GUIDE TO NY EVIDENCE
ARTICLE 3
PRESUMPTIONS & PRIMA FACIE EVIDENCE

Table of Contents

3.01 Presumptions in Civil Proceedings[1]

(1) This rule applies in civil proceedings to a "presumption," which as provided in subdivisions two and three is rebuttable; it does not apply to a "conclusive" presumption, that is, a "presumption" not subject to rebuttal, or to an "inference" which permits, but does not require, the trier of fact to draw a conclusion from a proven fact.

(2) A presumption is created by statute or decisional law, and requires that if one fact (the "basic fact") is established, the trier of fact must find that another fact (the "presumed fact") is thereby established unless rebutted as provided in subdivision three.

(3) Unless the court determines that a presumption is not applicable:

(a) The party against whom a presumption is invoked may rebut the presumption by disproof of the basic fact or presumed fact.

(b) Upon presentation of rebuttal evidence, the court shall as provided by the statute or decisional law establishing the presumption, either:

(i) itself determine that the presumption has been rebutted, in which event the court shall not submit the presumption to the finder of fact; or

(ii) instruct the trier of fact to find that the presumed fact exists unless the trier of fact is persuaded that the presumed fact does not exist; or

(iii) proceed as set forth in subparagraph (ii) when the statute or decisional law

establishing the presumption does not otherwise dictate.

(c) Unless the applicable statute or decisional law provides otherwise, the burden of persuasion necessary to rebut a presumption is "substantial evidence."

Note

Subdivision (1) defines the scope of this rule. It begins by limiting the application of this rule to presumptions in civil proceedings.

(Presumptions in criminal proceedings are governed by a separate Guide to New York Evidence rule [3.03, 305] because constitutional principles as developed by the United States Supreme Court and the Court of Appeals limit the operation of a presumption in a criminal proceeding.)

The rule further limits its application to a "rebuttable" or "true" presumption as defined in subdivision (2). It expressly excludes a "conclusive" presumption and an "inference" from its scope.

A conclusive presumption (also known as an "irrebuttable" presumption) requires the trier of fact to draw a particular conclusion after certain specified facts are established, regardless of proof to the contrary (*Cordua v Guggenheim*, 274 NY 51, 57 [1937]; *Brandt v Morning Journal Assn.*, 81 App Div 183, 185 [1st Dept 1903], *affd* 177 NY 544 [1904]). It is not a true evidentiary presumption but in reality "a rule of substantive law expressed in terms of rules of evidence" (Prince, Richardson on Evidence § 3-103 [Farrell 11th ed 1995]; *see Derby v Prewitt*, 12 NY2d 100, 106 [1962] ["Irrebuttable presumptions have their place in the law but only where public policy demands that inquiry cease"]). Conclusive presumptions have been created under the common law and by statute (*see e.g. Cordua v Guggenheim*, 274 NY 51, 57 [1937] ["There is a conclusive presumption that the parties intended to integrate in the deed every agreement relating to the nature or extent of the property to be conveyed"]; RPTL 1168 [2] ["After two years from the issuance of such certificate (of sale) or other written instrument, no evidence shall be admissible in any court to rebut such presumption unless the holder thereof shall have procured such certificate of sale or such other written instrument by fraud or had previous knowledge that it was fraudulently made or procured"]).

An inference permits, but does not require, the trier of fact to draw a conclusion from a proven fact (*see Foltis, Inc. v City of New York*, 287 NY 108, 119-120 [1941]; *Kilburn v Bush*, 223 AD2d 110, 116 [4th Dept 1996] [noting the difference between an inference, which "merely allows the trier of fact to draw a conclusion from a proven fact," and a "true" presumption, which places a burden upon the adversary to produce evidence to rebut the presumed fact]). In this connection, the Court of Appeals has noted that "[a] study of the opinions of the appellate courts of this state reveals that judges have used the terms 'inference' and 'presumption' indiscriminately and without recognition that an 'inference' and a 'presumption' are not identical in scope or effect" (*Foltis, Inc.*, 287 NY at 121).

Subdivision (2). Subdivision (2) sets forth the traditional definition of a presumption (*see e.g. Ulrich v Ulrich*, 136 NY 120, 123 [1892] ["A presumption has been defined to be a rule of law that courts and judges shall draw a particular inference from particular facts, or from particular evidence, unless and until the truth of the inference is disproved"]; *Platt v Elias*, 186 NY 374, 379 [1906] [a presumption is "a particular inference (that) *must* be drawn from an ascertained state of facts"]; *see* Barker & Alexander, Evidence in New York State and Federal Courts § 3:18 [2d ed]).

Present New York law recognizes the existence of dozens of rebuttable presumptions, created by decisional law or statute. Each presumption sets forth the "basic fact(s)" that will give rise to a "presumed fact," which is then subject to rebuttal.

Decisional law presumptions include: presumption of mailing and delivery (*see Nassau Ins. Co. v Murray*, 46 NY2d 828, 829 [1978]); presumption of proper service of process (*see Kihl v Pfeffer*, 94 NY2d 118, 122 [1999]; *Wells Fargo Bank, N.A. v Leonardo*, 167 AD3d 816, 817 [2d Dept 2018]); presumption of negligence in rear-end collision (*see Tutrani v County of Suffolk*, 10 NY3d 906, 908 [2008]); presumption against suicide (*see Schelberger v Eastern Sav. Bank*, 60 NY2d 506, 509-510 [1983]); presumption of regularity (*see Matter of Driscoll v Troy Hous. Auth.*, 6 NY2d 513, 518 [1959]); presumption of the legitimacy of children (*see Matter of Matthews*, 153 NY 443, 448 [1897]).

Statutory presumptions include: CPLR 4540-a (presumption of authentication for records produced pursuant to discovery demand); Correction Law § 753 (presumption of rehabilitation); EPTL 2-1.7 (presumption of death after three years' absence); Public Health Law § 10 (presumptions of fact from orders of Department of Health records and records of state and local health officials);

Vehicle and Traffic Law § 388 (1) (presumption of permissive use of motor vehicle); Vehicle and Traffic Law § 2108 (certificate of title of vehicle is presumptive evidence of vehicle's ownership). Some of the more important and frequently utilized presumptions are discussed in detail in Fisch on New York Evidence §§ 1122-1145 (2d ed); Martin, Capra & Rossi, NY Evidence Handbook § 3.2 (2d ed); and Prince, *supra* §§ 3-107, 3-138.

Subdivision (3). Subdivision (3) (a) restates the traditional view of a presumption, namely, that the party against whom a presumption is invoked may rebut the presumption by disproof of the basic fact or presumed fact (*see* Barker & Alexander, Evidence in New York State and Federal Courts § 3:18 [2d ed]).

Unfortunately, as various commentators have observed, New York does not have a uniform approach on the effect of a presumption once rebuttal evidence is introduced (*see* Proposed NY Code of Evidence § 302, Comment [1991], available at https://www.nycourts.gov/judges/evidence/0-TITLE_PAGE/RESOURCES/1991_PROPOSED_NY_CODE_OF_EVIDENCE.pdf [there are "notorious difficulties and disparities concerning the effect of presumptions"]; Barker & Alexander, *supra* § 3:16 ["Searching for consistency in the law of presumptions in New York can be a frustrating exercise"]; Martin, Capra & Rossi, *supra* § 3.1; Prince, *supra* § 3-104 ["The operation and effect in New York of a presumption . . . is not free from doubt. No one principle explains all the New York cases"]).

The lack of a uniform rule may be traced to the works of two professors of law who advanced different theories on the procedural effect of a presumption (*see* Thayer, A Preliminary Treatise on Evidence at the Common Law 346 [1898]; Morgan & Maguire, *Looking Backward and Forward at Evidence*, 50 Harv L Rev 909, 913 [1937]), as well as the public policy behind the different presumptions. As to the public policy issue, the Proposed New York Code of Evidence noted:

> "Some presumptions, *e.g.*, receipt of a regularly mailed letter, are mainly authoritative embodiments of natural probabilities drawn from logic and experience. Others, such as the presumption that anyone driving an automobile had the owner's permission to do so, reflect substantive social policies rather than, or in addition to, considerations of natural probability or probative worth. The presumption that fixes the time of death at the end of the [three] year death-from-unexp[l]ained-absence period is actually contrary to natural probabilities, and is a purely arbitrary solution to an impasse

> in proof. Still, other presumptions, *e.g.*, that as between connecting carriers the damage occurred on the line of the last carrier, serve the interests of fairness by seeking to elicit evidence from the party who has superior means of access to it" (Proposed NY Code of Evidence § 302, Comment).

