 24, 29, 63 P. 719 (1901); *White v. Kemper*, 25 Mont. 432, 437, 65 P. 422 (1901); and *State v. Tate*, 55 Mont. 343, 344, 177 P. 243 (1918).

127. *Palmer v. McMaster*, 8 Mont. 61, 66, 85 P. 739 (1906).

128. *Evans v. Oregon Short Line Ry. Co.*, 51 Mont. 107, 112, 149 P. 715 (1915).

supports the trial court's actions is not followed.¹²⁹ Where the same stipulated facts are submitted to both the trial and supreme courts the presumption that the trial court's findings are correct does not have the same force as in other cases.¹³⁰ The presumption that the judge considered only competent evidence is not followed where the excluded evidence was important and apparently used by the trial court in its findings,¹³¹ where the excluded evidence went to the heart of the matter,¹³² where the record shows that recitals contained in the judgment were untrue,¹³³ or where the equities are clearly in favor of the losing party.¹³⁴

The presumption of regularity has been variously followed when default judgments are concerned. It will be presumed that the court followed the law when entering a default judgment,¹³⁵ and that there was neglect when the statutory period was permitted to run.¹³⁶ Jurisdiction will not, however, be presumed on appeal from a default judgment.¹³⁷ The presumption that the default judgment was supported by the pleadings does not obtain when they are before the court;¹³⁸ neither does it obtain when proper notice was not received by the defendants.¹³⁹

Other applications of the presumption of regularity include: that an attorney's acts are presumed regular and done pursuant to the client's authority;¹⁴⁰ that a federal court discharging a bankrupt had jurisdiction and that its proceedings were regular;¹⁴¹ that proceedings in criminal cases were regular;¹⁴² that an order amending minutes was proper;¹⁴³ that sentencing before a two-day interval had expired was proper;¹⁴⁴ that evidence was sufficient to sustain a jury's verdict;¹⁴⁵ that instructions to the jury were correct¹⁴⁶ and were fol-

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129. *State ex rel. Ellan v. District Court*, 97 Mont. 160, 168, 33 P.2d 526 (1934).
 130. *McCracken v. Liquor Control Board*, 115 Mont. 347, 352, 143 P.2d 891 (1943).
 131. *Anaconda Copper Mining v. Heinze*, 27 Mont. 161, 172, 69 P. 909 (1902).
 132. *State ex rel. Rankin v. Martin*, 68 Mont. 392, 404, 219 P. 632 (1923).
 133. *Regis v. District Court*, 102 Mont. 74, 85, 55 P.2d 1295 (1936).
 134. *Cedar Creek Oil and Gas Co. v. Archer et al.*, 112 Mont. 477, 489, 117 P.2d 265 (1941).
 135. *Butte Butchering Co. v. Clarke*, 19 Mont. 306, 311, 48 P. 303 (1897).
 136. *Pacific Acceptance Corp. v. McCue*, 71 Mont. 99, 103, 288 P. 761 (1924).
 137. *Griffith v. Montana Wheat Growers Assoc.*, 75 Mont. 466, 473, 244 P. 277 (1926).
 138. *State ex rel. Costello v. District Court*, 86 Mont. 387, 394, 284 P. 128 (1930).
 139. *Holen v. Phelps*, 131 Mont. 146, 152, 308 P.2d 624 (1957).
 140. *Pullen v. City of Butte*, 45 Mont. 46, 56, 121 P. 878 (1911); *Rieckoff v. Woodhull*, 106 Mont. 22, 32, 75 P.2d 56 (1937).
 141. *Ragsdale v. Botham*, 81 Mont. 408, 419, 263 P. 293 (1928).
 142. *Territory v. Clayton*, 8 Mont. 1, 13, 19 P. 293 (1888).
 143. *State v. Lu Sing*, 34 Mont. 31, 40, 85 P. 521 (1906).
 144. *State v. Mich*, 36 Mont. 168, 175, 92 P. 459 91907.
 145. *State v. Wong Sun*, 114 Mont. 185, 193, 133 P.2d 761 (1943).
 146. *Black v. Black*, 5 Mont. 15, 24, 2 P. 317 (1883); *Howard v. Fraser*, 83 Mont. 194, 199, 271 P. 444 (1928).

lowed;¹⁴⁷ that a jury's decision was supported by the evidence¹⁴⁸ and was reached properly;¹⁴⁹ that an assessment was properly made;¹⁵⁰ that the necessity for passage of an ordinance existed;¹⁵¹ that a 40-acre tract was included within the corporate limits of a town;¹⁵² that proceedings on a motion for new trial met all necessary requirements;¹⁵³ that proceedings generally were regular and that notice was given;¹⁵⁴ that conditions precedent to delivery of an oil and gas lease held in escrow had been met under the doctrine that those things which should have been done have been done;¹⁵⁵ and that orders and findings of the State Board of Equalization are presumed correct and justified by the evidence.¹⁵⁶

The following disputable common law presumptions are created entirely by case law and are not found in any statute. They cover almost every area of the law.

