

SENATE BILL 37

IN THE SENATE

January 4, 1979

Introduced.

On motion, Senator Lensink was added as author to the pre-filed bill.

Referred to Committee on Judiciary.

April 20, 1979

Died in Committee.

1 SENATE BILL NO. 37
 2 INTRODUCED BY _____
 3 BY REQUEST OF THE CODE COMMISSIONER

4
 5 A BILL FOR AN ACT ENTITLED: "AN ACT TO GENERALLY REVISE AND
 6 CLARIFY THE LAWS RELATING TO EVIDENCE."

7
 8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

9 Section 1. Section 26-1-101, MCA, is amended to read:

10 "26-1-101. General definitions. (1) The "Direct
 11 examination" is the examination of a witness by the party
 12 producing him ~~is denominated the "direct examination"~~.
 13 "Cross-examination" is the examination of the same witness
 14 upon ~~the same matter~~ by the adverse party ~~the~~
 15 "cross-examination". ~~The direct examination must be~~
 16 ~~completed before the cross-examination begins unless the~~
 17 ~~court otherwise directs.~~

18 (2) "~~Judicial~~ evidence" is the means
 19 ~~sanctioned by law~~ of ascertaining in a judicial proceeding
 20 the truth respecting a question of fact.

21 (3) A "leading question" or "suggestive question" is a
 22 question which suggests to the witness the answer which the
 23 examining party desires ~~is denominated a "leading question"~~
 24 ~~or "suggestive question"~~. ~~On a direct examination leading~~
 25 ~~questions are not allowed, except in the sound discretion of~~

1 ~~the court under special circumstances making it appear that~~
 2 ~~the interests of justice require it.~~

3 (4) "Proof" is ~~the effect of evidence~~ the
 4 establishment of a fact by evidence.

5 (5) A "witness" is a person whose declaration under
 6 oath is received as evidence for any purpose, whether such
 7 declaration be made on oral examination or by deposition or
 8 affidavit."

9 Section 2. Section 26-1-102, MCA, is amended to read:

10 "26-1-102. Definitions -- kinds of evidence. (1) (a)
 11 "Conclusive evidence" or "unanswerable evidence" is that
 12 which the law does not permit to be contradicted. For
 13 example, the record of a court of competent jurisdiction
 14 cannot be contradicted by the parties to it.

15 (b) No evidence is by law made conclusive or
 16 unanswerable unless so declared by ~~this code~~ statute.

17 (2) "Cumulative evidence" is additional evidence of
 18 the same character to the same point.

19 (3) "Direct evidence" is that which proves the fact in
 20 dispute directly, without an inference or presumption, and
 21 which in itself, if true, conclusively establishes that
 22 fact. For example, if the fact in dispute be ~~is~~ an
 23 agreement, the evidence of a witness who was present and
 24 witnessed the making of it is direct.

25 (4) (a) "Indirect Circumstantial evidence" is that

1 which tends to establish the fact in dispute by proving
2 another and which, though true, does not of itself
3 conclusively establish that fact but affords an inference or
4 presumption of its existence. For example, a witness proves
5 an admission of the party to the fact in dispute. This
6 proves a fact from which the fact in dispute is inferred.

7 (b) ~~Indirect~~ Circumstantial evidence is of two kinds:

8 (i) inferences; and

9 (ii) presumptions.

10 (c) "Prima facie evidence" is that which suffices for
11 the proof of a particular fact until contradicted and
12 overcome by other evidence. For example, the certificate of
13 a recording officer is prima facie evidence of a record, but
14 it may afterward be rejected upon proof that there is no
15 such record."

16 Section 3. Section 26-1-105, MCA, is amended to read:

17 "26-1-105. Opinion evidence as to sanity. In
18 conformity with the ~~{preceding--provisions}~~ rules of
19 evidence, upon a trial evidence may be given of the
20 following, the reason for the opinion being given:

21 (1) the opinion of a subscribing witness to a writing,
22 the validity of which is in dispute, respecting the ~~mental~~
23 sanity of the signer; and

24 (2) the opinion of ~~an~~ individual acquaintanceship
25 acquaintance respecting the ~~mental~~ sanity of a person--the

1 ~~reason for the opinion being given."~~

2 Section 4. Section 26-1-107, MCA, is amended to read:

3 "26-1-107. When adverse party's admission of execution
4 of a writing sufficient. ~~Where no other evidence of~~
5 execution need be given whenever:

6 (1) evidence is given that the party against whom a
7 writing is offered has at any time admitted its execution;
8 ~~no other evidence of the execution need be given when; and~~

9 (2) the instrument writing is ~~one--mentioned--in~~
10 ~~{93-1101-16}~~;

11 (a) more than 30 years old; or

12 (b) one produced from the custody of the adverse party
13 and has been acted upon by him as genuine."