Thayer's approach would remove a presumption from the case once the trial court finds that the party affected by the presumption produced evidence to support a finding of the presumed fact's nonexistence (Barker & Alexander, *supra* § 3:21). The "classic" Thayer example is found in the presumption of receipt of a properly mailed letter: once the mailing of the letter is proved, the party affected by the presumption need only take the stand and deny receipt and the presumption would not be charged to the jury (*id.*; *see also People v Langan*, 303 NY 474, 480 [1952] ["A presumption of regularity exists only until contrary substantial evidence appears. It forces the opposing party . . . to go forward with proof but, once he does go forward, the presumption is out of the case. . . . (I)t will be for the Trial Judge to pass on all questions of fact, including the credibility of defendant and of any other witnesses on either side" (citations omitted)]; *Fleming v Ponziani*, 24 NY2d 105, 111 [1969] [a presumption of a valid release from liability is "no longer in the case" once the party against whom the presumption is invoked puts in evidence to rebut, such as fraud or duress, in securing the release; then, the party claiming the release "must come forward with real evidence to sustain his burden as to the legality of the release or otherwise suffer a directed verdict"]). The Thayer approach is potentially unfair to the party for whom the presumption exists, and so appears ill-suited to the policy concerns behind various presumptions.

In moving away from the potential unfairness of the Thayer approach, the Court of Appeals explained, in a case involving the presumption that a driver operates with the consent of the owner, that statements by both the owner and the driver that the driver was operating without the owner's consent, without more, did not automatically rebut the presumption and warrant summary judgment for the owner: "Where the disavowals are arguably suspect, as where there is evidence suggesting implausibility, collusion or implied permission, the issue of consent should go to a jury" (*Country-Wide Ins. Co. v National R.R. Passenger Corp.*, 6 NY3d 172, 178 [2006]; *see also Bornhurst v Massachusetts Bonding & Ins. Co.*, 21 NY2d 581, 586 [1968] ["Where the evidence rebutting a presumption presents an issue of credibility, it is for the jury to determine whether the rebuttal evidence is to be believed and, consequently, for the jury to determine whether the presumption has been destroyed" (internal quotation marks and citation omitted)]). That view approaches the Morgan theory of presumptions.

For Morgan, it is "not enough that the opponent takes the stand and says she did not receive the letter. The jury will be instructed that, upon a finding that the letter was mailed, they must also find that it was received unless they are persuaded by the evidence favoring the opponent that it was not in fact received" (Barker & Alexander, *supra* § 3:22). Thus, the Morgan approach appears more suited to vindicate the policy considerations behind many presumptions, and its application "would be consistent in many cases with current practice" (*id*. § 3:23; s*ee e.g*. UCC 1-206, Presumptions ["Whenever this act creates a 'presumption' with respect to a fact, or provides that a fact is 'presumed,' the trier of fact must find the existence of the fact unless and until evidence is introduced that supports a finding of its nonexistence"]).

Subdivision (3) (a) and (b) recognizes that there is no uniform rule in New York on the effect of rebuttal evidence. Thus, subdivision (3) (a) and (b) (i**)** embodies the Thayer approach; subdivision (3) (a) and (b) (ii) encompasses the Morgan approach and the Thayer approach as modified by the Court of Appeals in *Country-Wide Ins. Co.* (6 NY3d at 178); and subdivision (3) (a) and (b) (iii) recognizes the Morgan approach so long as the law of the particular presumption does not set forth the procedure upon the presentation of rebuttal evidence (*see* Barker & Alexander, *supra* § 3:23 ["Across-the-board application of the Morgan rule would overcome the Thayer rule's inadequate promotion of the policies underlying presumptions, would be consistent in many cases with current practice, would be easy to apply by trial judges and 'would abolish the prevailing confusion and complexities' "]; Proposed NY Code of Evidence § 302, Comment [commenting in favor of the uniform adoption of the Morgan approach]).

Subdivision (3) (c) recognizes that there is no uniform rule in New York with respect to the burden of proof necessary to rebut a presumption. In "most, but not all, of the presumptions in New York," the burden of proof is by "substantial evidence" (Jerome Prince, Richardson on Evidence § 58 at 37 [Farrell 10th ed 1973]; *see e.g. Matter of Board of Mgrs. of French Oaks Condominium v Town of Amherst*, 23 NY3d 168, 174–175 [2014] [the presumption of validity of the assessment of property made by a taxing authority requires the person challenging that assessment to come forward with "substantial evidence" that the property was overvalued by the assessor]; *Murdza v Zimmerman*, 99 NY2d 375, 380 [2003] ["proof of ownership of a motor vehicle creates a rebuttable presumption that the driver was using the vehicle with the owner's permission, express or implied. Once the plaintiff meets its initial burden of establishing ownership, a logical inference of lawful operation with the owner's consent may be drawn from the possession of the operator. This presumption may be rebutted, however, by substantial evidence

sufficient to show that a vehicle was not operated with the owner's consent" (internal quotation marks and citations omitted)]; *People v Langan*, 303 NY at 480 ["A presumption of regularity exists only until contrary substantial evidence appears"]; *see generally* Prince, *supra* § 3-120).

On what constitutes "substantial evidence" to rebut a presumption, the Court of Appeals in *Matter of FMC Corp. (Peroxygen Chems. Div.) v Unmack* (92 NY2d 179, 187-188 [1998]) explained that

> "generally speaking:
>
> > "a determination is regarded as being supported by substantial evidence when the proof is so substantial that from it an inference of the existence of the fact found may be drawn reasonably. . . . [I]t means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact . . . . Essential attributes are relevance and a probative character . . . . In final analysis, substantial evidence consists of proof within the whole record of such quality and quantity as to generate conviction in and persuade a fair and detached fact finder that, from that proof as a premise, a conclusion or ultimate fact may be extracted reasonably—probatively and logically.
>
> > "The substantial evidence standard is a minimal standard. It requires less than 'clear and convincing evidence,' and less than proof by 'a preponderance of the evidence' " (citations and some internal quotation marks omitted).

In some instances, a presumption is subject to rebuttal by a preponderance of the evidence (*see e.g. Matter of Granger v Misercola*, 21 NY3d 86, 92 [2013] [a presumption in favor of visitation of children has been held subject to rebuttal by a preponderance of the evidence]; UCC 1-201 [b] [8] [" 'Burden of establishing' a fact means the burden of persuading the trier of fact that the existence of the fact is more probable than its nonexistence"]; CPLR 4540-a ["Material produced by a party in response to a demand pursuant to article thirty-one of this chapter for material authored or otherwise created by such party shall be presumed authentic when offered into evidence by an adverse party. Such presumption may be rebutted by a preponderance of evidence proving such material is not authentic, and shall not preclude any other objection to admissibility"]). Proposed New York Code of

Evidence § 302 favored a uniform burden of persuasion of "a preponderance of evidence."

In some instances, the law sets forth the "higher" standard of persuasion: "clear and convincing" evidence (Prince, *supra* § 3-104). "The clear and convincing evidence standard is satisfied when the party bearing the burden of proof has established that it is highly probable that what he or she has claimed is actually what happened" (*Home Ins. Co. of Ind. v Karantonis*, 156 AD2d 844, 845 [3d Dept 1989]; *see Green v William Penn Life Ins. Co. of N.Y.*, 12 NY3d 342, 347 [2009] [presumption against suicide requires evidence that shows suicide to be "highly probable"]; *Murtagh v Murtagh*, 217 AD2d 538, 539 [2d Dept 1995] [the presumption that a child born during marriage is presumed to be the biological product of the marriage may be rebutted by clear and convincing proof excluding the husband as the father or otherwise tending to disprove legitimacy]; *Matter of Jean P. v Roger Warren J.*, 184 AD2d 1072, 1072 [4th Dept 1992] [same]; *Matter of Penny MM. v Bruce MM.*, 118 AD2d 979 [3d Dept 1986] [same]).

[1] In December 2022, the Note to subdivision (3) (c) was amended to add the paragraph defining "substantial evidence."

3.02 Res Ipsa Loquitur (Inference of Negligence in Civil Proceedings)

(1) The doctrine of res ipsa loquitur permits an inference of a defendant's negligence from the happening of an event and thereby creates a prima facie case of negligence sufficient for submission to a jury.

(2) To warrant submission of the inference for the jury's consideration, the plaintiff must show:

(a) the event was of a kind that ordinarily does not occur in the absence of someone's negligence;

(b) the event must be caused by an agency or instrumentality within the exclusive control of the defendant at the time of the act of negligence, thereby affording a rational basis for concluding that the defendant was probably responsible for any negligence connected with the event; and

(c) the event must not have been due to any voluntary action or contribution by the plaintiff.

(3) A defendant may rebut the inference of negligence with evidence that tends to cast doubt on the plaintiff's proof.

(4) A jury may, but is not required to, draw the inference of negligence.

(5) Expert testimony may be admissible where it is necessary to help the jury "bridge the gap" between its own common knowledge and the specialized knowledge and experience necessary to reach a conclusion that the event would not normally take place in the absence of negligence.

(6) A plaintiff may both rely on the doctrine of res ipsa loquitur and introduce specific evidence of the defendant's negligence.

