

CHAPTER 328.

PRESUMPTIONS AND JUDICIAL NOTICES.

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328.01 Laws of other states. The courts of this state shall take judicial notice of the statutes of the United States, and of all the states and territories thereof.

Note: Section 209.05, creating a presumption that a person doing certain acts respecting insurance is the insurer's agent, is inapplicable to transactions in a sister state the laws of which contain no equivalent provision. *Cooper v. Commercial C. Ins. Co.*, 209 W 314, 245 NW 154.

The supreme court may take judicial notice of the files of the public service commission showing applications before it and the actions taken thereon. *Wisconsin P. & L. Co. v. Beloit*, 215 W 439, 254 NW 119.

The case of *Hummel v. Moore*, 218 W 241, 260 NW 468, was decided without reference to this section.

The supreme court takes judicial notice of records in the office of the secretary of state showing appointments to public office. *State v. Roden*, 219 W 132, 262 NW 629.

The court applied this section in *Estate of Canon*, 221 W 322, 325, 266 NW 918.

The court does not take notice of the resolutions of the firemen's pension board. *Horlick v. Swoboda*, 221 W 373, 267 NW 38.

The supreme court, in reviewing the ad valorem assessments of utility property involved in this case, will take judicial notice of the fact that each of the companies involved operates in an unusually prosperous territory. *Wisconsin G. & E. Co. v. Tax Commission*, 221 W 487, 266 NW 186, 268 NW 121.

As bearing on the question of negligence of an Illinois owner who had loaned his automobile to a fifteen-year-old boy to drive to Wisconsin, the Illinois statutes relating to the licensing of drivers and the fixing of the minimum age of drivers should be taken into consideration. *Canzoneri v. Heckert*, 223 W 25, 269 NW 716.

The court takes judicial notice of the fact that the return receipt signed by the

addressee does not contain the date of mailing but does contain the date of the arrival at the post-office of destination. *Dairy Distributors v. Department of Agriculture and Markets*, 228 W 418, 280 NW 400.

This section does not extend to the common law of other states. As to the common law of those states the presumption is that their common law is the same as that of this state. *Switzer v. Weiner*, 230 W 599, 284 NW 509.

The supreme court takes judicial notice of the records in the office of the secretary of state, including the records of articles of incorporation filed therein. *Schoenburg v. Klapperich*, 239 W 144, 300 NW 237.

Judicial notice is taken of the fact that the Socialist party, in Wisconsin, whatever its standing as a political party under the statutes, presently has no voting strength outside of Milwaukee county. *State ex rel. State Central Committee v. Board*, 240 W 204, 3 NW (2d) 123.

The supreme court takes judicial notice of the records of proceedings before the public service commission showing that the commission interprets the term "dam" as including the entire development from flashboards to tailrace. *State ex rel. Priegel v. Northern States Power Co.*, 242 W 345, 8 NW (2d) 350.

"Sec. 622. Foreign Common Law. In the absence of evidence, the common law of another common-law state is presumed to be the same as the common law of the forum." *Restatement of Conflict of Laws*, p. 737.

"Sec. 624. Judicial Notice of Law of States. The federal courts take judicial notice of the law of every State of the United States." *Restatement of Conflict of Laws*, p. 738.

328.02 Municipal ordinances. Municipal courts shall take judicial notice of ordinances in cities in which they have jurisdiction.

328.03 Lists of state lands. All statements or lists of lands which shall have been certified by the president of the United States, or by any other officer of the government thereof, as conveyed to the state under or by any act of congress, being produced by the proper custodians thereof, shall be received in all cases as presumptive evidence that the title of the lands therein described became thereby vested in the state.

328.04 Certificate as to public lands. The certificate of the chief clerk of the state land office under the official seal, that any specified piece or tract of land belongs to or is mortgaged to the state, or that the state has any interest, legal or equitable, therein shall be

presumptive evidence of the facts so stated. The certificate of the secretary of the conservation commission under the official seal of the commission that authority has been given to any person, naming him, to seize timber or other materials specified in chapter 26 shall be presumptive evidence of the fact so stated.