14 Section 5. Section 26-1-201, MCA, is amended to read:

15 "26-1-201. Questions of law. ~~***~~ Except as provided in
16 Article II, section 7, of the Montana constitution, all
17 questions of law, including the admissibility of testimony,
18 the facts preliminary to such admission, the construction of
19 statutes and other writings, and other rules of evidence,
20 ~~are--to~~ must be decided by the court, and all discussions of
21 law addressed to it. ~~Whenever the knowledge of the court is~~
22 ~~by this code, made evidence of a fact--the court--is--to~~
23 ~~declare such knowledge to the jury, which is bound to accept~~
24 ~~its"~~

25 Section 6. Section 26-1-202, MCA, is amended to read:

1 "26-1-202. Questions of fact. ~~At~~ ~~Whenever the trial~~
 2 ~~is by jury, all~~ questions of fact, ~~where the trial is by~~
 3 ~~jury, other than those mentioned in 26-1-201 are to~~ ~~must~~ be
 4 decided by the jury, and all evidence thereon ~~is to~~ ~~must~~ be
 5 addressed to them, except when ~~as~~ otherwise provided by this
 6 code law. ~~Whenever the trial of some or all of the questions~~
 7 ~~of fact is not by jury, all evidence thereon must be~~
 8 ~~addressed to the trial court, which shall decide such~~
 9 ~~questions."~~

10 Section 7. Section 26-1-203, MCA, is amended to read:

11 "26-1-203. Who to judge effect or ~~and~~ value of
 12 evidence. The jury, subject to the control of the court, ~~in~~
 13 ~~the cases specified in this code,~~ is the judge of the effect
 14 or ~~and~~ value of evidence addressed to it, except when the
 15 evidence is declared to be conclusive. ~~The court is the~~
 16 ~~judge of the effect and value of evidence addressed to it."~~

17 Section 8. Section 26-1-301, MCA, is amended to read:

18 "26-1-301. One witness sufficient to prove a fact. The
 19 direct evidence of one witness who is entitled to full
 20 credit is sufficient for proof of any fact, except ~~perjury~~
 21 ~~and treason as otherwise provided by law."~~

22 Section 9. Section 26-1-302, MCA, is amended to read:

23 "26-1-302. Witness presumed to speak the truth. A
 24 witness is presumed to speak the truth. This presumption,
 25 however, may be repelled by the manner in which he

1 testifies, by the character of his testimony, by evidence
 2 affecting his motives or his character for truth, honesty,
 3 or integrity, or by contradictory evidence; and the jury, ~~or~~
 4 ~~the court in the absence of a jury,~~ is the exclusive judge
 5 of his credibility."

6 Section 10. Section 26-1-303, MCA, is amended to read:

7 "26-1-303. Instructions to jury on how to evaluate
 8 evidence. The jury is to be instructed by the court on all
 9 proper occasions ~~that~~:

10 (1) ~~that~~ their power of judging of the effect of
 11 evidence is not arbitrary but to be exercised with legal
 12 discretion and in subordination to the rules of evidence;

13 (2) ~~that~~ they are not bound to decide in conformity
 14 with the declarations of any number of witnesses which do
 15 not produce conviction in their minds, against a less number
 16 or against a presumption or other evidence satisfying their
 17 minds;

18 (3) ~~that~~ a witness false in one part of his testimony
 19 is to be distrusted in others;

20 (4) ~~that~~ the testimony of an accomplice ought to be
 21 viewed with distrust; ~~and~~

22 (5) ~~the~~ evidence of the oral admissions of a party
 23 ~~ought to be viewed~~ with caution;

24 (5) ~~that~~ evidence is to be estimated not only by
 25 its own intrinsic weight but also according to the evidence

1 which it is in the power of one side to produce and of the
2 other to contradict; and therefore

3 ~~{67}11~~ that if weaker and less satisfactory evidence
4 is offered when and it appears that it is within the power
5 of the party to offer stronger and more satisfactory was
6 within the power of the party evidence, the evidence offered
7 should be viewed with distrust."

8 Section 11. Section 26-1-401, MCA, is amended to read:

9 "26-1-401. Who has the burden of producing evidence.
10 ~~The party holding the affirmative of the issue must produce~~
11 ~~the evidence to prove it; therefore the~~ the initial burden
12 of ~~proof--ties producing evidence is~~ on the party who would
13 be defeated if no evidence were given on either side.
14 Hereafter, the burden of producing evidence is on the party
15 who would suffer an adverse finding against him in the
16 absence of further evidence."

17 Section 12. Section 26-1-402, MCA, is amended to read:

18 "26-1-402. Who has the burden of persuasion. Each
19 party ~~must prove~~ has the burden of persuasion as to his own
20 affirmative allegations; that is, he must prove them.
21 Evidence need not be given in support of a negative

22 negative allegation, except when such the
negative allegation is an ~~essential~~ essential

23 essential part of the statement of the right or title on
24 which the cause of action is founded; ~~nor even in such case~~
25 however, the exception does not apply and evidence need not

1 be given when the allegation is a denial of the existence of
2 a document the custody of which belongs to the opposite
3 party."

4 Section 13. Section 26-1-403, MCA, is amended to read:

5 "26-1-403. Instructions to jury on standard of proof
6 required to meet burden of persuasion. The jury is to be
7 instructed by the court on all proper occasions as to:

8 (1) ~~that which party has the burden of persuasion; for~~
9 ~~example, in civil cases the affirmative of the issue must be~~
10 ~~proved;~~ and

11 (2) ~~when whenever~~ the evidence is contradictory,
12 ~~whether~~ the decision must be made according to the
13 preponderance of the evidence; ~~and~~

14 ~~{2} that in criminal cases guilt must be established~~
15 ~~proof beyond a reasonable doubt, or some other burden~~
16 ~~established by law."~~

17 Section 14. Section 26-1-501, MCA, is amended to read:

18 "26-1-501. Inference defined. An "inference" is a
19 deduction which the reason of the jury trier of fact makes
20 from the facts proved, without an express direction of the
21 law to that effect."