Note

Subdivisions (1), (2), (3), and (4) are derived from *Dermatossian v New York City Tr. Auth.* (67 NY2d 219 [1986]) and its progeny. (*E.g. James v Wormuth*, 21 NY3d 540 [2013]; *Morejon v Rais Constr. Co.*, 7 NY3d 203 [2006]; *States v Lourdes Hosp.*, 100 NY2d 208 [2003]; *see* 1A NY PJI3d 2:65 at 431 [2022].)

"Res ipsa loquitur" is Latin for "the thing speaks for itself." (Black's Law Dictionary [11th ed 2019], res ipsa loquitur.) As explained by *Dermatossian*, the doctrine of res ipsa loquitur permits:

> "an inference of negligence [to] be drawn solely from the happening of the accident . . . . The rule simply recognizes what we know from our everyday experience: that some accidents by their very nature would ordinarily not happen without negligence. Res ipsa loquitur does not create a presumption in favor of the plaintiff but merely permits the inference of negligence to be drawn from the circumstance of the occurrence. The rule has the effect of creating a prima facie case of negligence sufficient for submission to the jury, and the jury may—but is not required to—draw the permissible inference. . . .
>
> "[S]ubmission of the case on the theory of res ipsa loquitur is warranted only when the plaintiff can establish the following elements: (1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff. . . .
>
> "Courts do not generally apply [the exclusive control] requirement as it is literally stated. For example, res ipsa loquitur has been applied even though the accident occurred after the instrumentality left the defendant's control, where it was shown that the defendant had exclusive control at the time of the alleged act of negligence.
>
> "The exclusive control requirement . . . is that the evidence must afford a rational basis for concluding that the cause of the accident was probably such that the defendant would be responsible for any negligence connected with it. The purpose is simply to eliminate within reason all explanations for the injury other than the defendant's negligence. The requirement does not mean that the

> possibility of other causes must be altogether eliminated, but only that their likelihood must be so reduced that the greater probability lies at defendant's door." (*Dermatossian* at 226-227 [internal quotation marks and citations omitted].)

By way of emphasis, a plaintiff "need not conclusively eliminate the possibility of all other causes of the injury. It is enough that the evidence supporting the three conditions afford a rational basis for concluding that it is more likely than not that the injury was caused by defendant's negligence. Stated otherwise, all that is required is that the likelihood of other possible causes of the injury be so reduced that the greater probability lies at defendant's door." (*Kambat v St. Francis Hosp.*, 89 NY2d 489, 494-495 [1997] [internal quotation marks and citations omitted]; *Ebanks v New York City Tr. Auth.*, 70 NY2d 621, 623 [1987] ["The proof did not adequately refute the possibility that the escalator—located in a subway station used by approximately 10,000 persons weekly—had been damaged by a member of the public either through an act of vandalism or, as defendant's witness suggested, by permitting an object such as a hand truck to become caught in the space between the step and sidewall. Plaintiff did not establish that the likelihood of such occurrences was so reduced that the greater probability lies at defendant's door" (internal quotation marks and citations omitted)]; *James v Wormuth*, 21 NY3d at 548 ["Whether the doctor was in control of the operation does not address the question of whether he was in exclusive control of the instrumentality, because several other individuals participated to an extent in the medical procedure. Given that plaintiff failed to produce any evidence that the doctor had exclusive control of the wire, or sufficient proof that 'eliminate(s) within reason all explanations for the injury other than the defendant's negligence,' the control element clearly has not been satisfied"].)

It should be emphasized that contrary to some *old decisional law*, "res ipsa loquitur does not create a presumption of negligence against the defendant. Rather, the circumstantial evidence allows but does not require the jury to infer that the defendant was negligent." (*Morejon v Rais Const. Co.*, 7 NY3d at 209.) Given that it is an inference, "only in the rarest of res ipsa loquitur cases may a plaintiff win summary judgment or a directed verdict. That would happen only when the plaintiff's circumstantial proof is so convincing and the defendant's response so weak that the inference of defendant's negligence is inescapable." (*Id.*)

The inference of negligence "may be rebutted with evidence from defendant that tends to cast doubt on plaintiff's proof." (*States v Lourdes Hosp.*, 100 NY2d at 214.)

Subdivision (5) is derived from *Kambat* (89 NY2d at 497) and *States* (100 NY2d at 212). *Kambat* recognized that expert testimony may be warranted to meet the second and third foundation requirements (i.e. exclusive control and absence of plaintiff's contributory conduct); *States* concluded that expert testimony in a medical malpractice "may be properly used to help the jury 'bridge the gap'

between its own common knowledge, which does not encompass the specialized knowledge and experience necessary to reach a conclusion that the occurrence would not normally take place in the absence of negligence, and the common knowledge of physicians, which does." (*States* at 212.) In doing so, the Court relied in part on the Restatement (Second) of Torts § 328D, Comment *d*, which recognized that the inference from res ipsa loquitor in the "usual case" is based on past experience "common to the community"; however, there may be in some cases "no fund of common knowledge which may permit laymen reasonably to draw the conclusion." (*States* at 212-213; *cf. Monzon v Chiaramonte*, 140 AD3d 1126, 1128-1129 [2d Dept 2016] ["This case is not one of the narrow category of factually simple medical malpractice cases which require no expert to enable a jury to reasonably conclude that the injury would not have happened without negligence"].)

Subdivision (6) is derived from *Abbott v Page Airways* (23 NY2d 502, 511 [1969] ["(T)he mere fact that the plaintiff seeks to bolster his case by introducing specific evidence of the defendant's negligence should not compel the plaintiff to forego reliance on the rule of *res ipsa loquitur*"]). In *Abbott*, the Court added that relying on both would not be permissible when "the two alternate modes of proof are fundamentally or inherently inconsistent." (*Id*. at 512.)

3.03. Presumptions in Criminal Proceedings Accorded the People

(1) A presumption is created by statute or decisional law and requires proof of a specified fact (the "basic fact") from which another fact (the "presumed fact") may be inferred.

(2) When the prosecution submits evidence from which the trier of fact finds that a basic fact is proven beyond a reasonable doubt, the trier of fact may, but is not required to, infer the presumed fact.

(3) When the prosecution presents evidence in support of a basic fact, the defendant may, but is not required to, present evidence in rebuttal of that fact and the presumed fact. Unless the court determines that the presumption is not applicable, or that there is insufficient evidence warranting a finding of the basic fact, and irrespective of whether the defendant presents rebuttal evidence, it remains for the trier of fact to consider whether the basic fact has been proven beyond a reasonable doubt and whether to infer the presumed fact.

Note

Subdivision (1) provides that this rule applies to a presumption when applied against the defendant in a criminal proceeding. It recognizes that constitutional principles, both federal and state, limit the operation of a presumption in a criminal proceeding against a defendant.

The definition of a presumption is derived from the decisional law of both the United States Supreme Court and the Court of Appeals. (*See County Court of Ulster Cty. v Allen*, 442 US 140, 156 [1979] ["Inferences and presumptions are a staple of our adversary system of factfinding. It is often necessary for the trier of fact to determine the existence of an element of the crime—that is, an 'ultimate' or 'elemental' fact—from the existence of one or more 'evidentiary' or 'basic' facts"]; *People v Leyva*, 38 NY2d 160, 168 n 3 [1975] [a presumption is "a deduction or an inference which the trier of fact may draw from facts found or otherwise established during the course of the trial"].)

As noted by subdivision (1), presumptions may be established by statute (*see e.g.* Penal Law § 220.25 [presumption of possession of a controlled substance]), as well as by decisional law (*see e.g. People v Kirkpatrick*, 32 NY2d 17, 23 [1973], *appeal dismissed for want of a substantial federal question* 414 US

948 [1973] ["Generally, possession suffices to permit the inference that the possessor knows what he possesses"]; *People v Hildebrandt*, 308 NY 397, 400 [1955] ["presumptions, in criminal law, need not necessarily be statutory"]). Whether created by statute or decisional law and whether specific to an element of a crime or of general application (such as the presumption of regularity) the finder of fact must be instructed as set forth in subdivision (3).

Before a presumption may be presented to a jury, there must be (or have been) a judicial determination that there is a reasonably high degree of probability that the presumed fact follows from those proved directly. As the Court of Appeals explained in *Leyva* (38 NY2d at 165-166), the United States Supreme Court held that

> "a rational connection between facts proved directly and ones to be inferred from them requires a 'substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend'. (*Leary v United States*, 395 US 6, 36; see, also, *Turner v United States*, 396 US 398, 407.) Our court has exacted an even higher standard of rational connection. As we said in *People v McCaleb* (25 NY2d 394, 404), the connection must assure 'a reasonably high degree of probability' that the presumed fact follows from those proved directly."