1. Attorneys

An attorney is presumed innocent in disbarment proceedings.¹⁵⁷ An order allowing attorney's fees is presumed to have followed proper considerations.¹⁵⁸ Although a court is presumed to be aware of

147. *Vasby v. U.S. Gypsum Co.*, 46 Mont. 411, 423, 128 P. 686 (1912).

148. *Huston v. Nuss*, 19 Mont. 113, 114, 47 P. 643 (1897); *Rumsey v. Spratt*, 79 Mont. 158, 162, 255 P. 5 (1927).

149. *State v. Sparks*, 40 Mont. 82, 87, 105 P. 87 (1909) presumed that the jury drew no inference from failure of defendant to testify; *Kansier v. City of Billings*, 56 Mont. 250, 257, 184 P. 630 (1919) presumed the jury considered the evidence; *Hunt v. Van*, 61 Mont. 395, 399, 202 P. 573 (1921) presumed the jury did not consider extraneous behavior of witness; and *Linguist v. Seibold*, 62 Mont. 162, 164, 199 P. 709 (1921) presumed that the jury disregarded a witness's stricken answer.

150. *City of Butte v. School District*, 29 Mont. 336, 339, 74 P. 869 (1903).

151. *State v. Mayor of Butte*, 69 Mont. 232, 236, 221 P. 524 (1923).

152. *Ogle v. Town of Ronan*, 112 Mont. 394, 396, 117 P.2d 257 (1941).

153. *Murray v. Hauser*, 21 Mont. 120, 125, 53 P. 99 (1898); *State v. Sheppard*, 23 Mont. 323, 324, 58 P. 868 (1899), decision made on proper foundation; *Beach v. Spokane R.&W. Co.*, 25 Mont. 367, 369, 65 P. 106 (1901), proper service made; *Harrington v. Butte-Boston Mining Co.*, 27 Mont. 1, 12, 69 P. 102 (1902), motion granted on presumed ground of insufficient evidence; *Friel v. Kimberly Montana Gold Mining Co.*, 34 Mont. 54, 59, 85 P. 734 (1906), proper steps taken to settle statement for motion for new trial; *Ettien v. Drum*, 35 Mont. 81, 90, 88 P. 659 (1907), presumption that court had notice before passing on a motion; *State ex rel. Cohn v. District Court*, 38 Mont. 119, 124, 99 P. 139 (1909), presumption of notice of intent to move for new trial timely; *Price v. Northern Pacific Ry. Co.*, 60 Mont. 166, 170, 198 P. 439 (1921), presumption that an order for new trial based on minutes; *Benjamin v. Helena Light & Railway Co.*, 79 Mont. 144, 146, 255 P. 20 (1927), presumption in favor of trial court's action even where affidavits for new trial conflict; *Shoenborn v. Williams*, 83 Mont. 477, 480, 272 P. 992 (1928), presumption that motion is denied when not heard within a specified time.

154. *Lish v. Martin*, 55 Mont. 582, 583, 179 P. 826 (1919); *In re McGovern's Estate*, 77 Mont. 182, 203, 250 P. 812 (1926).

155. *Guerin v. Sunburst Oil & Gas Co.*, 68 Mont. 365, 371, 218 P. 949 (1923).

156. *State ex rel. State Board of Equalization v. Jacobson*, 107 Mont. 461, 465, 86 P.2d 9 (1938); *IBM Corp. v. Lewis & Clark County*, 111 Mont. 384, 387, 112 P.2d 477 (1941).

157. *In re Parsons' Estate*, 35 Mont. 478, 482, 90 P. 163 (1907).