22 Section 15. Section 26-1-601, MCA, is amended to read:

23 "26-1-601. Complete list of conclusive presumptions.
24 The following presumptions and no others are deemed
25 conclusive:

1 (1) a malicious and guilty intent, from the deliberate
2 commission of an unlawful act for the purpose of injuring
3 another;

4 (2) the truth of the facts recited, ~~from the recital~~
5 in a written instrument, as between the parties thereto or
6 their successors in interest by a subsequent title; but this
7 rule presumption does not apply to the recital of a
8 consideration;

9 (3) ~~the truth of a declaration, act, or omission of a~~
10 ~~party, as against that party in any litigation arising out~~
11 ~~of such declaration, act, or omission,~~ whenever a party he
12 has, by his ~~own~~ such declaration, act, or omission,
13 intentionally ~~and deliberately~~ led another to believe a
14 particular thing true and to act upon such belief, ~~he cannot~~
15 ~~in any litigation arising out of such declaration, act, or~~
16 ~~omission be permitted to falsify it;~~

17 (4) ~~as against~~ a tenant ~~is not permitted to deny~~ the
18 validity of the title of his landlord at the time of the
19 commencement of the relation;

20 (5) the legitimacy of the issue of a wife cohabiting
21 with her husband who is not impotent ~~is indisputably~~
22 ~~presumed to be legitimate;~~

23 (6) the correctness of a judgment or order of a court
24 when which is declared by this code to be conclusive; but
25 such judgment or order must be alleged in the pleadings if

1 there be is an opportunity to do so; if there be is no such
2 opportunity, the judgment or order may be used as evidence;

3 (7) any other presumption which, by statute, is
4 expressly made conclusive."

5 Section 16. Section 26-1-602, MCA, is amended to read:
6 "26-1-602. Definition and examples of disputable
7 presumptions. All other presumptions ~~are satisfactory if~~
8 ~~uncontradicted.~~ They are denominated "disputable
9 presumptions" and may be controverted by other evidence. The
10 following are of that kind:

11 (1) ~~that~~ a person is innocent of crime or wrong;

12 (2) ~~that~~ an unlawful act was done with an unlawful
13 intent;

14 (3) ~~that~~ a person intends the ordinary consequence
15 of his voluntary act;

16 (4) ~~that~~ a person takes ordinary care of his own
17 concerns;

18 (5) ~~that~~ evidence willfully suppressed would
19 be adverse if produced;

20 (6) ~~that~~ higher more satisfactory evidence would be
21 adverse from inferior, being produced if weaker and less
22 satisfactory evidence is offered and it is within the power
23 of the party to offer more satisfactory evidence;

24 (7) ~~that~~ money paid by one to another was due to
25 the latter;

1 (8) ~~that~~—a thing delivered by one to another
2 belonged to the latter~~;~~

3 (9) ~~that~~—on when the instrument evidencing an
4 obligation has been delivered up to the debtor, the
5 obligation has been paid~~;~~

6 (10) ~~that~~—former Prior rent or installments have been
7 paid when a receipt for ~~letter~~ later rent or installments is
8 produced~~;~~

9 (11) ~~that~~—things Things which a person possesses are
10 owned by him~~;~~

11 (12) ~~that~~—a person is the owner of property from
12 exercising if he exercises acts of ownership over it or from
13 there is common reputation of his ownership~~;~~

14 (13) ~~that~~—a person in possession of an order on
15 himself for the payment of money ~~on~~ or the delivery of a
16 thing, has paid the money or delivered the thing
17 accordingly~~;~~

18 (14) ~~that~~—a person acting in a public office was
19 regularly appointed to it~~;~~

20 (15) ~~that~~—official Official duty has been regularly
21 performed~~;~~

22 (16) ~~that~~—a court or judge, acting as such, whether
23 in this state or any other state or country, was acting in
24 the lawful exercise of its or his jurisdiction~~;~~

25 (17) ~~that~~—a judicial record, when not conclusive,

1 does still correctly determine or set forth the rights of
2 the parties~~;~~

3 (18) ~~that~~—all All matters within an issue were laid
4 before the jury and passed upon by them, and in like
5 manner, that all matters within a submission to arbitration
6 were laid before the arbitrators and passed upon by them~~;~~

7 (19) ~~that~~—private Private transactions have been fair
8 and regular~~;~~

9 (20) ~~that~~—the the ordinary course of business has been
10 followed~~;~~

11 (21) ~~that~~—a promissory note or bill of exchange was
12 given or endorsed for a sufficient consideration~~;~~

13 (22) ~~that~~—on An endorsement of a negotiable promissory
14 note or bill of exchange was made at the time and place of
15 making the note or bill~~;~~

16 (23) ~~that~~—a writing is truly dated~~;~~

17 (24) ~~that~~—a letter duly directed and mailed was
18 received in the regular course of the mail~~;~~

19 (25) There is an identity of persons from when there is
20 an identity of name ~~names~~~~;~~

21 (26) ~~that~~—a person not heard from in 7 years is
22 dead~~;~~

23 (27) ~~that~~—acquiescence Acquiescence followed from a
24 belief that the thing acquiesced in was conformable to the
25 right or fact~~;~~

1 ~~(28) that things~~ Things have happened according to the
2 ordinary course of nature and the ordinary habits of life.

3 ~~(29) that persons~~ Persons acting as partners have
4 entered into a contract of partnership.

5 ~~(30) that a~~ A man and a woman deporting themselves as
6 husband and wife have entered into a lawful contract of
7 marriage.

8 ~~(31) that a~~ A child born in lawful wedlock, there being
9 no divorce from bed and board, is legitimate.

10 ~~(32) that a~~ A thing once proved to exist continues as
11 long as is usual with things of that nature.

12 ~~(33) that the~~ the law has been obeyed.