Subdivision (2) sets forth the requirement that a presumption in a criminal case is in fact a permissive inference (*People v McKenzie*, 67 NY2d 695, 696 [1986]; *People v Leonard*, 62 NY2d 404, 411 [1984]; *People v Getch*, 50 NY2d 456, 466 [1980]). Thus, in the criminal law, the term "presumption" set forth by statute or decision law is used interchangeably with the term "inference" (*Leyva*, 38 NY2d at 168 n 3 ["Legislatures have been somewhat loose in their use of the word 'presumption' when an inference is clearly what is intended, thus leading to a good deal of unnecessary confusion"]; *see* CJI2d[NY] Penal Law § 220.25 [1] [instruction for the presumption of possession of a controlled substance: "What this (presumption) means is that, if the People have proven beyond a reasonable doubt (the 'basic' fact), then you may, but you are not required to, infer from that fact (the 'presumed' fact). Whether or not to draw that inference is for you (the jury) to decide and will depend entirely on your evaluation of the evidence"]).

The Court of Appeals has cautioned that a " 'mandatory' or 'conclusive' presumption, which operates to *require* the finder of fact to hold against the defendant in the absence of some showing by the defendant to the contrary, may never be applied in a criminal case with respect to one of the elements of the crime being prosecuted" (*Leonard*, 62 NY2d at 411 [a conclusive presumption of regularity as to the conduct of a public official was held to be impermissible]).

Requiring the basic fact to be proved beyond a reasonable doubt is a due process safeguard. (*Barnes v United States*, 412 US 837, 843 [1973] ["if a statutory inference submitted to the jury as sufficient to support conviction satisfies the reasonable-doubt standard (that is, the evidence necessary to invoke the inference is sufficient for a rational juror to find the inferred fact beyond a reasonable doubt) as well as the more-likely-than-not standard, then it clearly accords with due

process"]; *see* CJI2d[NY] Penal Law §§ 165.15 [4]; 165.55, 220.25, 265.15 [instructions for presumptions].)

Examples of the application of a presumption in a criminal case include:

- *Kirkpatrick* (32 NY2d at 23): "Generally, possession suffices to permit the inference that the possessor knows what he [or she] possesses, especially, but not exclusively, if it is in [the possessor's] hands, on [the possessor's] person, in [the possessor's] vehicle, or on [the possessor's] premises."

- *People v Everett* (10 NY2d 500 [1962]): The recent and exclusive possession of the fruits of a crime, if unexplained or if falsely explained, permits the inference that the possessor participated in the theft of the property.

- Penal Law § 165.05 (1): A person who takes, operates, exercises control over, rides in, or otherwise uses a vehicle without the owner's consent is presumed to know that he or she does not have such consent. (*See Matter of Raquel M.*, 99 NY2d 92, 94 [2002].)

- Penal Law § 220.25 (1): The presence of a controlled substance in an automobile is presumptive evidence of knowing possession of that substance by each and every person in the automobile at the time the controlled substance was found unless the controlled substance was concealed upon the person of one of the occupants. (*See Leyva*, 38 NY2d 160.)

- Penal Law § 220.25 (2): The presence of narcotic drugs in open view in a room, other than a public place, under circumstances evincing an intent to unlawfully prepare same for sale is presumptive evidence of knowing possession of the drugs by each person in close proximity to them (*see People v Tirado*, 38 NY2d 955, 956 [1976] [the basic facts establishing that the premises constituted a "drug factory" were proved and permitted the inference that those found in the premises were engaged in the illicit enterprise]; *compare People v Kims*, 24 NY3d 422, 433 [2014] [a basic fact that was necessary to establish the presumption, i.e. that the defendant was "in close proximity" to the drugs, was not proved and thus the presumption was not applicable]).

- Penal Law § 265.15 (3): The presence in an automobile (other than a stolen one or a public omnibus) of contraband weapon is presumptive evidence of its possession by all persons occupying such automobile at the time such weapon is found except if the weapon is found upon the person of one of the occupants therein. (*See People v Lemmons*, 40 NY2d 505 [1976] [whether a pistol found in the handbag of a woman passenger of a car was found "on her person" was a question of fact for the jury]; *County Court of Ulster Cty.*, 442 US 140 [Lemmons'

codefendant unsuccessfully challenged the constitutionality of the presumption].)

- Penal Law § 250.45 (3) (b): When a person uses or installs, or permits the utilization or installation of an imaging device in a bedroom, changing room, fitting room, restroom, toilet, bathroom, washroom, shower or any room assigned to guests or patrons in a hotel, motel or inn, there is a rebuttable presumption that such person did so for no legitimate purpose.

Subdivision (3) is primarily drawn from *Leyva* (38 NY2d at 168-170):

"The purpose of the presumption was to prove the fact of possession [of drugs], inferential though such proof may be. As such, it formed part of the support for the prosecution's prima facie case. No less than with any other proof of facts offered by a prosecution, contrary evidence from a defendant does not negate the existence of a prima facie case; rather it presents an alternate set of facts, or inferences from facts, to the jury. The jury then has the right to choose between the two versions. . . .

"It might be possible, of course, that a defendant's evidence will prove the truth of his choice of inferences so conclusively that reasonable persons could no longer believe the inference authorized by the statute. There is nothing arcane about such a situation; where a defendant's proof is conclusive and reasonable persons cannot disagree about the matter at issue, our courts always have the power to issue a trial order of dismissal (CPL 290.10) or direct the jury's finding on an element of a crime. . . .

"In such a case, the fact that a jury is not given the opportunity to consider the inference authorized by the statute does not mean that the inference plays no role in the case. It merely means that, though the presumption suffices to enable the prosecution to make out a prima facie case, it is no longer sufficiently tenable to permit a jury, in the light of the defendant's evidence, to consider it. It receives the same treatment that any other 'fact' so thoroughly controverted would receive." (*See e.g. People v Adamkiewicz*, 298 NY 176, 181 [1948] [a statutory presumption of intent to possess a weapon unlawfully was rebutted]; *Kims*, 24 NY3d at 433 [a statutory presumption of criminal possession of drugs was inapplicable because the defendant was not in "close proximity" to the drugs].)

3.05 Presumptions Accorded Defendant in a Criminal Proceeding

(1) In a criminal proceeding, the defendant is presumed to be innocent. As a result, the People are required to prove a defendant's guilt of a charged offense beyond a reasonable doubt.

(2) (a) In a hearing to determine whether a pretrial identification procedure was unduly suggestive, a rebuttable presumption that the procedure was suggestive arises when the People either fail to preserve photographs, whether in physical form or computer-generated, that the identifying witness viewed or fail to preserve a photograph of a lineup that the identifying witness viewed.

(b) The People may rebut the presumption by proof of procedures used to safeguard against suggestiveness.

(3) (a) Where a defendant is successful on appeal in having a judgment of conviction reversed or in having the appellate court order a resentence, a rebuttable presumption of vindictiveness may arise when the defendant is subsequently sentenced for the same offense and given a greater sentence than was imposed after the defendant's initial conviction, irrespective of whether the same judge presided over both sentences. The presumption is inapplicable when the defendant is given the same sentence as was imposed on the initial conviction.

(b) The presumption may be rebutted where the trial court identifies reasons based on objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.

Note

Subdivision (1) sets forth the bedrock principle of American criminal jurisprudence (CPL 300.10 [2]; *Estelle v Williams*, 425 US 501, 503 [1976] ["The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment. The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice" (citation omitted)]; *Taylor v Kentucky*, 436 US 478, 490 [1978] ["the trial court's refusal to give petitioner's requested instruction on the presumption of innocence resulted in a violation of his right to a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment"]; *In re Winship*, 397 US 358, 363 [1970] ["The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence"]; *People v Antommarchi*, 80 NY2d 247, 252 [1992] ["Manifestly, the burden of proving guilt beyond a reasonable doubt in a criminal proceeding must always remain with the People"]).

Subdivision (2) is derived from *People v Holley* (26 NY3d 514 [2015] [computer-generated array of photographs]) and *People v Simmons* (158 AD2d 950 [4th Dept 1990] [lineup photograph]), cited with approval by *Holley*. As *Holley* explained:

> "the People have the burden of producing evidence in support of the fairness of the identification procedure. If this burden is not sustained, a peremptory ruling against the People is justified. If the People meet their burden of production, the burden shifts to the defendant to persuade the hearing court that the procedure was improper. . . .
> "[T]he failure of the police to preserve a photographic array [shown to an identifying witness] gives rise to a rebuttable presumption that the array was suggestive. The rebuttable presumption fits within the burden-shifting mechanism in the following manner. Failure to preserve a photo array creates a rebuttable presumption that the People have failed to meet their burden of going forward to establish the lack of suggestiveness. To the extent the People are silent about the nature of the photo array, they have not met their burden of production. On the other hand, the People may rebut the presumption by means of testimony detailing the procedures used to safeguard against suggestiveness, in which case they have met their burden, and the burden shifts to the defendant" (*Holley* at 521-522 [internal quotation marks and citations omitted]).