158. *Forrester v. MacGinnis Mining Co.*, 29 Mont. 397, 409, 74 P. 1088 (1914).

the value of an attorney's services, evidence may be allowed showing what is just and reasonable.¹⁵⁹ However, where the record contains no evidence as to whether attorney's fees are reasonable, it is presumed that the amount fixed by the court was correct.¹⁶⁰

2. *Constitutional and Statutory Construction*

The constitutionality of statutes is presumed.¹⁶¹ In the area of interpretation of language, words used in statutes and constitutions are presumed to be used in their ordinary sense,¹⁶² or in the sense given them by another jurisdiction.¹⁶³

Another technique of construction is to examine legislative intent. In this area, several presumptions can help a court decide the meaning to be given a statute. When a statute is amended, it is presumed that the legislature intended to change existing law, although a mere change of words may have been made to clarify language.¹⁶⁴ However, it is presumed that the legislature is aware of existing law relating to a subject when attempts are made to change it,¹⁶⁵ and that it understands the meaning of words used, and uses them in their ordinary sense.¹⁶⁶ The legislature is presumed to pass legislation which is reasonable, just and convenient.¹⁶⁷ Where a particular class of persons is treated specially, it is presumed that there were legitimate grounds of distinction.¹⁶⁸ The legislature is also presumed to act in good faith when estimating amounts of revenue and appropriations,¹⁶⁹ and to know the conditions and policies of industries when making legislation.¹⁷⁰ In interpreting the public policy of the state, if the supreme court's interpretation of a particular policy has not been changed in three legislative sessions, it will be presumed correct.¹⁷¹ As a general rule, retroactive laws are not favored, for it is presumed that the legislature did not intend to establish a new rule for past transactions,¹⁷² and that statutes should operate

159. Hickey et al. v. Parrot Silver & Copper Co., 32 Mont. 143, 158, 79 P. 698 (1904).

160. Britt v. Powder Butte Mine, 108 Mont. 174, 180, 89 P.2d 266 (1939).

161. People ex rel. v. VanGaskin, 5 Mont. 352, 366, 6 P. 30 (1885).

162. State ex rel. Heinz v. Moody, 71 Mont. 473, 481, 230 P. 575 (1924); Rider v. Cooney, Gov., 94 Mont. 295, 309, 23 P.2d 261 (1933).

163. State ex rel. Gerry v. Edwards et al., 42 Mont. 135, 143, 111 P. 734 (1910).

164. State ex rel. Rankin v. Wibaux County Bank, 85 Mont. 532, 540, 281 P. 341 (1929).

165. State ex rel. Escar v. District Court, 56 Mont. 464, 467, 185 P. 157 (1919).

166. Helena Light and Ry. Co. v. Northern Pacific Ry. Co., 57 Mont. 93, 113, 186 P. 702 (1920).

167. State ex rel. Mallott v. Board of Commissioners, 89 Mont. 37, 87, 296 P. 1 (1931).

168. Rutherford v. City of Great Falls, 107 Mont. 512, 520, 86 P.2d 656 (1939).

169. State ex rel. Tipton v. Erickson, 93 Mont. 466, 475, 19 P.2d 227 (1933).

170. Leuthold v. Brendjord, 100 Mont. 96, 106, 47 P. 41 (1935).

171. State ex rel. Rankin v. Madison State Bank, 68 Mont. 342, 349, 218 P. 652 (1923).

172. Sullivan v. City of Butte, 65 Mont. 495, 498, 211 P. 301 (1922).

prospectively.¹⁷³ In adopting the statute of another state, it is presumed that the legislature also adopts the interpretation given it by the highest court of the other state,¹⁷⁴ and it is presumed the law of another state is the same as the law of Montana on a particular subject when no showing is made by the parties.¹⁷⁵ A statute is presumed to be in force until its repeal is shown;¹⁷⁶ therefore when a new statute conflicts with an existing one, the later statute is merely deemed an exception to or qualification of the prior one.¹⁷⁷ A similar rule is that where there are two conflicting sections, they are both presumed to be operative and to govern the title in which they appear; courts will construe them together and attempt to reconcile them.¹⁷⁸

3. *Contracts*

In construing the terms of a contract, courts may rely on these presumptions: when a contract does not state the place of performance, it is presumed that payment is to be made at the creditor's residence or place of business.¹⁷⁹ When not mentioned in the contract, payment should be presumed to be required within a reasonable time.¹⁸⁰ When terms are ambiguous it is presumed that parties knew what was meant and would not be mistaken as to their own intent.¹⁸¹ When services are rendered and received without a contract, it is presumed that they were given in expectation of payment and carry a promise to pay what they are worth.¹⁸² When there is a breach of a building contract and the owner permits work to proceed after expiration of the time for completion, it is presumed that he waived the provision requiring a contract to be completed within that time.¹⁸³ It is presumed that grain contracts for future delivery are not wagering contracts and are therefore lawful.¹⁸⁴ Where building materials were delivered in compliance with a contract, it is presumed that they were used in the construction pursuant to the

173. *State ex rel. Mills v. Dixon*, 68 Mont. 526, 528, 219 P.2d 637 (1923).