328.05 Land patents by state officers. Every patent which shall have been executed and delivered by the commissioners of school and university lands or by the commissioners of public lands, purporting to convey any land, and every deed or patent which shall have been executed and delivered by the governor, purporting to convey any lands granted to the state by the United States, shall be received as presumptive evidence of the facts therein stated and that the grantee named therein became vested thereby at the date thereof with an absolute title in fee to the lands therein described.

328.06 Deed on judicial sale. Every conveyance of land or any estate or interest therein executed by any sheriff, referee, receiver or other person, in pursuance of a sale made by virtue of any judgment, order, license or execution of any court of record in this state, and which shall have been recorded in the proper county, as well as such record, shall be received, as presumptive evidence of the facts therein stated and that the title, estate or interest in the land therein described, which such conveyance purports to convey, of every person whom it purports to affect passed to and vested in the grantee therein at the date thereof or at such previous date as such conveyance purports to fix for that purpose.

328.07 Certificate of judicial sale. Every certificate of sale of land or any estate or interest therein executed by any sheriff, referee, receiver or other person, in pursuance of a sale made by virtue of any judgment, order, license or execution of any court of record in this state, and the record thereof, shall be received as presumptive evidence of the facts therein stated.

328.08 Records showing revenue stamps. Whenever the record, in the office of a register of deeds, of any conveyance or of any instrument whatever, upon which revenue stamps may have been at any time required to be affixed by any act of congress, shall show such stamps or any of them, more or less, to have been affixed, it shall be presumptive evidence that such conveyance or instrument had properly affixed to it the number and denomination of stamps required by law.

328.081 [*Repealed by 1927 c. 523 s. 96*]

328.09 Record of births, stillbirths, deaths and marriages. (1) **RECORDS AS EVIDENCE.** The record of any marriage, birth, stillbirth or death kept in the office of any register of deeds or city health officer or in the state bureau of vital statistics shall be received as presumptive evidence of the marriage, birth, stillbirth or death so recorded.

(2) **CHURCH AND DOCTOR'S RECORDS.** Any church, parish or baptismal record, and any record of a physician or a person authorized to solemnize marriages, in which record are preserved the facts relating to any birth, stillbirth, marriage or death, including the names of the persons, dates, places and other material facts, may be admitted as prima facie evidence of any fact aforesaid. But such record must be produced by its proper custodian and be supported by his oath that it is such a record as it purports to be and is genuine to the best of his knowledge and belief.

(3) **CERTIFICATES OF FOREIGN BIRTHS, ETC.** Official certificates of births, marriages or deaths, issued in foreign countries in which such births, marriages or deaths have occurred, purporting to be founded on books of record and authenticated by the signature of any United States minister, secretary of legation or other diplomatic officer, or by a consul of the United States accredited to or appointed for the foreign country in which such certificates are issued, shall be received as presumptive evidence of the facts in such certificates stated. [*1943 c. 503 s. 70*]

328.10 Village records. The papers, documents and orders relating to the organization and incorporation or the alteration of the boundaries of any village, being recorded in the office of the proper register of deeds pursuant to law, and such record and also the record thereof in the office of the village clerk shall be received as presumptive evidence of the facts therein stated.

328.11 County records as to taxation. (1) All books and files in the office of any county treasurer or county clerk, all assessments and tax rolls and certificates and warrants thereto attached, all notices required to be published or posted by the county treasurer or county clerk, and the proofs of publication or posting filed in the office of either, pursuant to any law relating to the assessment or collection of taxes or to lands sold for taxes, shall be received as presumptive evidence of the facts therein stated.

