### HOUSE BILL NO. 355

### INTRODUCED BY SANDS, RAMIREZ, ADDY, SPAETH, YARDLEY

# BY REQUEST OF THE MONTANA SUPREME COURT AND THE MONTANA SUPREME COURT COMMISSION ON THE RULES OF EVIDENCE

### IN THE HOUSE

January 19, 1983	Introduced and referred to Committee on Judiciary.
February 4, 1983	Committee recommend bill do pass. Report adopted.
February 5, 1983	Bill printed and placed on members' deaks.
February 7, 1983	Second reading, do pass.
Pebruary 8, 1983	Considered correctly engrossed.
February 9, 1983	Third reading, passed. Transmitted to Senate.
IN THE S	SENATE
February 10, 1983	Introduced and referred to Committee on Judiciary.
March 1, 1983	Committee recommend bill be concurred in. Report adopted.
March 3, 1983	Second reading, concurred in.
March 5, 1983	Third reading, concurred in. Ayes, 48; Noes, 0.
IN THE I	HOUSE
March 5, 1983	Returned to House.

Sent to enrolling.

Reported correctly enrolled.

March 7, 1983

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2	INTRODUCED BY and Ramery May Spack
3	BY REQUEST OF THE MONTANA SUPREME COURT AND THE
4	MONTANA SUPREME COURT COMMISSION ON THE RULES OF EVIDENCE
	HONTANA JOTACHE COURT CONTAINED ON THE ROCES OF EVIDENCE
5	
6	A BILL FOR AN ACT ENTITLED: "AN ACT TO GENERALLY REVISE AND
7	CLARIFY THE LAWS RELATING TO EVIDENCE; AMENDING SECTIONS
8	26-1-101, 26-1-102, 26-1-201 THROUGH 26-1-203, 26-1-302,
9	26-1-303, 26-1-401, 26-1-402, 26-1-501, 26-1-601, 26-1-602,
0	26-1-607, 26-1-622, 26-1-623, 26-1-805, 26-2-104, 26-2-302,
1	AND 26-2-404, MCA; REPEALING SECTIONS 26-1-107, 26-1-108,
2	AND 26-1-621, MCA.*
3	
4	BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:
5	Section 1. Section 26-1-101, MCA, is amended to read:
6	#26-1-101. General definitions. (1) The "Direct
7	examination is the first examination of a witness by the
8	party-producing-him-is-denominated-the-Mdirect-examination#7
9	on a particular matter. "Cross examination" is the
0	examination of the same a witness upon the same matter by
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1	sametioned by law, of ascertaining in a judicial proceeding
2	the truth respecting a question of facts including but not
3	limited to witness testimony, writings, physical objects, or
4	other things presented to the senses.
5	(3) A <u>"leading question" is a</u> question which suggests
6	to the witness the answer which the examining party desires
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10	· underspecialcircumstancesmakingitappearthatthe
11	interests-of-justice-require-it.
12	(4) "Proof" is the effect of evidence, the
13	establishment of a fact by evidence.
14	(5) A "witness" is a person whose declaration under
15	dath is received as evidence for any purpose, whether such
16	declaration be made on oral examination or by deposition or
17	affidavit."
18	Section 2. Section 26-1-102, MCA, is amended to read:
19	#26-1-102. Definitions kinds of evidence.
20	(1) (a) "Conclusive evidence" or—"unanswerable-evidence" is
21	that which the law does not permit to be contradicted. For
22	exampley-the-record-of-ocourtofcompetentjurisdiction
23	cannot-be-contradicted-by-the-parties-ta-ity
24	(b) No evidence is by law made conclusive or

unanswerable unless so declared by this-code statute.