174. *Moreland v. Monarch Mining Co.*, 55 Mont. 419, 425, 178 P. 175 (1919).

175. *State v. American Bank & Trust Co.*, 76 Mont. 445, 451, 247 P. 336 (1926).

176. *Walker Motor Exchange v. Lindberg*, 86 Mont. 513, 519, 284 P. 270 (1930).

177. *Special Road District No. 8 v. Mills*, 81 Mont. 86, 98, 261 P. 885 (1927); *State ex rel. Charette v. District Court*, 107 Mont. 489, 495, 86 P.2d 750 (1939).

178. *Barth v. Ely*, 85 Mont. 310, 322, 278 P. 1002 (1929).

179. *Electrical Products Consolidated v. Goldstein*, 97 Mont. 581, 585, 36 P.2d 1033 (1934).

180. *Johnson v. Elliot*, 123 Mont. 597, 604, 218 P.2d 703 (1950).

181. *Cook-Reynolds Co. v. Beyer*, 107 Mont. 1, 16, 79 P.2d 658 (1938).

182. *San Antonio v. Spencer*, 82 Mont. 9, 13, 264 P. 944 (1928).

183. *Wortman v. Montana Central Ry.*, 22 Mont. 266, 289, 56 P. 316 (1899).

184. *Benson Stabeck Co. v. Reservation Farmers Draining Co.*, 62 Mont. 254, 270, 205 P. 651 (1922).

contract.¹⁸⁵ Finally, a court will presume that contracts required to be in writing are in writing.¹⁸⁶

4. Corporations

Corporate officers are presumed to have full authority to bind a corporation¹⁸⁷ and a presumption of implied authority arises where ratification, custom and acquiescence are shown.¹⁸⁸ When a contract is executed by a corporation's general manager it is to be presumed that of the corporation until a contrary showing is made.¹⁸⁹

Knowledge of the corporation's affairs by the directors is presumed in favor of innocent third persons, but not in favor of officers or other directors.¹⁹⁰ If a director is holding a *bona fide* claim against a corporation, he may enforce it as any creditor might, and there is no presumption of bad faith unless the director gains advantage thereby.¹⁹¹ When a majority of directors are present at a stockholder's meeting and assent to an action, it is presumed that the action has been ratified by the board of directors.¹⁹² The presumption does not obtain that stockholders know the contents of records of director's meetings or account books, and entries in such books do not therefore impute knowledge to or ratification by them.¹⁹³ Finally, there exists a presumption that the acts of a corporation are not *ultra vires* and that its bylaws are valid.¹⁹⁴

5. Criminal Law

In criminal cases error will not be presumed to be prejudicial,¹⁹⁵ but if an accused shows he was denied the constitutional right of public trial, such prejudice will be presumed.¹⁹⁶ Prior to the Criminal Code of 1973, in the absence of evidence establishing manslaughter, second degree murder was presumed when there was proof the defendant committed homicide; the state must establish deliberation for first degree murder.¹⁹⁷ It is presumed that a person

185. *Rogers-Templeton Lumber Co. v. Welch*, 56 Mont. 321, 329, 184 P. 838 (1919).

186. *Sweetland v. Barrett*, 4 Mont. 217, 223, 1 P. 745 (1882); *Johnson v. Elliot*, 123 Mont. 597, 603, 218 P.2d 703 (1950).

187. *Tague v. John Caplice Co.*, 28 Mont. 51, 60, 72 P. 297 (1903).

188. *Alley v. Butte & Western Mining Co.*, 77 Mont. 477, 492, 251 P. 517 (1926).

189. *Wells-Dickey Co. v. Embody*, 82 Mont. 150, 161, 266 P. 869 (1928).

190. *Alward v. Broadway Gold Mining Co.*, 94 Mont. 45, 56, 20 P.2d 647 (1933).

191. *Mayger v. St. Louis Mining Co.*, 68 Mont. 492, 501, 219 P. 1102 (1923).