Holley noted that "Appellate Division cases have found that the People overcame the presumption when the detective's testimony detailed 'the sheer volume of the photographs viewed, as well as the fact that the police had not yet focused upon defendant as a particular suspect' " (*Holley* at 524). In the *Holley* case itself, the Court found that the presumption was rebutted, there being support for

the finding that the detective "entered enough information about the perpetrator's physical features to ensure that the photo manager system would generate 'a fair selection of photos,' rather than an array in which defendant's image would stand out as markedly different" (*Holley* at 525, quoting *People v Holley*, 116 AD3d 442, 442 [1st Dept 2014]; *see People v Busano*, 141 AD3d 538, 540-541 [2d Dept 2016] [presumption was rebutted where the officer who administered the identification procedure testified that the "complainant's daughter was shown computer-generated photo arrays shortly after the attack occurred. The officer further testified as to the specific information that was entered into the photo manager system, which included the perpetrator's race and approximate age, height, and weight. The officer testified that approximately 230 photographs fit the search criteria that was entered into the photo manager system and that these photographs were displayed in arrays consisting of six photographs at a time" (citations omitted)]; *People v Brennan*, 222 AD2d 445, 445 [2d Dept 1995] [presumption of suggestiveness from the failure to preserve a photograph of a lineup was rebutted where "photographs of the lineup fillers were taken approximately 10 months after the original lineup was held, and the police officer who was present at the lineup testified about the height and weight of the fillers, whether they had gained or lost any weight between the lineup and the reconstruction, and their positions in the lineup"]).

Subdivision (3) is derived from *People v Flowers* (28 NY3d 536 [2016]), *People v Young* (94 NY2d 171 [1999]) and *People v Van Pelt* (76 NY2d 156 [1990]). The rule has its origins in the Federal Constitution (*North Carolina v Pearce*, 395 US 711 [1969]).

The presumption was designed "to insure that trial courts do not impose longer sentences to punish defendants for taking an appeal" (*Young*, 94 NY2d at 176). As summarized by *Flowers*, "the presumption of vindictiveness applies only to 'defendants who have won appellate reversals' who are 'given *greater* sentences . . . than were imposed after their initial convictions' (*People v Young*, 94 NY2d 171, 176 [1999] [emphasis added]). The presumption is inapplicable where, as here, the same term of imprisonment is imposed upon resentencing" (*Flowers*, 28 NY3d at 541-542).

The presumption may be rebutted (*People v Young*, 94 NY2d at 182 ["Once the presumption arises, it can be rebutted only if the trial court identifies reasons 'based on objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding' (*North Carolina v Pearce, supra*, 395 US, at 726)"]; *People v Miller*, 65 NY2d 502, 508 [1985] [the presumption "may be overcome by evidence that the higher sentence rests upon a legitimate and reasoned basis"]; *e.g. People v Bludson*, 15 AD3d 912, 913 [4th Dept 2005] ["The retrial and sentencing thereon were before a different justice and, in enhancing defendant's sentence following the retrial, the court noted that it was doing so because, in the court's view, defendant had committed perjury at the retrial. Thus, the record before us does not support defendant's contention

that there is a reasonable likelihood that the enhanced sentence was the result of vindictiveness" (citations omitted)]).

What may trigger the presumption in other situations depends on "the opportunity which the particular situation presents for vindictiveness and the reasonable likelihood that the prosecutor or sentencing authority is improperly motivated by what has occurred" (*Miller*, 65 NY2d at 508).

The presumption therefore does not normally arise when a plea of guilty has been set aside and the defendant is then convicted after a trial (*Alabama v Smith*, 490 US 794, 795 [1989] ["no presumption of vindictiveness arises when the first sentence was based upon a guilty plea, and the second sentence follows a trial"]; *Miller*, 65 NY2d at 509 ["Having accepted the exercise of discretion to lower the original sentence in return for a plea in order to protect the victim, the defendant should not be heard to complain that a higher sentence is imposed after conviction following a retrial at which, by requiring that the victim testify, he has removed from consideration the element of discretion involved"]).

"Similarly," *Young* explained, "the Supreme Court has held that the presumption does not arise in other instances where, although there was an 'opportunity' for vindictiveness, there was not a 'realistic likelihood' that the enhanced sentence was the result of impermissible vindictiveness (*United States v Goodwin* [457 US 368, 384 (1982)] [no presumption of vindictiveness where defendant was charged with a felony after refusing to plead guilty to misdemeanor charges]; *see also*, *Colten v Kentucky*, 407 US 104, 117-120 [1972] [no presumption of vindictiveness where, following conviction in inferior court, defendant sought trial de novo in superior court under Kentucky's two-tiered system and received greater sentence]). Where there is no 'reasonable likelihood' of vindictiveness, 'the burden remains upon the defendant to prove actual vindictiveness' (*Alabama v Smith* [490 US at 799-800])" (*Young*, 94 NY2d at 177-178).

Where a defendant receives a "greater sentence on an individual count, but an equal or lesser over-all sentence, courts must examine the record to determine whether there is a reasonable likelihood that the enhanced sentence on the individual count was the result of vindictiveness" (*Young*, 94 NY2d at 179).

While the presumption of vindictiveness on resentence "does not apply" under the Federal Constitution when "a different Judge imposes the longer sentence," as a matter of State constitutional law, the presumption does apply (*Young*, 94 NY2d at 178). That "a different Judge imposes the second sentence is but a factor to be weighed with others in assaying whether the presumption has been overcome" (*Van Pelt*, 76 NY2d at 161).

A claim that the sentence imposed was presumptively vindictive must be preserved for appellate review as a question of law (*People v Olds*, 36 NY3d 1091 [2021]).

3.21 Lack of record (CPLR 4521)

A statement signed by an officer or a deputy of an officer having legal custody of specified official records of the United States or of any state, territory or jurisdiction of the United States, or of any court thereof, or kept in any public office thereof, that he [or she] has made diligent search of the records and has found no record or entry of a specified nature, is prima facie evidence that the records contain no such record or entry, provided that the statement is accompanied by a certificate that legal custody of the specified official records belongs to such person, which certificate shall be made by a person described in [CPLR] 4540.

Note

This rule restates CPLR 4521, which sets forth a hearsay exception for the admissibility, as prima facie evidence, of a certificate of the legal custodian of government records that after a "diligent search" (*see Briggs v Waldron*, 83 NY 582, 585 [1881]) "no record or entry" of the item searched for was found.

More than a century ago, the Court of Appeals in *Deshong v City of New York* (176 NY 475, 485 [1903]) stated the rationale for the statute:

> "The law presumes that all officers intrusted with the custody of public files and records will perform their official duty by keeping the same safely in their offices, and if a paper is not found where, if in existence, it ought to be deposited or recorded, the presumption thereupon arises that no such document has ever been in existence, and until this presumption is rebutted it must stand as proof of such non-existence."

The statute is limited to government records of the "United States or of any state, territory or jurisdiction of the United States, or of any court thereof." In *Brill v Brill* (10 NY2d 308, 310 [1961]), however, the Court of Appeals, in accord with prior common law, on a motion for summary judgment, accepted certificates of officials of Mexican courts, "duly authenticated by the Vice-Consul of the U. S. A.," stating that "they have searched the files of the court since the year 1954 but that no divorce action" between the parties in the New York action "has been registered."

"CPLR 4521 and its predecessors have provided an expeditious method of proving such matters as the failure of a married couple to have obtained a divorce decree (*Matter of Brown's Estate*, 1976, 40 N.Y.2d 938, 390 N.Y.S.2d 59, 358 N.E.2d 883), the failure of a landowner to have obtained a building permit (*Deshong v. City of New York*, 1903, 176 N.Y. 475, 68 N.E. 880), and the failure of a contractor to have obtained a license to do business (*Dartmouth Plan, Inc. v. Valle*, 1983, 117 Misc.2d 534, 458 N.Y.S.2d 848 (Sup. Ct. Kings Co.)." (Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 4521.)

Although unresolved by an appellate court, CPLR 4521 "should not preclude recognition of a common law hearsay exception for testimony about the absence of a public record." (*Id.*; *People v Niang*, 160 Misc 2d 500, 502 [Crim Ct, NY County 1994]; *see* CPLR 4543 ["Nothing in this article prevents the proof of a fact . . . by any method authorized . . . by the rules of evidence at common law"].)

In a criminal proceeding, with or without a certificate, if the lack of a record or entry constitutes testimonial evidence, the official may be required to testify, subject to cross-examination, for example, on what constituted a "due diligent" search. (*See Bullcoming v New Mexico*, 564 US 647 [2011]; *Crawford v Washington*, 541 US 36 [2004]; *People v Pacer*, 6 NY3d 504 [2006]; *People v Niene*, 8 Misc 3d 649, 651 [Crim Ct, NY County 2005] [the "affidavit" of a Department of Consumer Affairs "official who reported that her review of the Department's records disclosed that the defendant did not have a general vendor's license" was testimonial evidence; so the defendant was entitled to cross-examine its maker].)

3.22. Ancient Filed Maps, Surveys and Records Affecting Real Property (CPLR 4522)

All maps, surveys and official records affecting real property, which have been on file in the state in the office of the register of any county, any county clerk, any court of record or any department of the city of New York for more than ten years, are prima facie evidence of their contents.