13 ~~(34) that a document or writing more than 30 years old~~
14 ~~is genuine when the same has been since generally acted~~
15 ~~upon as genuine by persons having an interest in the~~
16 ~~question and its custody has been satisfactorily explained.~~

17 ~~(35) (34)~~ that a printed and published book purporting
18 to be printed or published by public authority was so
19 printed or published.

20 ~~(36) (35)~~ that a printed and published book purporting
21 to contain reports of cases adjudged in the tribunals of the
22 state or country where the book is published contains
23 correct reports of such cases.

24 ~~(37) (36)~~ that a trustee or other person whose duty it
25 was to convey real property to a particular person has

1 actually conveyed to him, when such this presumption
2 applies when it is necessary to perfect the title of such
3 person or his successor in interest.

4 ~~(38) (37)~~ the when there has been uninterrupted use by
5 the public of land for a burial ground for 5 years, with the
6 consent of the owner and without a reservation of his
7 rights, ~~is presumptive evidence of his intention~~ he intended
8 to dedicate it to the public for that purpose.

9 ~~(39) (38)~~ that there there was a good and sufficient
10 consideration for a written contract.

11 Section 17. Section 26-1-607, MCA, is amended to read:

12 "26-1-607. When writings of a decedent prima facie
13 evidence. The entries and other writings of a decedent, made
14 at or near the time of the transaction and when the decedent
15 was in a position to know the facts stated therein, may be
16 read as are prima facie evidence of the facts stated
17 therein, in the following cases:

18 (1) when the writing or entry was made against the
19 interest of the person making it;

20 (2) when it was made in a professional capacity and in
21 the ordinary course of professional conduct;

22 (3) when it was made in the performance of a duty
23 specially enjoined by law."

24 Section 18. Section 26-1-621, MCA, is amended to read:

25 "26-1-621. Finding of presumed death under federal

1 Missing Persons Act prima facie evidence. A written finding
 2 of presumed death made by the secretary of ~~wary--the~~
 3 ~~secretary-of-the-navy~~ defense or any other officer or
 4 employee of the United States authorized to make such
 5 findings, pursuant to the federal Missing Persons Act (56
 6 Stat. 143, 1092, and 58 Stat. 679; 50 U.S.C. App. Supp.
 7 1001-17), as now or hereafter amended, or a duly certified
 8 copy of such finding shall be received in any court, office,
 9 or other place in this state as prima facie evidence of the
 10 death of the person therein found to be dead and the date,
 11 circumstances, and place of his disappearance."

12 Section 19. Section 26-1-622, MCA, is amended to read:

13 "26-1-622. Official reports and records made pursuant
 14 to federal law prima facie evidence. An official written
 15 report or record, or duly certified copy thereof, that a
 16 person is dead or alive; missing; missing in action; i
 17 interned in a neutral country; i or beleaguered, besieged, or
 18 captured by an enemy ~~or-is-dead-or-is-otlive~~, made by any
 19 officer or employee of the United States authorized by the
 20 act referred to in 26-1-621 or by any other law of the
 21 United States to make same, shall be received in any court,
 22 office, or other place in this state as prima facie evidence
 23 that such person is dead or alive; missing; missing in
 24 action; interned in a neutral country; i or beleaguered,
 25 besieged, or captured by an enemy ~~or-is-dead-or-is-otlive~~, as

1 the case may be."

2 Section 20. Section 26-1-802, MCA, is amended to read:

3 "26-1-802. Spousal privilege. A husband cannot be
 4 examined for or against his wife without her consent or a
 5 wife for or against her husband without his consent; nor can
 6 either, during the marriage or afterward, be examined
 7 without the consent of the other ~~---examined~~ as to any
 8 communication made by one to the other during the marriage,
 9 ~~but--this--exception~~ However, the privilege granted by this
 10 section does not apply to in a civil action or proceeding by
 11 one against the other or to in a criminal action or
 12 proceeding for a crime committed by one against the other."

13 Section 21. Section 26-1-804, MCA, is amended to read:

14 "26-1-804. Confessions made to member of clergy. A
 15 ~~clergyman--or--priest~~ member of the clergy of any religion
 16 cannot, without the consent of the person making the
 17 confession, be examined as to any confession made to him in
 18 his professional character in the course of discipline
 19 enjoined by the church religious body to which he belongs."

20 Section 22. Section 26-1-805, MCA, is amended to read:

21 "26-1-805. Doctor-patient privilege. Except as
 22 provided in Rule 35, M.R.Civ.P., a licensed physician or
 23 surgeon cannot, without the consent of his patient, be
 24 examined in a civil action as to any information acquired in
 25 attending the patient which was necessary to enable him to

1 prescribe or act for the patient."

2 Section 23. Section 26-1-808, MCA, is amended to read:

3 "26-1-808. Information gathered by psychology teachers
4 and observers. Any A person who is engaged in teaching
5 psychology in any school or who, acting as such a teacher,
6 is engaged in the study and observation of child mentality
7 ~~shall not~~ cannot, without the consent of the parent or
8 guardian of such a child being so taught or observed,
9 testify in any civil action as to any information concerning
10 that child so obtained."

11 Section 24. Section 26-2-104, MCA, is amended to read:

12 "26-2-104. Disobedience -- how punished. Disobedience
13 to of a subpoena or a refusal to be sworn or to answer as a
14 witness or to subscribe an affidavit or deposition, when
15 required, may be punished as a contempt by the court or
16 ~~officer~~ issuing or enforcing the subpoena or requiring the
17 witness to be sworn, to answer, or to subscribe an affidavit
18 or deposition; and if the witness be is a party, his
19 complaint or answer may be stricken out."