192. *Fitzpatrick v. O'Neill*, 43 Mont. 552, 563, 118 P. 273 (1911).

193. *Alward v. Broadway Gold Mining Co.*, *supra* note 190 at 54.

194. *McMahon v. Cooney, Gov., et al.*, 95 Mont. 138, 145, 25 P.2d 131 (1933).

195. *State v. Byrd*, 41 Mont. 585, 592, 111 P. 407 (1910).

196. *State v. Keeler*, 52 Mont. 205, 214, 156 P. 1080 (1916).

197. *State v. LeDuc*, 89 Mont. 545, 562, 300 P. 919 (1931).

in possession of a premises is also in possession of articles found thereon.¹⁹⁸

6. Damages

When a landlord enters the premises and intrudes upon a tenant's family for a continued length of time, detriment and damages are presumed.¹⁹⁹ When a jury allows exemplary damages, it is presumed that they found actual damages.²⁰⁰ When a portion of the purchase price sought as damages for breach of contract is the agreed value of a used car turned in as payment, the presumption attaches that such valuation is the actual value of the car.²⁰¹ It is presumed that reasonably certain profits are within the mutual understanding of parties and may be the basis for damages for breach.²⁰²

7. Fiduciary Relationships

It is presumed that a trustee bank used its own funds first when mingling its funds with the beneficiary's, and that the remaining sum belongs to the beneficiary.²⁰³ Transactions of guardians are viewed with distrust, and the presumption obtains that a ward acts under the guardian's influence.²⁰⁴ Where parties in a fiduciary relationship are parent and adult child, the presumption that undue influence was exerted in transactions does not always apply.²⁰⁵

8. Insurance

A policyholder is presumed to know the contents, conditions and limitations of his policy.²⁰⁶ However, this presumption is limited by R.C.M. 1947, § 40-5350, covering fraternal benefit societies' insurance policies, which states:

In any determination of the incompleteness or misleading character of any comparison or statement, it shall be presumed that the insured had no knowledge of any of the contents of the contract involved.

An insurance agent is presumed to know the character and practice

198. *State v. Daly*, 77 Mont. 387, 393, 250 P. 976 (1926).

199. *Welch v. Roehm*, 125 Mont. 517, 525, 241 P.2d 816 (1952).

200. *Id.* at 527.

201. *Evankovich v. Howard Pierce, Inc.*, 91 Mont. 344, 354, 8 P.2d 653 (1932).

202. *Smith v. Fergus County*, 98 Mont. 377, 386, 39 P.2d 193 (1934).

203. *Hawaiian Pineapple Co. v. Brown*, 69 Mont. 140, 1 48, 220 P. 114 (1923).

204. *In re Cuffe's Estate*, 63 Mont. 399, 406, 207 P. 640 (1922).

205. *Roecher, Administrator v. Story*, 91 Mont. 28, 42, 5 P.2d 205 (1931).

206. *Collins v. Metropolitan Life Ins. Co.*, 32 Mont. 329, 342, 80 P. 609 (1905).

of businesses that he insures,²⁰⁷ and, in addition, it is presumed that the type of business practices engaged in are contemplated when entering into the insurance contract.²⁰⁸ Insurance policies are presumed to contain mutually agreeable terms and all the undertakings of the parties.²⁰⁹ In an action on a hail insurance policy it was presumed that the plaintiff owned the crop in the absence of proof to the contrary.²¹⁰ An insurance company is presumed to have waived forfeiture of a policy for non-compliance if the company retained a premium paid two days after it was due.²¹¹ An insurance company does not waive its security for a loan on a policy when it keeps the application for the loan.²¹² In life insurance cases, a presumption arises against suicide and in favor of accidental death.²¹³

9. Justice Courts

There is no presumption in favor of the judgments of justice courts²¹⁴ and no presumption in favor of their jurisdiction.²¹⁵ It is presumed that a justice has administered the oath to a witness before the witness testified.²¹⁶

10. Libel and Slander

A publication libelous *per se* is presumed malicious and injurious.²¹⁷ It is presumed that third parties understood allegedly slanderous words in their usual popular meaning.²¹⁸ In an action for slander it is presumed the plaintiff has a good reputation.²¹⁹

11. Master-Servant

An employee can presume that his master is performing his

207. *Park Saddle Horse Co. v. Royalty Indemnity Co.*, 81 Mont. 99, 110, 261 P. 880 (1927).

208. *Id.* at 111.