Note

This rule restates verbatim CPLR 4522. Compare Guide to New York Evidence rule 8.07 (Ancient Documents), which sets forth the common-law exception to the hearsay rule for a statement in a document that is proven to be in existence for more than 30 years; while that statement is admissible, unlike the present rule, it does not constitute prima facie evidence of the truth or accuracy of the statement.

CPLR 4522 provides that maps, surveys, and official records affecting real property, which have been on file in the state in an office specified in the rule for more than 10 years, are "prima facie evidence" of their contents. By making those items "prima facie evidence" of their contents, the rule thereby establishes a hearsay exception for those items.

The Appellate Division has held that the "prima facie" language creates a rebuttable presumption of the accuracy of the document (*Knox Vil. Assoc. v Town of New Windsor*, 219 AD2d 585, 586 [2d Dept 1995] ["the defendants overcame the presumption of accuracy afforded to the ancient documents produced by the plaintiff (*see,* CPLR 4522 . . .)"]; *Berman v Golden*, 131 AD2d 416, 417 [2d Dept 1987] [evidence was "insufficient to rebut the presumption of accuracy which attaches pursuant to CPLR 4522 to the description of the property conveyed by that deed"] *See* Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C4518:9.)

3.23. Search by Title Insurance or Abstract Company (CPLR 4523)

A search affecting real property, when made and certified to by a title insurance, abstract or searching company, organized under the laws of this state, may be used in place of, and with the same legal effect as, an official search.

Note

This rule restates verbatim CPLR 4523. It sets forth a hearsay exception for a certified title search made by a New York title insurance, abstract or searching company. The exception does not identify the person who should make the certification; the better practice, however, would be for an authorized officer of the company to issue the certified search.

When admitted, the certified title search has the "same legal effect" as an "official search." A county clerk may conduct an "official search" and in that instance the clerk's certified title search constitutes prima facie evidence of its contents (CPLR 4520). In turn, therefore, the certified title search by a title insurance, abstract or searching company pursuant to this rule should be prima facie evidence of its contents. (*See* Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, CPLR 4523.)

While the certified title search is thus admissible and should be "prima facie evidence" of its contents, evidence may be introduced to rebut its accuracy or otherwise to affect the weight of the evidence. (*Cf. Knox Vil. Assoc. v Town of New Windsor*, 219 AD2d 585, 586 [2d Dept 1995] ["the defendants overcame the presumption of accuracy afforded to the ancient documents produced by the plaintiff (*see,* CPLR 4522 . . .)"]; *Berman v Golden*, 131 AD2d 416, 417 [2d Dept 1987] [indicating that the terminology "prima facie evidence" in CPLR 4522 (Ancient filed maps, surveys and records affecting real property) created a rebuttable presumption of the accuracy of the documents]. *See* Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C4518:9.)

3.24. Conveyance of Real Property Without the State (CPLR 4524)

A record of a conveyance of real property situated within another state, territory, or jurisdiction of the United States, recorded therein pursuant to its laws, is prima facie evidence of conveyance and of due execution.

Note

This rule restates verbatim CPLR 4524.

The statute makes a record of a conveyance of real property located outside New York and its due execution "prima facie evidence" of its contents when the real property is situated within another state, territory, or jurisdiction of the United States and the record was recorded in that jurisdiction in accordance with the jurisdiction's laws.

By making that record "prima facie evidence" of the conveyance and its due execution, the statute provides a hearsay exception for that record. While the record is thus admissible and is "prima facie evidence" of conveyance and due execution, evidence may be introduced to rebut the accuracy of conveyance and due execution or otherwise to affect the weight of the evidence. (*Cf. Knox Vil. Assoc. v Town of New Windsor*, 219 AD2d 585, 586 [2d Dept 1995] ["the defendants overcame the presumption of accuracy afforded to the ancient documents produced by the plaintiff (*see,* CPLR 4522 . . .)"]; *Berman v Golden*, 131 AD2d 416, 417 [2d Dept 1987] [indicating that the terminology "prima facie evidence" in CPLR 4522 (Ancient filed maps, surveys and records affecting real property) created a rebuttable presumption of the accuracy of the documents]. *See* Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C4518:9.)

3.25. Copies of Statements under Article 9 of the UCC (CPLR 4525)

A copy of a statement which is noted or certified by a filing officer pursuant to section 9-523 of the uniform commercial code and which states that the copy is a true copy is prima facie evidence of the facts stated in the notation or certification and that the copy is a true copy of a statement filed in the office of the filing officer.

Note

This rule restates verbatim CPLR 4525.

UCC article 9 relates to "Secured Transactions," and part 5 thereof to "Filing." Section 9-523 relates to the obligations of the "filing office" to acknowledge a filing. That acknowledgement may be done by a certification of an image of the record filed or by a notation on a copy of the record furnished by the person seeking the acknowledgement.

CPLR 4525 specifies that a copy of a statement noted or certified by a "filing officer," which contains a statement that the copy is a "true copy" of a statement filed in the office of a "filing officer," is prima facie evidence (1) of the facts stated in the notation or certification and (2) that the copy is a "true copy" of the filed statement.

By making that statement "prima facie" evidence of its stated facts, the statute provides a hearsay exception for the statement. While the statement is thus admissible and is "prima facie evidence" of the facts stated, evidence may be introduced to rebut the accuracy of the facts stated or otherwise to affect the weight of the evidence. (*Cf. Knox Vil. Assoc. v Town of New Windsor*, 219 AD2d 585, 586 [2d Dept 1995] ["the defendants overcame the presumption of accuracy afforded to the ancient documents produced by the plaintiff (*see,* CPLR 4522 . . .)"]; *Berman v Golden*, 131 AD2d 416, 417 [2d Dept 1987] [indicating that the terminology "prima facie evidence" in CPLR 4522 (Ancient filed maps, surveys and records affecting real property) created a rebuttable presumption of the accuracy of the documents]. *See* Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C4518:9.)

3.26. Marriage Certificate or Record of Registration

Part I (CPLR 4526)

An original certificate of a marriage made by the person by whom it was solemnized within the state, or the original entry thereof made pursuant to law in the office of the clerk of a city or a town within the state, is prima facie evidence of the marriage.

Part II (Domestic Relations Law § 14-a [4])

A copy of the record of marriage registration when properly certified by the city and town clerks or their duly authorized deputies, as . . . provided [in Domestic Relations Law § 14-a], shall be prima facie evidence of the facts therein stated and in all actions, proceedings or applications, judicial, administrative or otherwise, and any such certificate of registration of marriage shall be accepted with the same force and effect with respect to the facts therein stated as the original certificate of marriage or certified copy thereof.

Note

There are two separate statutes relating to documentary proof of a marriage.

Part I restates verbatim CPLR 4526. That statute provides that an "original certificate of a marriage" made by the person who solemnized the marriage in New York, or the "original entry" of the certificate made by a city or town clerk in New York is prima facie evidence "of the marriage" (and not of any other facts stated in the certificate), and thereby establishes an exception to the rule against the admission of hearsay.

Part II restates subdivision (4) of Domestic Relations Law § 14-a. That statute provides that the "record of marriage registration" is prima facie evidence "of the facts therein stated" and thereby establishes an exception to the rule against the admission of hearsay for the facts stated in the marriage registration.

While the "certificate" (CPLR 4526) or "registration" (Domestic Relations Law § 14-a [4]) of marriage is admissible and each is "prima facie evidence" as indicated, evidence may be introduced to rebut the "prima facie evidence" of

"marriage" or of the "facts" stated in the "registration," as the case may be, or otherwise to affect the weight of the evidence. (*Cf. Knox Vil. Assoc. v Town of New Windsor*, 219 AD2d 585, 586 [2d Dept 1995] ["the defendants overcame the presumption of accuracy afforded to the ancient documents produced by the plaintiff (*see,* CPLR 4522 . . .)"]; *Berman v Golden*, 131 AD2d 416, 417 [2d Dept 1987] [indicating that the terminology "prima facie evidence" in CPLR 4522 (Ancient filed maps, surveys and records affecting real property) created a rebuttable presumption of the accuracy of the documents]. *See* Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C4518:9.)

3.27. Death or Other Status of a Missing Person (CPLR 4527)

(a) Presumed death. A written finding of presumed death, made by any person authorized to make such findings by the federal missing persons act is prima facie evidence of the death, and the date, circumstances and place of disappearance. In the case of a merchant seaman, a written finding of presumed death, made by the maritime war emergency board or by the war shipping administration or the successors or assigns of such board or administration in connection with war risk insurance is prima facie evidence of the death, and the date, circumstances and place of disappearance.

(b) Death, internment, capture and other status. An official written report or record that a person is missing, missing in action, interned in a neutral country, or beleaguered, besieged or captured by an enemy, or is dead, or is alive, made by an officer or employee of the United States authorized by law of the United States to make it is prima facie evidence of such fact.