(2) A transcript of so much of said books, files and records, as relates to the assessment or sale for taxes of any parcel of land in any specified year or years, certified in substantially the following form:

I hereby certify that the annexed and foregoing is a true and correct transcript of all books, records, papers, files and proceedings of every name and nature on file or of record

in my office relating in any wise to the assessment of taxes upon or to the sale for taxes of the following described lands . . . situated in the county of . . . , state of Wisconsin, for the year (or years) A. D. . . . , and of the whole thereof. In testimony whereof I have hereunto set my hand this . . . day of . . . , A. D. . . .

County Clerk (or Treasurer) of . . . county.

shall be received in evidence with the same effect as the originals and as presumptive evidence of the facts stated in such certificate.

Note: The provision in 328.11, part of the statutory chapter on presumptions, that all books and files in the office of any county treasurer or county clerk, all assessments and tax rolls and certificates and warrants thereto attached, shall be presumptive evidence of the facts therein stated, makes assessment rolls admissible as presumptive

evidence as against a party in a proceeding to enforce the property tax levied against him, but such provision has no application to a proceeding in the county court to determine the value of property for inheritance tax purposes. Estate of Ryerson, 239 W 120, 300 NW 782.

328.12 Land office receipt. The receiver's receipt or certificate of purchase of public lands, signed by the receiver, and the official certificate of any register or receiver of the entry or purchase of any land or the location of any land by any land warrant shall be received, when held by the original claimant, his heirs or assigns, as presumptive evidence that the title to the lands therein described passed to and is vested in the person therein named, his heirs or assigns, except when, at the time of such entry or purchase, the land was owned or occupied by any person as mineral ground on which discoveries of mineral ores had been made.

328.13 [Repealed by 1927 c. 523 s. 99]

328.14 State land office certification of title. A certificate of the chief clerk of the state land office, or any one of the commissioners of the public lands substantially in the following form:

Office of the Commissioners of the Public Lands, Madison, Wis., . . . , A. D. . . .

I hereby certify that from the books, files and records of the office of the commissioners of public lands it appears that on the . . . day of . . . , A. D. . . . , the following described real estate, situate in the state of Wisconsin, viz. . . . was duly transferred by the United States to the state of Wisconsin, and that on the . . . day of . . . , A. D. . . . , the above described real estate was duly transferred by the state of Wisconsin to

In witness whereof, I have hereunto set my hand and affixed the official seal of the commissioners of the public lands this . . . day of . . . , A. D. . . .

shall be received as presumptive evidence of the facts stated, and that the person named became vested at the date stated with an absolute title in fee to the lands described.

328.15 [Repealed by 1927 c. 523 s. 100]

328.16 Certificate of land transfers. A certificate by the secretary of state, under the great (or lesser) seal, to any facts which appear from the books, files and records in his office or the office of the commissioners of public lands in regard to the grant, conveyance or transfer of any land by the United States to the territory or state of Wisconsin, and also in regard to the sale, conveyance or transfer of any such land by said territory or state shall be received as presumptive evidence of the facts so certified.

328.17 Certificate of adjutant general. A certificate by the adjutant general to any facts which appear from the books, files and records in his office shall be received as presumptive evidence of the facts so certified.

328.18 Affidavits of service. Whenever any notice or other writing is by law authorized or required to be served the affidavit of the person serving it, setting forth the facts necessary to show that it was duly served, shall be presumptive proof that such notice or writing was duly served. But this section shall not apply to any service where another way of proving such service is expressly prescribed by law.

328.19 Proof of publication. (1) **AFFIDAVIT OF PRINTING.** The affidavit of the editor, publisher, printer or proprietor of any newspaper, or of his foreman or principal clerk, of the publication of any notice or advertisement required to be published by any law of the state, annexed to a copy of such notice or advertisement, clipped from such newspaper, and specifying the time when, and the paper in which it was published, shall be received in all cases as presumptive evidence of such publication and of the facts stated therein.

(2) **TIME OF FILING.** Such affidavit may be filed with the proper officer at any time after the last day of the publication of such notice, unless the filing time is otherwise specified.