20 Section 25. Section 26-2-203, MCA, is amended to read:

21 "26-2-203. When production of witness may be required.
22 If the witness be is imprisoned in the county where the
23 action or proceeding is pending, his production may be
24 required. In all other cases, his examination ~~when allowed~~
25 must be taken upon deposition."

1 Section 26. Section 26-2-302, MCA, is amended to read:

2 "26-2-302. Witness required to answer questions. A
3 witness must answer questions legal and pertinent to the
4 matter in issue, though his answer may establish a claim
5 against himself, but he need not give an answer which will
6 have a tendency to subject him to punishment for a felony
7 criminal offense nor need he give an answer which will have
8 a direct tendency to degrade his character unless it be to
9 the very fact in issue or to a fact from which the fact in
10 issue would be presumed. ~~But a witness must answer as to~~
11 ~~the fact of his previous conviction for felony."~~

12 Section 27. Section 26-2-404, MCA, is amended to read:

13 "26-2-404. Affidavit of arrested witness --
14 exoneration of arresting officer. (1) An officer is not
15 liable ~~to the party~~ for making the arrest in ignorance of
16 the facts creating the exoneration but is liable for any
17 subsequent detention of the party witness if such party
18 ~~et al~~ witness claims the exemption and ~~make~~ makes an
19 affidavit stating that:

20 (a) he has been served with a subpoena to attend as a
21 witness before a court, officer, or other person, specifying
22 the same, the place of attendance, and the action or
23 proceeding in which the subpoena was issued;

24 (b) he has not thus been served by his own procurement
25 with the intention of avoiding arrest; and

1 (c) he is at the time going to the place of
2 attendance, returning therefrom, or remaining there in
3 obedience to the subpoena.

4 (2) The affidavit may be taken by the officer and
5 exonerates him from liability for discharging the witness
6 when-arrested."

7 Section 28. Section 26-3-104, MCA, is amended to read:

8 "26-3-104. Principal bound when surety bound.
9 Whenever, pursuant to ~~26-3-102~~--~~26-3-103~~--~~26-3-201~~--and
10 ~~26-3-202~~ this chapter, a party is bound by a record and such
11 party stands in the relation of a surety for another, the
12 latter is also bound from the time that he has notice of the
13 action or proceeding and an opportunity at the surety's
14 request to join in the defense."

15 Section 29. Section 26-3-201, MCA, is amended to read:

16 "26-3-201. Effect of judgment or final order -- when
17 conclusive. The effect of a judgment or final order in an
18 action or special proceeding before a court or judge of this
19 state or of the United States having jurisdiction to
20 pronounce the judgment or order is as follows:

21 (1) In the case of a judgment or order against a
22 specific thing, or ~~in respect to one involving~~ the probate
23 of a will or the administration of the estate of a decedent,
24 or ~~in respect to~~ the personal, political, or legal condition
25 or relation of a particular person, the judgment or order is

1 conclusive upon the title to the thing, the will or
2 administration, or the condition or relation of the person.

3 (2) In other cases, the judgment or order is, in
4 respect to the matter directly adjudged, conclusive between
5 the parties and their successors in interest by title
6 subsequent to the commencement of the action or special
7 proceeding, litigating for the same thing under the same
8 title and in the same capacity, provided they have had
9 notice, actual or constructive, of the pendency of the
10 action or proceeding."

11 Section 30. Section 26-3-202, MCA, is amended to read:

12 "26-3-202. Effect of other judicial orders -- when
13 disputable presumption created. Other judicial orders of a
14 court or judge of this state or of the United States create
15 a disputable presumption--according in respect to the matter
16 directly determined, between the same parties and their
17 representatives and successors in interest by title
18 subsequent to the commencement of the action or special
19 proceeding, litigating for the same thing under the same
20 title and in the same capacity."

21 Section 31. Repealer. Sections 93-301-3 through

22 93-301-8; 93-301-12 through 93-301-14; 93-301-17; 93-401-2;
23 93-401-3; 93-401-5; 93-401-6; 93-401-9 through 93-401-12;
24 93-401-20; 93-401-24; 93-401-25; 93-401-27(1) through (9),
25 (11), and (13) through (16); 93-501-1 through 93-501-8;

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1 93-701-2; 93-701-3; 93-701-5; 93-701-6; 93-801-1 through
2 93-801-6; 93-901-1 through 93-901-5; 93-1001-13; 93-1001-14;
3 93-1001-17 through 93-1001-19; 93-1001-30; 93-1001-31;
4 93-1001-33 through 93-1001-36; 93-1101-8 through 93-1101-12;
5 93-1101-14 through 93-1101-16; 93-1101-18; 93-1101-19;
6 93-1101-21; 93-1201-1; 93-1301-3; 93-1301-5; 93-1401-1;
7 93-1401-2; 93-1601-1; 93-1601-5; 93-1901-1 through
8 93-1901-3; 93-1901-6 through 93-1901-14; 93-2201-5; and
9 93-2501-3, R.C.M. 1947, are repealed.

-End-

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LC 0017

1979 Legislature
Code Commissioner Bill - Summary

SENATE Bill No. 37

AN ACT TO GENERALLY REVISE AND CLARIFY THE LAWS RELATING
TO EVIDENCE.

(This summary does not include discussion of routine form
or grammatical changes.)

Section 1. 26-1-101. General definitions. In sub-
section (1) deleted "upon the same matter" to reconcile
conflict with Rule 611(b)(1), Montana Rules of Evidence;
deleted last sentence to reconcile conflict with Rule 611(a),
M.R.E.