Note

This rule restates verbatim CPLR 4527 (Death or other status of missing person). See also EPTL 2-1.7 (Presumption of death from absence; effect of exposure to specific peril) which sets forth a presumption of death of a person who is absent for a continuous period of three years.

Subdivision (a) sets forth a hearsay exception for (1) a written finding of presumed death of a person made by a person authorized to make such a finding by the "Federal Missing Persons Act," and (2) a written finding of a presumed death of a merchant seaman made by the Maritime War Emergency Board or the war shipping administration or their successors, in connection with war risk insurance.

The "Federal Missing Persons Act" was, however, repealed in 1966. While relevant provisions of that act now appear to exist in 5 USC § 5565 (applicable to a federal employee) and 37 USC § 555 (applicable to a member of a uniformed service), it remains for the New York courts to determine the successor federal statute and whether to deem CPLR 4527 applicable to that statute(s).

The written finding of death is "prima facie evidence" of the "death, and the date, circumstances and place of disappearance." Notably, the statute makes the finding of death "prima facie evidence," not the date of death; the date of disappearance is given "prima facie" effect and the date of disappearance may not be the date of death. (*See Matter of Cuthell*, 193 Misc 226 [Sup Ct, Westchester County 1948].)

In making the requisite finding of death "prima facie evidence," the statute establishes an exception for such documents to the rule against the admission of hearsay.

While those documents are thus admissible and are "prima facie evidence" as indicated, evidence may be introduced to rebut the accuracy of the evidence or otherwise to affect the weight of the evidence. (*Cf. Knox Vil. Assoc. v Town of New Windsor*, 219 AD2d 585, 586 [2d Dept 1995] ["the defendants overcame the presumption of accuracy afforded to the ancient documents produced by the plaintiff (*see,* CPLR 4522 . . .)"]; *Berman v Golden*, 131 AD2d 416, 417 [2d Dept 1987] [indicating that the terminology "prima facie evidence" in CPLR 4522 (Ancient filed maps, surveys and records affecting real property) created a rebuttable presumption of the accuracy of the documents]. *See* Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C4518:9.)

Subdivision (b) sets forth a hearsay exception for an official report or record made by an officer or employee of the United States authorized by federal law to make the report or record that a person is missing, missing in action, interned in a neutral country, or beleaguered, besieged or captured by an enemy, or is dead or alive. When admitted, the record or report is prima facie evidence of the facts stated therein.

3.28. Weather Conditions (CPLR 4528)

Any record of the observations of the weather, taken under the direction of the United States weather bureau, is prima facie evidence of the facts stated.

Note

This rule restates verbatim CPLR 4528.

The statute provides that a record of a weather observation made under the direction of the United States weather bureau is prima facie evidence of the facts stated therein and thereby establishes a hearsay exception as well for the admissibility of that record.

Note the requirement that the weather observation be made "under the direction of the United States weather bureau." *Beaton v City of New York,* __AD3d__, 2021 NY Slip Op 04477 [2d Dept 2021] ["the three pages of climatological data that [defendant] submitted in support of its motion should have been authenticated because these pages themselves did not indicate that the data contained therein was "taken under the direction of the United States weather bureau"].

While those weather records are thus admissible and are "prima facie evidence" of the facts stated, evidence may be introduced to rebut the accuracy of those facts or otherwise to affect the weight of the evidence. (*Cf. Knox Vil. Assoc. v Town of New Windsor*, 219 AD2d 585, 586 [2d Dept 1995] ["the defendants overcame the presumption of accuracy afforded to the ancient documents produced by the plaintiff (*see,* CPLR 4522 . . .)"]; *Berman v Golden*, 131 AD2d 416, 417 [2d Dept 1987] [indicating that the terminology "prima facie evidence" in CPLR 4522 (Ancient filed maps, surveys and records affecting real property) created a rebuttable presumption of the accuracy of the documents]. *See* Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C4518:9.)

3.29. Inspection Certificate Issued by United States Department of Agriculture (CPLR 4529)

An inspection certificate issued by the authorized agents of the United States department of agriculture on file with the United States secretary of agriculture is prima facie evidence of the facts stated.

Note

This rule restates verbatim CPLR 4529.

The statute provides that an inspection certificate issued by an authorized agent of the United States Department of Agriculture and on file with the Secretary of Agriculture of the United States is "prima facie evidence" of the "facts stated" therein.

CPLR 4529 thereby provides a hearsay exception for the inspection certificate. While the inspection certificate is thus admissible and is "prima facie evidence" of the facts stated, evidence may be introduced to rebut the accuracy of the facts stated or otherwise affect the weight of the evidence. (*Cf. Knox Vil. Assoc. v Town of New Windsor*, 219 AD2d 585, 586 [2d Dept 1995] ["the defendants overcame the presumption of accuracy afforded to the ancient documents produced by the plaintiff (*see,* CPLR 4522 . . .)"]; *Berman v Golden*, 131 AD2d 416, 417 [2d Dept 1987] [indicating that the terminology "prima facie evidence" in CPLR 4522 (Ancient filed maps, surveys and records affecting real property) created a rebuttable presumption of the accuracy of the documents]. *See* Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C4518:9.)

3.30. Population Certificate [CPLR 4530]

(a) Prima facie evidence. A certificate of the officer in charge of the census of the United States, attested by the United States secretary of commerce, giving the result of the census is, except as hereinafter provided, prima facie evidence of such result.

(b) Conclusive evidence. Where the population of the state or a subdivision, or a portion of a subdivision of the state is required to be determined according to the federal or state census or enumeration last preceding a particular time, a certificate of the officer in charge of the census of the United States, attested by the United States secretary of commerce, as to such population as shown by such federal census, or a certificate of the secretary of state as to such population as shown by such state enumeration, is conclusive evidence of such population.

Note

Except for the heading, this rule restates verbatim CPLR 4530.

Subdivision (a) sets forth a hearsay exception for a certificate made by the officer in charge of the census of the United States and attested by the United States Secretary of Commerce giving the results of the census. When admitted, the certificate is prima facie evidence of the result.

Subdivision (b) applies to a subset of the census, that is, where the population of New York or a subdivision or a portion of a subdivision of New York is required to be determined according to the most recent census. In that instance, the statute provides a hearsay exception for the admission of a certificate by the officer in charge of the census of the United States and attested by the United States Secretary of Commerce as to such population, as shown by such federal census, or a certificate by the secretary of state as to such population, as shown by such "state enumeration." Beyond the hearsay exception, the statute makes the certificate conclusive evidence of the reported population.

3.31. Affidavit of Service or Posting Notice by Person Unavailable at Trial (CPLR 4531)

An affidavit by a person who served, posted or affixed a notice, showing such service, posting or affixing is prima facie evidence of the service, posting or affixing if the affiant is dead, mentally ill or cannot be compelled with due diligence to attend at the trial.

Note

This rule restates verbatim CPLR 4531.

The statute provides that an affidavit of a person who has served, posted, or affixed a notice, which shows such service, posting or affixing, is prima facie evidence of the service, posting, or affixing when that person is deceased, mentally ill or cannot be compelled with due diligence to testify at a trial.

The specified "notice" includes all forms of judicial process (*see Gordon v Nemeroff Realty Corp*., 139 AD2d 492, 492 [2d Dept 1988] ["Pursuant to both statutory and decisional law, where a process server dies after service and prior to a hearing as to whether service was properly effected, his affidavit of service (in this case of a summons and complaint) shall be received as prima facie evidence of service provided it is not conclusory and devoid of sufficient detail"]; *Laurenzano v Laurenzano*, 222 AD2d 560, 561 [2d Dept 1995] [due diligence was established in an attempt to locate the process server, allowing for the use of the affidavit of service that "contained 'sufficient factual detail' " to establish service of summons and complaint]).

By making the affidavit "prima facie" evidence of service, posting, or affixing, the statute thereby provides a hearsay exception for the admissibility of that affidavit. While the affidavit is thus admissible and is "prima facie evidence" of the accuracy of the affidavit of the service, posting, or affixing, evidence may be introduced to rebut the affidavit's accuracy or otherwise to affect the weight of the evidence. (*Cf. Knox Vil. Assoc. v Town of New Windsor*, 219 AD2d 585, 586 [2d Dept 1995]; *Berman v Golden*, 131 AD2d 416, 417 [2d Dept 1987] [indicating that the terminology "prima facie evidence" in CPLR 4522 (Ancient filed maps, surveys and records affecting real property) created a rebuttable presumption of the accuracy of the documents]. *See* Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C4518:9.)