(3) **SAME.** The affidavit of publication of any notice of a sale of real property required by law to be published may be filed, at any time within six months after the last day of such publication, with the register of deeds of the county in which the premises are situated.

328.20 Articles of incorporation, presumptions. Any charter or patent of incorporation which shall have been issued by the governor or secretary of state, or both, to any corporation under any law of the state; any certificate of organization or association of any corporation or joint stock company; the articles of association or organization of any corporation, or a certified copy thereof, which shall have been filed or recorded in the office of the secretary of state, or of any register of deeds or clerk of the circuit court under any law of the state; any certificate or resolution for the purpose of amendment, and every amendment in any form, of the charter, patent, certificate or articles of association or organization or of the name, corporate powers or purposes of any corporation, filed or recorded in either of said offices and a duly certified copy of any such document so filed or recorded shall be received as conclusive evidence of the existence of the corporation or joint stock company mentioned therein, or of the due amendment of the charter, patent, certificate or articles of association or organization thereof in all cases where such facts are only collaterally involved; and as presumptive evidence thereof and of the facts therein stated in all other cases.

328.21 Affidavit of notice of corporate meeting. Whenever any corporation notice is given, posted or served, an affidavit of the person who gave, posted or served the same, specifying the manner and time of doing so, annexed to a copy of such notice, may be filed with the clerk or secretary of the corporation, and when so filed, the original or certified copies thereof, shall be presumptive evidence in all cases of the facts contained in such affidavit.

328.22 Certificate of insurance assessment. Whenever an action is brought by any mutual insurance company to collect any assessment, the certificate of the secretary of said company, specifying such assessment, the amount due said company by means thereof, and that notice thereof was given the person liable therefor, shall be received as presumptive evidence of the facts so certified.

Note: The certificate of the secretary of the plaintiff mutual insurance company specifying the assessment, the amount due the company by means thereof, and that notice thereof was given the persons liable therefor, should have been given the effect as presumptive evidence to which it was entitled under 328.22, and on the basis

thereof the plaintiff was entitled to recover for the amount owing by each defendant to the plaintiff on the assessment in question, in the absence of proof by the defendants that there was no necessity for the assessment or that the levy was invalid in other respects. *Lisbon Town Fire Ins. Co. v. Tracy*, 236 W 651, 296 NW 126.

328.23 Copies of insurance books. Copies of the entries in the books of any life or mutual benefit insurance corporation or association engaged in doing business on the level premium or assessment plan, together with statements verified by the custodian of such books, showing the number of members insured in or belonging to such corporation or association, and the number of members in each class or grade thereof, and the aggregate amount which would be due from them upon a single assessment, and that such copies are true and are taken from the regular books of the corporation or association used and kept for the transaction of its business, and that such books are now in his custody or under his control, shall be received in all proceedings as prima facie evidence of such entries or statements. No officer of any such corporation or association shall be compelled (unless by special order of the court or officer before whom the action or proceeding is pending) to produce any books or records thereof; provided, such verified copies and statements shall be furnished to the attorney who reasonably requires them, at least six days before the term of court or time set for the trial or hearing of the action or proceeding, and that such books and records shall be subject to the inspection of any interested party or his attorney to the extent prescribed by such court or officer.

Note: The presumption that one who was driving a car at the time of a collision was the agent or servant of the owner and that he was driving it in the pursuit of the owner's business and within the scope of his employment, so that proof of ownership makes out a prima facie case of liability for injuries against the owner, is a rebut-

table presumption of fact, the effect of which is merely to require the owner to go on with his proof as to the facts, and where this is done the burden still remains on the plaintiff to establish that the driver of the car was acting within the scope of his employment. *Hanson v. Engebretson*, 237 W 126, 294 NW 317.