In subsection (2) deleted "Judicial" since the term
"judicial evidence" is not used in the code, but the term
"evidence" is; deleted "sanctioned by law" to remove any
implication that inadmissible evidence which is not objected
to may not be considered (see Rule 103(a)).

In subsection (3) deleted second sentence - conflict
with Rule 611(c).

In subsection (4) deleted "the effect of evidence" --
inaccurate and superfluous.

Section 2. 26-1-102. Definitions -- kinds of evidence.
In subsections (1)(a) and (b) changed "Indirect evidence"
to "Circumstantial evidence" to update terminology. In
subsection (2)(b) changed "this code" to "statute" to
clarify and update obsolete reference.

Section 3. 26-1-105. Opinion evidence as to sanity.
Changed "[preceding provisions]" to "rules of evidence"
to update and clarify obscure 1895 reference; rearranged
clauses to clarify that last clause applies to both situations.
Deleted "mental" -- redundant; clarified "intimate acquaint-
ship".

Section 4. 26-1-107. When adverse party's admission of execution of a writing sufficient. Rewrote to clarify; changed "one mentioned in [93-1101-16]" to "more than 30 years old" -- substituting substance of 93-1101-16 which is being recommended for repeal.

Section 5. 26-1-201. Questions of law. Added "Except as provided in Article II, section 7, of the Montana constitution" to resolve conflict with that constitutional provision, which provides that the jury determines the law in cases of libel or slander; deleted last sentence relating to judicial notice -- conflict with Rule 201(g), M.R.E.

Section 6. 26-1-202. Questions of fact. Changed "this code" to "law" to clarify that the reference includes all rules of procedure; added last sentence to provide for the case when the court is the trier of fact -- aid recodification.

Section 7. 26-1-203. Who to judge effect and value of evidence. Deleted "in the cases specified in this code" -- superfluous; changed "or" to "and" to clarify; added last sentence to provide for the case when the court is the trier of fact -- aid recodification.

Section 8. 26-1-301. One witness sufficient to prove a fact. Made exception clause general to cover future enactments.

Section 9. 26-1-302. Witness presumed to speak the truth. Added "or the court in the absence of a jury" to provide for the case when the court is the trier of fact -- aid recodification.

Section 10. 26-1-303. Instructions to jury on how to evaluate evidence. In subsection (1) deleted redundant "of"; split former subsection (4) into two subsections to clarify that two separate situations are involved; rewrote subsection (7) to clarify.

Section 11. 26-1-401. Who has the burden of producing evidence. Deleted first clause -- redundant with 26-1-402; added "initial" to clarify that the burden of establishing a prima facie case is intended; changed "burden of proof" to "burden of producing evidence" to clarify; added last sentence to clarify who has the burden once a prima facie case has been established.

Section 12. 26-1-402. Who has the burden of persuasion. Added "has the burden of persuasion" and rewrote first sentence to clarify the difference between the burden of producing evidence and the burden of persuasion (see also 26-1-401, section 11 of the bill); clarified "nor even in such case".

Section 13. 26-1-403. Instructions to jury on standard of proof required to meet burden of persuasion. In subsection (1) added a general statement and made the present language an example to clarify and aid recodification; rewrote subsection (2) to make the language more general and correct inaccuracies and omissions (There are specific statutes that provide for standards of proof other than those listed. In criminal cases, the defendant has the burden of persuasion as to affirmative defenses.)

Section 14. 26-1-501. Inference defined. Changed "jury" to "trier of fact" to provide for the case in which the court decides the facts -- aid recodification.

Section 15. 26-1-601. Complete list of conclusive presumptions. In subsection (2) deleted "from the recital" -- redundant, added "as" to clarify, and changed "rule" to "presumption" to clarify. Rewrote subsection (3) to clarify and for uniform style and deleted "and deliberately" -- redundant. Rewrote subsections (4), (5), and (6) for uniform style.

Section 16. 26-1-602. Definition and examples of disputable presumptions. In introduction deleted redundancies with Rule 301(b), M.R.E. Rewrote subsection (6) to clarify (language adopted from 26-1-303(7), formerly (6)). Rewrote subsections (9), (10), (25), and (36) to clarify. Rewrote subsections (12) and (37) for uniform style. In subsection (13) changed "on" to "or" -- error in R.C.M. (See Section 3266, 1895 Code of Civil Procedure. This section has not previously been amended.) In subsection (29) added "a" -- grammar. Deleted former subsection (34) -- redundant and conflicting with Rules 803(16) and 901(b)(8), M.R.E.

Section 17. 26-1-607. When writings of a decedent prima facie evidence. In introduction clarified "and in a position..." and "may be read as". In subsection (1) added "writing or" -- consistency with introduction.

Section 18. 26-1-621. Finding of presumed death under federal Missing Persons Act prima facie evidence. Updated reference to secretaries of war and navy. Added "any" -- grammar.

Section 19. 26-1-622. Official reports and records made pursuant to federal law prima facie evidence. Rewrote to clarify.

Section 20. 26-1-802. Spousal privilege. Clarified inaccurate reference to "exception".

Section 21. 26-1-804. Confessions made to member of clergy. Reworded to eliminate unconstitutional sectarianism.

Section 22. 26-1-805. Doctor-patient privilege. Added "Except as provided in Rule 35, M.R.Civ.P." to clarify that the privilege is subject to the more recently adopted exception in Rule 35.

Section 23. 26-1-808. Information gathered by psychology teachers and observers. Clarified "acting as such"; changed "shall not" to "cannot" -- uniform terminology (See also 26-1-804 and 26-1-805.) Clarified "such child", adding "concerning that child".