1	(2) "Cumulative evidence" is additional evidence of
2	the same character to the same point.
3	(3) "Corroborative evidence" is additional evidence of
4	a different character to the same point.
5	(3)(4) *Direct evidence* is that which proves the a
6	fact <del>in-dispute-directly,</del> without an inference or
7	presumptions and which in itself, if true, conclusively
В	establishes that fact. For example, if the fact - in dispute
9	beonagraementy-the-evidence-of-e-witness-who-was-present
10	and-witnessed-the-waking-of-it-is-direct.
11	(+) (a)(5) **Indirect evidence* **Circumstantia)
12	evidence" is that which tends to establish the a fact in
13	dispute by proving another and which, though true, does not
14	of itself conclusively establish that fact but affords an
15	inference or presumption of its existence. For-example,
16	witnessprovesanadmissionofthe-party-to-the-fact-in
17	disputesThis-proves-a-fact-from-which-thu-fact-indispute
18	<del>is-inferred</del> a
19	(b)Indirect-evidence-is-Of-two-kinds+
20	<del>(i)inferences;-and</del>
21	<del>(ii)-presumptions-</del>
22	(5)(6) "Prima facie evidence" is that which suffices

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1	pactic-may-arrerware-pe-rejected-apon-proof-that-there-is-no
2	such-records*
3	Section 3. Section 26-1-201, MCA, is amended to read
4	#26-1-201. Questions of law. ★## Except as provided in
5	Article II. section 7. of the Montana constitution. al
6	questions of lawy including the admissibility of testimony
7	the facts preliminary to such admission: the construction o
8	statutes and other writings, and other rules of evidence
9	are to sust be decided by the courter-and-all-discussions-on
10	law-addressed-to-itw-Whenever-the-knowledge-of-the-court-is
11	bythiscodeymade-revidenceofa-facty-the-court-is-t
12	declare-such knowledge to the jurye which is bound to occup
13	† to "
14	Section 4. Section 26-1-202, MCA, is amended to read
15	#26-1-202. Questions of fact. #H If a trial is b
16	jurys all questions of facty-where the trial is by jury
17	other than those mentioned in 26-1-201 are-to must be
18	decided by the jury, and all evidence thereon +
19	addressed to them, except when as otherwise provided by this
20	ende law. If the trial of a question of fact is not by jury

Section 5. Section 26-1-203, MCA, is amended to read: \*26-1-203. Who to judge effect or and value of evidence. The jury, subject to the control of the court, in

which shall decide such question."

all evidence thereon must be addressed to the trial courts

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for-the-proof-of proves a particular fact until contradicted

and overcome by other evidence. For-exampley-the-certificate

of-a-recording-officer-is-prima-facia-evidence-of-a-recordy

1	the cases specified in this coder is the judge of the effect
2	er and value of evidence addressed to it, except when the
3	evidence is declared to be conclusive. The court is the
4	judge of the effect and value of evidence addressed to it."
5	Section 6. Section 26-1-302, MCA, is amended to read:
6	*26-1-302. Witness presumed to speak the truth how
7	presumption rebutted. A witness is presumed to speak the
8	truth. This-presumptions-howevers-may-be-repelled-by-the
9	manner in which he testifies, by the character of his
10	testimonybyevidenceoffectinghis-motivesorhis
11	character—for—truthy—homestyy—or integrityy—or by
12	controdictory evidence; and the The jury or the court in the
13	absence of a jury is the exclusive judge of his credibility.
14	This presumption may be controverted and overcome by any
15	matter that has a tendency to disprove the truthfulness of a
16	witness* testimony: such matters include but are not limited
17	to:
18	(1) the demeanor or manner of the witness while
19	testifying:
20	(2) the character of the witness* testimony:
21	(3) bias of the witness for or against any party
22	involved in the case:
23	(4) interest of the witness in the outcome of the
24	litigation or other motive to testify falsely:
25	(5) the witness* character for truth, honesty, or