328.24 Evidence from bank books. Whenever any bank or any of its officers shall be subpoenaed to produce its books containing a specified account or other specified entries, such bank may, if it so elects, produce a copy of the specified account or other entries, verified under oath by one of its officers, stating that the books called for are the ordinary books of the bank used in the transaction of its business, that the entries copied were made therein at the dates thereof and in the usual course of business, that there are no interlineations or erasures in or among the items copied, that the books are in the custody or control of the bank, and that he has carefully compared the copy with the books and found it to be a correct copy of the specified account or entries. Such verified copy shall be prima facie evidence of such entries, and, when presented, no officer of the bank shall be compelled to produce the books demanded or attend the trial or hearing, unless specially

ordered so to do by the court or officer before whom it is pending; provided, that such books shall be open to the inspection of all parties to the action or proceeding.

Note: Presumptions as to the existence of facts are applied to compel the production of evidence to the contrary if any exists, not to exclude its production, and this is done to further the administration of justice, not to thwart it. *Hanson v. Engebretson*, 237 W 126, 294 NW 817.

328.25 Presumptions as to signatures. When any written instrument constitutes the subject of the action or proceeding or when the signing of such instrument is put in issue and the instrument purports to have been signed, the instrument itself is proof that it was signed until denied by the oath or affidavit of the person by whom it purports to have been signed or by a pleading duly verified. This section does not extend to an instrument purporting to have been signed by a person who died before proof is required. [*Supreme Court Order, effective July 1, 1943*]

Comment of Advisory Committee: 328.25 is amended so that it plainly expresses the meaning which the committee understands was given to it in *Nielson v. Schuckman*, 53 W 638, 645 and *Estate of Dick*, 204 W 89, 92. [Re Order effective July 1, 1943]

Note: This statute applies only to instruments which constitute the subject of the action or the execution of which is tendered or placed in issue by the pleading. The defendant should have some opportunity of denying the genuineness of a written document with which he is to be confronted on

the trial if he is to be barred from challenging the genuineness of such instrument. In a contest for a claim against an estate for services, a receipt signed by the claimant is inadmissible without proof of execution for genuineness of his signature. In re *Dick's Estate: Scheben v. Central Wisconsin T. Co.*, 204 W 89, 235 NW 401.

There is no presumption under this section that the deceased executed the note by mark, it appearing that he could write. *Cushman v. Estate of Cushman*, 213 W 74, 250 NW 873.

328.26 Possession proof of indorsement. In all actions brought on promissory notes or bills of exchange by the indorsee the possession of the note shall be presumptive evidence that the same was indorsed by the persons by whom it purports to be indorsed.

328.27 Effect of seal. A seal upon an executory instrument shall be received as only presumptive evidence of a sufficient consideration.

Note: Under this section a contract of guaranty under seal within 235.17 imports consideration and is good, even though no consideration therefor is stated; the true consideration may be shown, but not for the purpose of defeating the contract. *Bradley Bank v. Pride*, 208 W 134, 242 NW 505.

One who has executed under seal a release of cause of action upon accident policy for purpose of compromising dispute cannot rescind contract of release upon breach constituting failure of consideration, since, in view of conclusive presumption of consideration, true consideration of executed contract under seal, or its failure, cannot be inquired into for purpose of defeating instrument. *Singer v. General A. F. & L. Assur. Corp.*, 219 W 508, 262 NW 702.

In an action for specific performance of the contract, the fact that the contract was under seal did not prevent showing the true

consideration; the contract being executory. *Spankus v. West*, 222 W 238, 267 NW 910.

Although an option for the sale of a farm was under seal and recited a consideration of one dollar, the seal afforded only presumptive evidence of the consideration. The true consideration may be proved to enable the court to determine whether there has been such performance as to entitle a party to specific performance of the agreement. *Helbig v. Bonsness*, 227 W 52, 277 NW 634.

A seal is conclusive of consideration in the case of an executed contract but a seal is merely presumptive evidence of consideration in the case of an executory contract. In an action by a bondholder against a guarantor on a guaranty which was under seal, the defendant could set up and show that there was no consideration for the guaranty, the contract of guaranty being executory. *Frank v. Schroeder*, 239 W 159, 300 NW 254.