3.33-a. Bill for Services or Repairs Not in Excess of $2,000 (CPLR 4533-a)

An itemized bill or invoice, receipted or marked paid, for services or repairs of an amount not in excess of two thousand dollars is admissible in evidence and is prima facie evidence of the reasonable value and necessity of such services or repairs itemized therein in any civil action provided it bears a certification by the person, firm or corporation, or an authorized agent or employee thereof, rendering such services or making such repairs and charging for the same, and contains a verified statement that no part of the payment received therefor will be refunded to the debtor, and that the amounts itemized therein are the usual and customary rates charged for such services or repairs by the affiant or his employer;

and provided further that a true copy of such itemized bill or invoice together with a notice of intention to introduce such bill or invoice into evidence pursuant to this rule is served upon each party at least ten days before the trial. No more than one bill or invoice from the same person, firm or corporation to the same debtor shall be admissible in evidence under this rule in the same action.

Note

Except for the heading, this rule restates verbatim CPLR 4533-a. It sets forth a hearsay exception and a certification procedure applicable in any civil action for the admissibility of an "itemized bill or invoice" not in excess of $2,000 for services or repairs rendered.

The bill or invoice must be "marked paid" or a receipt showing payment attached. Although no more than one bill from the same person may be admitted under this statutory provision, there is no limit on the number of bills from different persons or entities that may be introduced in this manner.

The certification must be made by the person, firm, or corporation or an authorized agent or employee thereof, rendering such services or making such repairs and charging for them. It must also contain a verified statement that no part of the payment received therefor will be refunded to the debtor and that the amounts itemized therein are the usual and customary rates charged for such services or repairs by the affiant or affiant's employer. A copy of such itemized bill or invoice together with a notice of intention to introduce it into evidence pursuant to this rule must be served upon each party at least ten days before the trial. Compliance with the certification procedure makes it unnecessary to call a foundation witness to establish the admissibility of the bill.

Upon admission, the itemized bill is "prima facie evidence" of the reasonable value and necessity of the services rendered or repairs made. The legislative history shows that the itemized bill is not admissible as evidence that the services or repairs rendered were incurred as a result of another person's conduct. (Joseph M. McLaughlin, *The Admissibility of Professional and Repair Bills Under CPLR 4533-a*, reprinted in 15th Ann Rep of NY Jud Conf at 241.)

3.34. Standard of Measurement Used by Surveyor (CPLR 4534)

An official certificate of any state, county, city, village or town sealer elected or appointed pursuant to the laws of the state, or the statement under oath of a surveyor, that the chain or measure used by him conformed to the state standard at the time a survey was made is prima facie evidence of conformity, and an official certificate made by any sealer that the implement used in measuring such chain or other measure was the one provided the sealer pursuant to the provisions of the laws of the state is prima facie evidence of that fact.

Note

This rule restates verbatim CPLR 4534.

The statute provides that certain documents related to the standard of measurement used by a surveyor are prima facie evidence of their contents and thereby establishes an exception to the rule against the admission of hearsay.

Those documents are:

1. an "official certificate" of a state or municipal "sealer" (i.e. "an official who attests or certifies conformity to a standard of correctness" [Merriam-Webster Online Dictionary, sealer (https://www.merriam-webster.com/dictionary/sealer)]), or a statement under oath of a surveyor, that the chain or measure used by the surveyor conformed to the then current applicable state standard, and

2. a certificate made by a sealer that the implement used in measuring the chain or measure was one provided by the sealer pursuant to law.

While those documents are admissible and are "prima facie evidence" of the accuracy of their contents, evidence may be introduced to rebut the accuracy of their contents or otherwise to affect the weight of the evidence. (*Cf. Knox Vil. Assoc. v Town of New Windsor*, 219 AD2d 585, 586 [2d Dept 1995] ["the defendants overcame the presumption of accuracy afforded to the ancient documents produced by the plaintiff (*see,* CPLR 4522 . . .)"]; *Berman v Golden*, 131 AD2d 416, 417 [2d Dept 1987] [indicating that the terminology "prima facie evidence" in CPLR 4522 (Ancient filed maps, surveys and records affecting real

property) created a rebuttable presumption of the accuracy of the documents]. *See* Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C4518:9.)

3.41 Proof of proceedings before justice of the peace (CPLR 4541).

(a) Of the state. A transcript from the docket-book of a justice of the peace of the state, subscribed by him [or her], and authenticated by a certificate signed by the clerk of the county in which the justice resides, with the county seal affixed, to the effect that the person subscribing the transcript is a justice of the peace of that county, is prima facie evidence of any matter stated in the transcript which is required by law to be entered by the justice in his [or her] docket-book.

(b) Of another state. A transcript from the docket-book of a justice of the peace of another state, of his [or her] minutes of the proceedings in a cause, of a judgment rendered by him [or her], of an execution issued thereon or of the return of an execution, when subscribed by him [or her], and authenticated as prescribed in this subdivision is prima facie evidence of his [or her] jurisdiction in the cause and of the matters shown by the transcript. The transcript shall be authenticated by a certificate of the justice to the effect that it is in all respects correct and that he [or she] had jurisdiction of the cause; and also by a certificate of the clerk or prothonotary of the county in which the justice resides, with his [or her] official seal affixed, to the effect that the person subscribing the certificate attached to the transcript is a justice of the peace of that county.

Note

This rule recites verbatim CPLR 4541.

Subdivision (a) allows a "transcript" from the docket-book of a New York justice of the peace (presently referred to as a Town Justice or Village Justice), when certified as required by the statute, to be prima facie evidence of the contents of the transcript that are "required by law to be entered by the justice in his [or her] docket-book."

Subdivision (b) addresses a transcript from the docket-book of a justice of the peace of another state. When the specified procedure is followed, that transcript is prima facie evidence of both the "justice's 'jurisdiction in the cause'

and of 'the matters shown by the transcript.' Under subdivision (a), on the other hand, the transcript from the docket book of a New York justice of the peace is not per se evidence of the justice's jurisdiction and is prima facie evidence only of the matters stated in the transcript that are 'required by law to be entered by the justice in his [or her] docket-book' " (Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 4541 at 778-779 [2007 ed]). The jurisdiction of a New York justice of the peace, however, is subject to judicial notice. (*Id.*)

While the properly certified transcript is admissible as an exception to the rule excluding hearsay and is "prima facie evidence," an opposing party may introduce evidence to rebut the accuracy of the transcript or otherwise to affect the weight of the evidence. (*Cf. Berman v Golden*, 131 AD2d 416, 417 [2d Dept 1987] [the terminology "prima facie evidence" in CPLR 4522 (ancient filed maps, surveys and records affecting real property) created a rebuttable presumption of the accuracy of the documents]; *see* Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C4518:9.)

3.60. Certificates Concerning Judgments of Conviction and Fingerprints (CPL 60.60)

1. A certificate issued by a criminal court, or the clerk thereof, certifying that a judgment of conviction against a designated defendant has been entered in such court, constitutes presumptive evidence of the facts stated in such certificate.

2. A report of a public servant charged with the custody of official fingerprint records which contains a certification that the fingerprints of a designated person who has previously been convicted of an offense are identical with those of a defendant in a criminal action, constitutes presumptive evidence of the fact that such defendant has previously been convicted of such offense.

Note

This rule reproduces verbatim CPL 60.60. By making the specified certificate of a judgment of conviction and of an official fingerprint record "presumptive evidence" of the specified facts, the statute also provides an exception to the hearsay rule for the admission in evidence of those facts.

Subdivision (1) authorizes the introduction in evidence of a certificate of a judgment of conviction of a named person. If the purpose, however, is to provide presumptive evidence of the identity of a person as the one named in the certificate, the certificate, with only a name recorded on it, is insufficient (*People v Vollick*, 148 AD2d 950, 951 [4th Dept 1989] ["While the certificate here states that (a named person) was previously convicted, it does not otherwise state any facts demonstrating that the person named in the certificate is the defendant. The certificate proves only that a person by the same name as defendant was previously convicted" (citation omitted)], *affd for reasons stated below* 75 NY2d 877 [1990]). Additional evidence of identity, such as "date of birth and NYSID number," is necessary (*People v Shaw*, 83 AD3d 1101, 1102-1103 [2d Dept 2011]).

Subdivision (2) allows for presumptive proof of identity by a comparison of the defendant's fingerprints and the fingerprints of the person previously convicted of an offense (*People v Mathis*, 278 AD2d 803, 803 [4th Dept 2000]

["The certificates of conviction issued by the clerks of (the) Counties constitute presumptive evidence of defendant's two prior violent felony convictions (*see,* CPL 60.60 [1]), and the testimony of a State Police investigator concerning defendant's fingerprints established that defendant is the person named in those certificates (*see,* CPL 60.60 [2]" (citation omitted)]).

While the Sixth Amendment right of confrontation does not apply in a grand jury or sentencing proceeding (*People v Leon*, 10 NY3d 122 [2008]), it applies at a trial. As a result, "fingerprint reports," comparing unknown latent prints from a crime scene with fingerprints from a known individual, that are introduced in evidence at a trial are testimonial when prepared "solely for prosecutorial purposes and, most importantly, because they were accusatory and offered to establish defendant's identity," so the defendant is accordingly entitled to confront the author of the report (*People v Rawlins*, 10 NY3d 136, 157 [2008]).