209. *Austin v. New Brunswick Fire Ins. Co.*, 111 Mont. 192, 199, 108 P.2d 1036 (1940); *Baker v. Pennsylvania Fire Insurance Co.*, 81 Mont. 271, 278, 263 P. 93 (1928).

210. *Pasherstnik v. Continental Ins. Co.*, 67 Mont. 19, 23, 214 P. 603 (1923).

211. *Collins v. Metropolitan Life Ins. Co.*, 32 Mont. 329, 344, 80 P. 609 (1932).

212. *Zimmerman v. Mutual Life Ins. Co.*, 90 Mont. 336, 343, 3 P.2d 278 (1931).

213. *Withers v. Pacific Mutual Life Ins. Co.*, 58 Mont. 485, 493, 193 P. 566 (1920); *Nichols v. New York Life Ins. Co.*, 88 Mont. 132, 140, 192 P. 253 (1930); *Lewis v. New York Life Ins. Co.*, 113 Mont. 151, 158, 124 P.2d 579 (1942).

214. *Jenkins v. Carroll*, 42 Mont. 302, 312, 112 P. 1064 (1910).

215. *Layton v. Trapp*, 20 Mont. 453, 455, 52 P. 208 (1897); *General Oil Corp. v. Kelly*, 94 Mont. 445, 450, 23 P.2d 555 (1933).

216. *Mette and Kanne Distilling Co. v. Lowrey et al.*, 39 Mont. 124, 133, 101 P. 966 (1909).

217. *Paxton v. Woodward*, 31 Mont. 195, 208, 78 P. 215 (1904); *Kelly v. Independent Publishing Co.*, 45 Mont. 127, 141, 122 P. 735 (1912).

218. *Daniel v. Moncure*, 58 Mont. 193, 200, 190 P. 983 (1920).

219. *Fowlie v. Cruse*, 52 Mont. 222, 237, 157 P. 951 (1916).

duty to provide for the former's safety,²²⁰ and the employer is presumed to use due care in supplying work equipment for his employee.²²¹ It is presumed that compensation paid to an employee is for services performed which are similar to his regular duties and within the scope of his employment.²²² Where an employee uses his employer's truck and the employer accrues some benefit, it is presumed that the employee was acting within the scope of his employment.²²³

12. Mining

The common law presumption of ownership of the land from the sky to the center of the earth is overcome by the right to follow the entire length of an ore vein.²²⁴ The quality and degree of a vein does not overcome the presumption that a landowner owns the ore beneath the surface of his land.²²⁵ The angle of a vein is presumed the same both at the below the surface.²²⁶ The validity of a mining claim is presumed, and its abandonment must be proved.²²⁷

13. Municipal Government

It is presumed that a party contracting with a public board knows its authority.²²⁸ City councils have only such powers as are created by law and there is no presumption in favor of their power to create special improvement districts.²²⁹ It is presumed that a city has sufficient taxable property to cover all municipal bonds issued.²³⁰ There is no presumption that sidewalks have been built under a uniform plan,²³¹ although it is presumed that municipal sidewalks and roads are constructed so as to be safe.²³²

14. Negligence

When one person is found negligent, the presumption obtains

220. *McCabe v. Montana Central Ry.*, 30 Mont. 323, 333, 76 P. 701 (1904); *Morelli v. Twohy Bros.*, 54 Mont. 366, 376, 170 P. 757 (1918).

221. *Forquer v. Slater Brick Co.*, 37 Mont. 426, 447, 97 P. 843 (1908).

222. *Doane v. Marquisee*, 63 Mont. 166, 171, 206 P. 420 (1922).

223. *Monaghan v. Standard Motor Co.*, 96 Mont. 165, 173, 29 P.2d 278 (1934).

224. *State ex rel. Parrott S & C Co. v. District Ct.*, 28 Mont. 528, 538, 73 P. 230 (1903).

225. *Heinze et al. v. Boston & Montana Consolidated Mining Co.*, 30 Mont. 484, 488, 77 P. 421 (1904).

226. *Barker v. Condon*, 53 Mont. 585, 594, 165 P. 909 (1917).

227. *Street v. Delta Mining Co.*, 42 Mont. 371, 385, 112 P. 701 (1910); *Tripp v. Silver Dike Mining Co.*, 70 Mont. 120, 125, 224 P. 272 (1924).

228. *State ex rel. Stuerve v. Henson*, 44 Mont. 429, 443, 120 P. 485 (1912).