Section 24. 26-2-104. Disobedience -- how punished. Deleted "or officer" as an unconstitutional violation of separation of powers and due process requirements (See Opinions of Attorney General, Vol. 8, p. 184). Added "or enforcing" to provide for the case in which a court orders obedience to a subpoena issued by an officer. Added "to answer, or to subscribe an affidavit or deposition" for consistency with first clause.

Section 25. 26-2-203. When production of witness may be required. Deleted "when allowed" as redundant and confusing.

Section 26. 26-2-302. Witness required to answer questions. Changed "felony" to "criminal offense" -- uniform terminology (See Criminal Code) and constitutionality (See U. S. Constitution, Amendment 5, which uses the phrase "in any criminal case, and the Montana Constitution, Article II, Section 25, which uses the phrase "in a criminal proceeding". Deleted last sentence -- conflict with Rule 609, M.R.E. (Note that if the fact of a previous felony conviction is relevant for purposes other than impeachment, the first sentence requires the witness to answer.)

Section 27. 26-2-404. Affidavit of arrested witness -- exoneration of arresting officer. In subsection (1) deleted "to the party" and changed "party" to "witness" to clarify. In subsection (2) deleted "when arrested" as redundant and confusing.

Section 28. 26-3-104. Principal bound when surety bound. Changed list of sections to "this chapter" -- simplify and aid recodification.

Section 29. 26-3-201. Effect of judgment or final order -- when conclusive. Rewrote subsection (1) and in subsection (2) changed "have" to "had" to clarify.

Section 30. 26-3-202. Effect of other judicial orders -- when disputable presumption created. Clarified "according to".

Section 31. Repealer. 93-301-3. Definition of law of evidence. Obsolete classification of the different aspects of the law of evidence; subsection (4) inconsistent with Rule 103(a), M.R.E.

93-301-4. The degree of proof required to establish facts. Obsolete and conflicting with 26-1-403.

93-301-5. Four kinds of evidence specified. Obsolete classification.

93-301-6. Several degrees of evidence specified. Obsolete classification.

93-301-7. Primary evidence defined. Term never used; subject covered by Article X, M.R.E. (See Commission Comment to Rule 1005).

93-301-8. Secondary evidence defined. Same as 93-301-7.

93-301-12. Partial evidence defined. Term never used; subject covered by Rule 104(b), M.R.E.

93-301-13. Satisfactory evidence defined. Obsolete and conflicting with section 26-1-403, MCA.

93-301-14 Indispensable evidence defined. Obsolete.

93-301-17. Corroborative evidence defined. Term never used; subject covered by Rule 804(b)(3), M.R.E., and section 46-16-213, MCA.

93-401-2. Testimony confined to personal knowledge. Superseded by Rule 602, M.R.E.

93-401-3. Testimony to be in presence of persons affected. Superseded by Rules 603 and 611(e), M.R.E.

93-401-5. One person not affected by acts of another. Obsolete introduction to sections following; superseded by Article VIII, M.R.E. (Hearsay).

93-401-6. Declarations of predecessor in title evidence. Superseded by Rule 804(b)(3), M.R.E.

93-401-9. Declaration of decedent evidence of pedigree. Superseded by Rules 803(19) and 804(b)(4), M.R.E.

93-401-10. Declaration of decedent evidence against his successor in interest. Superseded by Rule 804(b)(3), M.R.E.

93-401-11. When part of the transaction proved, the whole is admissible. Superseded by Rule 106, M.R.E.

93-401-12. Contents of writing -- how proved. Superseded by Article X, M.R.E.

93-401-20. Person skilled may testify to decipher characters. Superseded by Rules 401, 402, and 702, M.R.E.

93-401-24. Material allegations only to be proved. Superseded by Rule 401, M.R.E. (See Commission Comment - concept of materiality has been incorporated into the concept of relevance.)

93-401-25. Evidence confined to material allegations. Superseded by Rules 401 and 403, M.R.E., Rule 15(b), M.R.Civ.P., and Section 46-11-403, MCA.

93-401-27. Facts which may be proved on trial. Subsection (1) - superseded by Rules 401 and 402, M.R.E. Subsections (2) and (3) - superseded by Rule 801, M.R.E. Subsection (4) - superseded by Rule 804, M.R.E. Subsection (5) - superseded by Rule 801(d)(2) and second sentence covered by Rule 804(b)(3), M.R.E., and section 26-1-104, MCA. Subsection (6) - superseded by Rule 801(d)(2)(E). Subsection (7) -- redundant with section 26-1-103, MCA. Subsection (8) - superseded by Rule 804(b)(1). Subsection (9) - superseded by Rules 701, 702, and 901, M.R.E. Subsection (11) - superseded by Rule 803(19) and (20), M.R.E. Subsection (13) - superseded by Rule 803(13) and (20), M.R.E. Subsection (14) - superseded by Article X, M.R.E. Subsection (15) - superseded by Rules 401 and 402, M.R.E. Subsection (16) redundant with section 26-1-302, MCA.

93-501-1 through 93-501-8. Judicial notice. Superseded by Article II, M.R.E.

93-701-2. All persons capable of perception and communication may be witnesses. Superseded by Rules 601, 609, and 610, M.R.E.

93-701-3. Persons who cannot be witnesses. Superseded by Rule 601, M.R.E. (See Commission Comment)

93-701-5. Judge or juror may be witness. Superseded by Rules 605 and 606, M.R.E.

93-701-6. When an interpreter to be sworn. Superseded by Rule 604, M.R.E., and Rule 43(P), M.R.Civ.P. (See also sections 3-1-316 and 46-16-201, MCA.)