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2	(6) the extent of the witness' capacity ar
3	opportunity to perceive or capacity to recollect or t
4	communicate any matter about which he testifies:
5	(7) inconsistent statements of the witness:
6	(8) an admission of untruthfulness by the witness:
7	(9) other evidence contradicting the witness
8	testimony."
9	Section 7. Section 26-1-303, MCA, is amended to read
0	#26-1-303. Instructions to jury on how to evaluat
1	evidence. The jury is to be instructed by the court on al
2	proper occasions that:
3	(1) that their power of judging of the effect o
4	evidence is not arbitrary but to be exercised with lega
5	discretion and in subordination to the rules of evidence;
6	(2) that they are not bound to decide in conformit
7	with the declarations of any number of witnesses which d
В	not produce conviction in their minds, against a less numbe
9	or against a presumption or other evidence satisfying thei
0	ainds;
1	(3) that a witness false in one part of his testimon
2	is to be distrusted in others;
3	(4) that the testimony of an accomplice a perso
4	legally accountable for the acts of the accused ought to b
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adai sai ons-	of-a-part	y-w <del>ith-toubion</del> ;

(5)—that-evidence—is—to—be-estimated-not-only—by—its

oun--intrinsie—weight—but—also—according-to—the-evidence
which-it-is-in-the-power-of-one-side-to-produce-and-of--the
other-to-contradicts-and-therefore

(6)(5) that if weaker and less satisfactory evidence is offered when and it appears that it is within the power of the party to offer stronger and more satisfactory was within the power of the party avidence: the evidence offered should be viewed with distrust.\*

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

"26-1-401. Who has the burden of producing evidence."

The party-holding the affirmative of the issue must produce the evidence to prove it; therefore, the initial burden of proof-lies producing evidence as to a particular fact is on the party who would be defeated if no evidence were given on either side. Thereafter, the burden of producing evidence is on the party who would suffer a finding against him in the absence of further evidence."

Section 9. Section 26-1-402, MCA, is amended to read:

#26-1-402. Who has the burden of persuasion. Each

Except as otherwise provided by laws a party must prove his

own-affirmative offequations. Evidence need not be given in

support of a negative offequation, except when such negative

offequation is an assential part of the statement of the

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right-or-title-on-which-the-ewase-of-action-is-founded;nor
eveninauchcasewhen-the-allegation-is-a-denial-of-the
existence-of-a-documenty-the-custody-of-which-belongs-to-the
epposite-porty has the burden of persuasion as to each fact
the existence or nonexistence of which is essential to the
claim for relief or defense he is asserting."

Section 10. Section 26-1-501, MCA, is amended to read:

"26-1-501. Inference defined. An "inference" is a

deduction which the reason of the jury makes trier of fact

may make from the focts provedy without an express direction

of the law to that effect guidance."

Section 11. Section 26-1-601, MCA, is amended to read:

#26-1-601. Complete---list List of conclusive
presumptions. The following presumptions and no-others are
deemed conclusive:

19 <del>(2) the truth of the facts recited, from the recited</del>
20 <del>in a written instrument between the parties thereto or their</del>
21 <del>successors in interest by a subsequent title; but this rule</del>
22 <del>does not apply to the recital of a consideration;</del>

(3)(1) the truth of a declaration, act, or omission of a party, as against that party in any litigation arising out of such declaration, act, or omission, whenever a party he

has, by <del>hisown</del> <u>such</u> declaration, act, or omission,
intentionally and deliberately led another to believe a
particular thing true and to act upon such beliefy-he-cannot
in-any-litigation-arising-out-of-such-declarationyactyor
omission-be-cormitted-to-foliaify-it:

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(4)(2) that a tenant is not permitted to deny the title of his landlord at the time of the commencement of the relation:

(5)--the-issue-of-a-wife-cohabiting-with--her-husband
who--is--not--impotent--is--indisputably--presumed--to--be
legitimate:

declared by this code statute to be conclusive;—but—such judgment—or-order-must-be-alleged-in-the-pleadings-if-there be-an-opportunity-to-do-so; if-there be-no-such-opportunity-the-judgment—or-order-may-be-used-as-evidence;

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

Section 12. Section 26-1-602, MCA, is amended to read:

"26-1-602. Befinition—and—examples—of—disputable

Disputable presumptions. All other presumptions are
satisfactory—if—uncontredicted.—They—are—denominated

"disputable presumptions" and may be controverted by other
evidence. The following are of that kind:

(1) that a person is innocent of crime or wrongta

1	(2)	that—an	ΔD	unlawful	act	was	done	with	an	unlawful
2	intente									

- 3 (3) that a ∆ person intends the ordinary consequence 4 of his voluntary actta
- 5 (4) that—a A person takes ordinary care of his own
  6 concernst.
- 7 (5) that-evidence Evidence willfully suppressed would 8 be adverse if producedta
- 9 (6) that—higher More satisfactory evidence would be
  10 adverse from inferiory being produced; if weaker and less
  11 satisfactory evidence is offered and it is within the power
  12 of the party to offer more satisfactory evidence.
- 13 (7) that-money Money paid by one to another was due to
  14 the latter:
- 15 (8) that—a A thing delivered by one to another

  16 belonged to the latter.
- 17 (9) that—an When the instrument evidencing an

  18 obligation has been delivered up to the debtor. the

  19 obligation has been paid.
- 20 (10) that—former Prior rent or installments have been
  21 paid when a receipt for later rent or installments is
  22 producedta
- 23 (11) that-things <u>Things</u> which a person possesses are owned by him;
- 25 (12) that--e A person is the owner of property from

- exercising if he exercises acts of ownership over it or from there is common reputation of his ownershipt.
- (13) that—a A person in possession of an order on himself for the payment of money—an or the delivery of a thing— has paid the money or delivered the thing accordingly.

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- 7 (14) that—a A person acting in a public office was 8 regularly appointed to itt.
- 9 (15) that-official duty has been regularly
  10 performed:
- 11 (16) that—a A court or judgev acting as such, whether
  12 in this state or any other state or country, was acting in
  13 the lawful exercise of its or his jurisdictions.
- 14 (17) that—a A judicial record, when not conclusive.
  15 does still correctly determine or set forth the rights of
  16 the parties.
  - (18) that all matters within an issue were laid before the jury and passed upon by them, and in like manner, that all matters within a submission to arbitration were laid before the arbitrators and passed upon by them;
- 21 (19) that—private Private transactions have been fair 22 and regularts
- 23 (20) that the <u>The</u> ordinary course of business has been followed.
- 25 (21) \*hat-a A promissory note or bill of exchange was

l given or endorsed for a sufficient considerat	C CONT	eration	considerat	Sufficient (	a	tor	endorsed	OF F	qiven	Ł
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- 2 (22) thet-on An endorsement of a negotiable promissory
  3 note or bill of exchange was made at the time and place of
  4 making the note or billta
  - (23) that-s A writing is truly dateds.

- 6 (24) that-a & letter duly directed and mailed was received in the regular course of the mailta
- 8 (25) There is an identity of persons from when there is
  9 an identity of neme; names.
- 10 (26) that—e A person not heard from in 7 years is
  11 dead+=
- 12 (27) that-acquiescence Acquiescence followed from a

  13 belief that the thing acquiesced in was conformable to the

  14 right or fact;
- 15 (28) that things Inings have happened according to the ordinary course of nature and the ordinary habits of lifet.
- 17 (29) that—persons <u>Persons</u> acting as partners have

  18 entered into a contract of partnershipt.
- 19 (30) that—a A man and a woman deporting themselves as
  20 husband and wife have entered into a lawful contract of
  21 marriagets
- 22 (31) that a A child born in lawful wedlock, there being
  23 no divorce from bed and board, is legitimate.
- 24 (32) that—a A thing once proved to exist continues as 25 long as is usual with things of that natureta

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(33)	that-the	The	law	has	heen	obeyeds.
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1341-that-a-document-or-writing-more-than-30-years--old is-genuiney-when-the-same-has-been-since-generally-acted upon-as--genuine--by--persons--having--an--interest--in--the question--end-its-custody-hos-boom-satisfactorily-explained;

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

(36)(35) that-a A printed and published book purporting to contain reports of cases adjudged in the tribunals of the state or country where the book is published contains correct reports of such casesta

437+1361 thek-a A trustee or other person whose duty it was to convey real property to a particular person has actually conveyed to himy, when--such This presumption anglies when it is necessary to perfect the title of such person or his successor in interest+.

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

(39)(38) that--there There was a good and sufficient consideration for a written contract."