328.28 Area of towns and counties. Whenever the total area of towns or counties shall be in question, townships not returned as fractional by the surveys under which the public lands were sold by the United States, shall be held to be six miles square; and townships returned as fractional shall be held to contain the areas shown by such surveys or the plats thereof.

Note: Judicial notice may be taken of the dimensions of towns. *South Shore U. Co. v. Railroad Commission*, 207 W 95, 240 NW 734.

328.29 Allegations of copartnership. Whenever in any action or proceeding a party shall allege in his pleadings that named persons were partners at any particular time, or that as such partners they used any particular partnership name or style under which business was done, such averments shall be taken to be true unless expressly denied by the affidavit of the opposite party or some one in his behalf or by his pleading duly verified, within the usual time of pleading.

328.30 Joint liability. In actions or proceedings upon written contracts alleged to have been executed by the defendants, proof of the joint liability of the defendants shall not be required to entitle the plaintiff to judgment unless such execution is denied by a verified answer.

328.31 Corporate existence. In an action or proceeding by or against any corporation, it shall not be necessary to prove the existence of such corporation unless its existence is specially denied by an answer, duly verified.

328.32 Allegation as to executor, guardian, etc. Whenever a plaintiff shall sue as an executor, administrator, guardian or trustee and shall allege in his complaint his due

appointment as such, and, if appointed in another state or foreign country, the filing or recording of the authenticated copy of his appointment, as required by the laws of this state, such allegations shall be taken as true unless specifically denied by the defendant by his answer duly verified.

328.33 Proof of malice in slander and libel. If the defendant in any action for slander or libel shall set up in his answer that the words spoken or published were true, such answer shall not be proof of the malice alleged in the complaint.

Note: Refusing instruction, in libel action, that allegation in answer that libelous charge was true, was no evidence of malice, held prejudicial error where plaintiff stated such allegation was evidence of malice. Where there are two or more defendants in tort action wherein exemplary damages are allowable, evidence of wealth of one is prejudicial error, as against others. *Lehner v. Berlin P. Co.*, 211 W 119, 246 NW 579.

328.34 Presumption as to citizenship. Whenever in any proceeding to test the qualifications of any person to hold office the question of the citizenship of said person is raised, the burden of proof as to such citizenship shall be upon the person whose qualifications are contested.

328.35 Establishment of citizenship. Upon petition and proper showing made, that naturalization papers, or written records thereof, have been lost or destroyed, the circuit court of the county in which the petitioner resides may make an order that the petitioner is a citizen of the United States. Any such order or certified copy thereof shall be prima facie evidence of such citizenship. [1935 c. 419]

328.35 Execution of official bond. In every action upon any official bond the original bond or a certified copy thereof shall be presumptive evidence of the due execution thereof by the officer and his sureties.

328.36 Evidence of title to realty. In all criminal proceedings in which it is necessary for the state to prove that any person owns or has an interest in any real estate, a conveyance to such person of such real estate or an interest therein, so executed and acknowledged or proved as to be entitled to record, or the record of such conveyance or a certified copy of such record or such proof of possession as would entitle a plaintiff to recover in an action for trespass shall be received as presumptive evidence that such person owned or had an interest in the real estate in question.

328.37 Presumption as to officer's return. The return of a sheriff or constable to any writ shall be presumptive evidence that such return is correct and that the service has been rendered or disbursement made.

328.38 Officer's certificate as evidence. The certificate of the sheriff or other proper officer indorsed upon the summons, stating the time when he received the same for service, shall be presumptive evidence that he did receive the summons for service on the day in such certificate named.

328.39 to 328.42 [Repealed by 1927 c. 523 s. 114]

328.43 Public records, relief from destruction of. [Not printed; 1927 c. 523 s. 115; see 1925 Stats.]