93-801-1 through 93-801-6. Business records. Superseded by Rules 803(6), 1001(4), and 1003, M.R.E. (See also section 2-4-612(3).)

93-901-1 through 93-901-5. Official reports. Superseded by Rules 803(8) and 611(b), M.R.E., and conflicting current liberal rules for discovery.

93-1001-13. Evidence of foreign law or public writings. Superseded by Rule 902(3), M.R.E. (See also Rule 44(a), M.R. Civ.P.)

93-1001-14. Other evidence of laws of other states. Superseded by Rules 901(b)(1) and 902(5), M.R.E.

93-1001-17. Record -- how authenticated as evidence. Superseded by Rules 901(b)(7) and 902(1), M.R.E.

93-1001-18. Record of a foreign country -- how authenticated. Superseded by Rule 902(3), M.R.E.

93-1001-19. Copy of a foreign record -- when evidence. Superseded by Rules 901(b)(1) and 902(4), M.R.E.; conflicts with Rule 902(3), M.R.E., and Rule 44(a)(2), M.R.Civ.P.

93-1001-30. Manner of proving other official documents. Superseded by Rules 901(b)(7) and 902, M.R.E.

93-1001-31. Public record of private writing evidence. Superseded by Rules 901(b)(7) and 902(4), M.R.E.

93-1001-33 and 93-1001-34. Justice's judgment in other states. Superseded by Rule 902(1), (2), and (4), M.R.E.

93-1001-35. Contents of other official certificates. Superseded by Rule 902(4), M.R.E.

93-1001-36. Provisions in relation to states apply to United States and territories. Superseded by Rules 901(b)(7) and 902(1), (2), and (4), M.R.E., and no longer applicable since sections referred to are being repealed.

93-1101-8. Books, maps, etc. -- how far evidence. Superseded by Rules 201(b) and 803(18), M.R.E.

93-1101-9. Original writing to be proved or accounted for. Superseded by Rules 1002 and 1004, M.R.E.

93-1101-10. When in possession of adverse party, notice to be given. Superseded by Rule 1004(3), M.R.E.

93-1101-11. Writings called for and inspected may be withheld. Superseded indirectly by Rule 1004(3), M.R.E., and superfluous.

93-1101-12. Writings -- how proved. Superseded by Rules 901(b)(1) through (3) and 903, M.R.E.

93-1101-14 through 93-1101-16. Evidence of handwriting. Superseded by Rule 901(b)(1) through (3), M.R.E. (See Commission Comments.)

93-1101-18. Copies of entries also allowed. Superseded by Rules 1001(5) and 1003, M.R.E.

93-1101-19. Private writings -- how proved. Superseded by Rule 902(4) and (8), M.R.E.

93-1101-21. Certified copies of records as evidence. Same as 93-1101-19.

93-1201-1. Material objects. Superseded by Rules 401 (See Commission Comment), 402, 403, and 901(a) (See Commission Comment), M.R.E.

93-1301-3. Presumption defined. Superseded by Rule 301(a), M.R.E.

93-1301-5. Presumptions may be controverted, when. Superseded by Rule 301(b), M.R.E. (See Commission Comment).

93-1401-1. Indispensable evidence, what constitutes. Useless introduction to the rest of chapter 1401.

93-1401-2. To prove perjury and treason, more than one witness required. Redundant with section 45-7-201(7), MCA, and Article II, Section 30 of the Montana Constitution. (There is no statutory crime of treason in Montana.)

93-1601-1. Testimony -- in what mode taken. Useless and not very accurate introduction to chapters 1601, 1701, and 1901.

93-1601-5. Deposition -- how taken. Superseded by Rule 30, M.R.Civ.P. (civil) and Title 46, Chapter 15, part 2, MCA, (criminal).

93-1901-1. Order of proof -- how regulated. Superseded and covered by Rule 611(a), M.R.E., and sections 25-7-301 (civil) and 46-16-401 (criminal), MCA.

93-1901-2. Witness not under examination may be excluded. Superseded by Rule 615, M.R.E.

93-1901-3. Court may control mode of interrogation. Superseded by Rules 403 and 611(a), M.R.E.

93-1901-6. When witness may refresh memory from notes. Superseded by Rules 612 and 803(5), M.R.E.

93-1901-7. Cross-examination, as to what. Superseded by Rule 611(b) and (c), M.R.E. (See also Rule 607, M.R.E.)

93-1901-8. Party producing witness, how far may impeach his credit. Superseded by Rule 607.

[93-1901-9 - Repealed]

93-1901-10. Witness, how examined -- when reexamined. Superseded by Rule 611(d), M.R.E. (See also Rule 611(a), M.R.E.)

93-1901-11. How impeached. Superseded by Rules 607, 608, and 609, M.R.E.

93-1901-12. Impeachment by evidence of declarations. Superseded by Rule 613, M.R.E.

93-1901-13. Evidence of good character -- when allowed. Superseded by Rules 404(a) and (c) and 608, M.R.E.

93-1901-14. Writing shown to witness may be inspected by adverse party. Superseded by Rules 612 and 613(a), M.R.E. (See also Rule 901(b)(1), M.R.E.)

93-2201-5. Compromise offer of no avail. Superseded by Rule 408, M.R.E.

93-2501-3. Questions of fact by court or referee. Covered by Rule 101(a), M.R.E., and those relevant sections of Title 93, R.C.M. 1947, which have been recodified in the Montana Code Annotated (amendments suggested where necessary to provide for trial without a jury.)