229. *Johnston v. City of Hardin*, 55 Mont. 574, 579, 179 P. 824 (1919).

230. *Clerihew v. City of Baker*, 109 Mont. 317, 321, 96 P.2d 269 (1939).

231. *Metz v. City of Butte*, 27 Mont. 506, 509, 71 P. 761 (1903).

232. *O'Flynn v. City of Butte*, 26 Mont. 493, 501, 93 P. 643 (1908).

that other persons acted in a reasonable manner.²³³ The presumption of contributory negligence does not obtain because of a party's knowledge of the offending instrumentality at the accident site; it must be shown that he had a reason to apprehend danger.²³⁴ An instruction that a tenant is presumed to know defects of the premises and that he rents subject thereto was properly refused where the tenant fell on a sidewalk that had become icy through the neglect of an adjacent property owner, for a nuisance cannot be maintained by prescription.²³⁵

Certain fact situations have been held to give rise to a presumption of negligence. One is when the cause of an accident is under the control of defendant, and for lack of such control the accident would not have happened. It is then presumed that the defendant was negligent, with the result that the burden rests on him to prove ordinary care.²³⁶ Negligence was presumed when a motorman did not ring a bell when approaching an intersection and so caused an accident.²³⁷ The doctrine of *res ipsa loquitur* had been viewed as a presumption that, in the absence of explanatory evidence, the injury suffered by the plaintiff was due to defendant's negligence.²³⁸ A person is presumed to see everything he can by looking straight ahead and laterally; he must be vigilant to avoid negligence.²³⁹

15. Principal-Agent

It is presumed that an agent is hired only to make contracts and not to rescind or modify contracts affecting his principal's rights or obligations without his approval.²⁴⁰ When an agent acts openly for himself or for another, one cannot presume that he imported knowledge to his principal.²⁴¹ When an agent uses the word "I" in dealings, the presumption that he is dealing for the principal is not overcome.²⁴² It is presumed that the relationship of principal-agent continues in an absence of showing to the contrary; the principal

233. *Daniels v. Granite Bimetallic C. Mining Co.*, 56 Mont. 284, 289, 184 P. 836 (1919), miner charged with contributory negligence; *Flynn v. Helena Cab & Bus Co.*, 94 Mont. 204, 215, 21 P.2d 1105 (1933), occupants of a car; *Cowden v. Crippen*, 101 Mont. 187, 206, 53 P.2d 98 (1936), driver of a car.

234. *Hughey v. Fergus County*, 98 Mont. 98, 106, 37 P.2d 1035 (1934); *McCulloch v. Horton*, 105 Mont. 531, 541, 74 P.2d 1 (1937).

235. *Toole v. Paumie Parisian Dye House*, 98 Mont. 191, 202, 39 P.2d 965 (1934).

236. *Hardisty v. Largey Lumber Co.*, 34 Mont. 151, 157, 86 P. 29 (1906).

237. *McManus v. Butte Ry. Co.*, 68 Mont. 379, 391, 219 P. 241 (1923).

238. *McGowan v. Nelson*, 36 Mont. 67, 76, 92 P. 40 (1907); *Maki v. Murray Hospital*, 91 Mont. 251, 263, 7 P.2d 228 (1932).

239. *Autio, Administratrix v. Miller*, 92 Mont. 150, 165, 11 P.2d 1039 (1932).

240. *Benema v. Union Central Life Ins. Co.*, 94 Mont. 138, 148, 21 P.2d 69 (1933).

241. *Comerford v. U.S. F.&G. Co.*, 59 Mont. 243, 257, 196 P. 984 (1921).

242. *Bachman v. Gerer*, 64 Mont. 28, 34, 200 P. 891 (1922).

must show termination.²⁴³ Similarly, when an act by an agent was not repudiated, it was presumed that that act was ratified by the principal.²⁴⁴ The presumption that the agent was acting within the scope of his employment at the time of an accident is raised by slight facts.²⁴⁵

16. *Sanity*

The presumption of sanity is overcome whenever sufficient evidence is introduced to cast reasonable doubt on defendant's mental state.²⁴⁶ Persons are presumed to be of sound mind when entering transactions.²⁴⁷ When insanity is established, it is presumed to continue to exist until there is a showing to the contrary.²⁴⁸

17. *Tax*

Taxes are presumed valid.²⁴⁹ A state's taxing power is never presumed to be relinquished.²⁵⁰ Courts presume the legislature correctly classified property for tax purposes and did not intend to grant special privileges.²⁵¹ Fraud by taxing officials is never presumed.²⁵² It is presumed that non-resident land owners take notice of the fact that if taxes are not paid annually, their property will be sold at a tax sale.²⁵³ When a taxpayer cannot prove he paid a tax for a given year, it is presumed that he paid his taxes upon a showing that he had paid them for a series of years and that the particular year's taxes were not included in the tax bill for the following years.²⁵⁴ For tax purposes, intangible personal property is presumed to have its situs at the owner's domicile.²⁵⁵

243. *Exchange State Bank v. Occident Elevator Co.*, 95 Mont. 78, 89, 24 P.2d 126 (1933).

244. *Miller v. Aetna Life Ins. Co.*, 101 Mont. 212, 225, 53 P.2d 704 (1936).

245. *Monaghan v. Standard Motor Co.*, 96 Mont. 165, 173, 29 P.2d 178 (1934), where the employer accrued slight incidental benefit; *Eliason v. Geil Agency*, 114 Mont. 97, 99, 132 P.2d 158 (1942), where driver of car is car owner's employee.

246. *State v. Peel*, 23 Mont. 358, 372, 59 P. 169 (1899).

247. *Sommerville v. Greenhood*, 65 Mont. 101, 114, 210 P. 1048 (1922); *Lacy v. Harmon*, 137 Mont. 489, 493, 353 P.2d 96 (1960).

248. *In re Murphy's Estate*, 43 Mont. 353, 373, 116 P. 1004 (1911); *In re Estate of Redfern*, 64 Mont. 49, 57, 208 P. 1072 (1922).

249. *Anaconda Copper Mining Co. v. Ravalli County*, 52 Mont. 422, 426, 158 P. 682 (1916).

250. *Cruse v. Fischl*, 55 Mont. 258, 267, 175 P. 878 (1918); *Valley County v. Thomas*, 109 Mont. 345, 372, 97 P.2d 345 (1939).

251. *Hiljer v. Moore, County Treas.*, 56 Mont. 146, 175, 182 P. 477 (1919).

252. *Danforth v. Livingston*, 23 Mont. 558, 563, 59 P. 916 (1900); *State v. State Bd. of Equal.*, 56 Mont. 413, 455, 186 P. 697 (1920).

253. *Sutter v. Scudder*, 110 Mont. 390, 395, 103 P.2d 303 (1940).

254. *Smith v. Blaine County*, 102 Mont. 116, 119, 56 P.2d 179 (1936).

255. *Monidah Trust v. Sheehan*, 45 Mont. 424, 430, 123 P. 692 (1912).

18. *Wills*

The presumption of proper execution is raised when a will is proved and admitted to probate.²⁵⁶ When one makes a will it is presumed that one intends to dispose of one's entire estate, so that the will should be construed in that manner.²⁵⁷ When used in a will, the word "relatives" is presumed to mean such relatives as are heirs under the law, unless a contrary intention is apparent from the context.²⁵⁸ When a lost will was last seen in the testator's possession, it is presumed that he destroyed it.²⁵⁹ A presumption exists against intestacy, and courts will sustain a will if it is possible to do so, every presumption arising in favor of its execution.²⁶⁰

III. CONCLUSION

Presumptions can be useful in determining issues in a case and in establishing who has the burden of proof as to those issues. They can also save time during trials by not requiring the introduction of evidence on an issue or requiring the trier of fact to consider that issue where the result would be consistent with the probabilities. Unfortunately, presumptions are not easily found or recognized. Therefore this compilation is intended as a research aid for practicing lawyers in Montana.

This compilation does not represent a complete list of all presumptions existing in Montana. Such a list would be nearly impossible to assemble. A more complete list of statutes may be found as part of the Proposed Montana Rules of Evidence, appended as Table C. The cases cited in this article as common law presumptions are only a sample of those found in Table C, which in turn is only intended as an adequate representation of cases for those presumptions.

256. *In re Silver's Estate*, 98 Mont. 141, 156, 38 P.2d 277 (1934).

257. *In re Sprigg's Estate*, 70 Mont. 272, 275, 225 P. 617 (1924).

258. *In re Bernheim's Estate*, 82 Mont. 198, 208, 266 P. 378 (1928).

259. *In re Colbert's Estate*, 31 Mont. 461, 468, 78 P. 971 (1904).

260. *In re Bragg's Estate*, 106 Mont. 132, 140, 76 P.2d 57 (1938).