Section 13. Section 26-1-607, MCA, is amended to read:

1 "26-1-607. When writings of a decedent prima facie evidence. The entries and other writings of a decedent, made 2 at or near the time of the transaction and when the decedent was in a position to know the facts stated therein, way-be read-as are prima facie evidence of the facts stated therein, in the following cases:

- 7 (1) when the writing or entry was made against the interest of the person making it;
- (2) when it was made in a professional capacity and in 10 the ordinary course of professional conduct;
  - (3) when it was made in the performance of a duty specially enjoined by law."

Section 14. Section 26-1-622, MCA, is amended to read: \*26-1-622. Official reports and records made pursuant to federal law prima facie evidence. An official written report or record, or duly certified copy thereof, that a person is dead or alive: missing in actiony: interned in a neutral country; or beleaguered, besieged, or captured by an enemy or-is-dead-or-is-olive, made by any officer or employee of the United States authorized by the act--referred--to--in--26-1-621--or--by-eny-other law of the United States to make same, shall be received in any court, office, or other place in this state as prima facie evidence that such person is <u>dead or alive:</u> missing\*: missing in actionvi interned in a neutral countryvi or beleaguered,

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- besieged, or captured by an enemy or-is-dead-or-is-alive, as
  the case may be."
- 3 Section 15. Section 26-1-623. MCA, is amended to read: 4 "26-1-623. Presumption of authenticity of finding. 5 report, or record. For the purposes of 26-1-621--ond 26-1-622, any finding, report, or record or duly certified copy thereof purporting to have been signed by such an 7 8 officer or employee of the United States as is described in 9 said-sections that section shall prime facie be deemed to 10 have been signed and issued by such an officer or employee 11 pursuant to law, and the person signing same shall prima 12 facie be deemed to have acted within the scope of his authority. If a copy purports to have been certified by a 13 14 person authorized by law to certify the same, such certified copy shall be prima facie evidence of his authority so to 15 16 certify.
- 17 Section 16. Section 26-1-805, MCA, is amended to read: 18 \*26-1-805. Doctor-patient privilege. ★ Except as 19 provided in Rule 35. Montana Rules of Civil Procedure. a 20 licensed physician or surgeon cannot, without the consent of 21 his patient, be examined in a civil action as to any 22 information acquired in attending the patient which was 23 necessary to enable him to prescribe or act for the 24 patient."

Section 17. Section 26-2-104. MCA, is amended to read:

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#26-2-104. Disobedience — how punished. Disobedience to a subpoena or a refusal to be sworn or to answer as a witness or to subscribe an affidavit or deposition, when required, may be punished as a contempt by the court or officer issuing the subpoena or requiring the witness to be so sworn, to so answer, or to so subscribe; and if the witness be a party, his complaint or answer may be stricken out.

Section 18. Section 26-2-302, MCA, is amended to read:

\*26-2-302. Witness required to answer questions. A

witness must answer questions legal and pertinent to the
matter in issue though his answer may establish a claim
against himself, but he need not give an answer which will
have a tendency to subject him to punishment for a felony,
nor need he give an answer which will have a direct tendency
to degrade his character unless it be to the very fact in
issue or to a fact from which the fact in issue would be
presumed. But a witness must answer as to the fact of his
previous conviction for felony.\*

Section 19. Section 26-2-404, MCA, is amended to read:

#26-2-404. Affidavit of arrested witness -exomeration of arresting officer. (1) An officer is not
liable to-the-party for making the arrest in ignorance of
the facts creating the exoneration but is liable for any
subsequent detention of the party witness if such party

elerm witness claims the exemption and make makes an affidavit stating that:

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- (a) he has been served with a subpoena to attend as a witness before a court, officer, or other person, specifying the same, the place of attendance, and the action or proceeding in which the subpoena was issued;
- (a) he has not thus been served by his own procurement with the intention of avoiding arrest; and
- 9 (c) he is at the time going to the place of 10 attendance, returning therefrom, or remaining there in 11 obedience to the subpoena.
- 12 (2) The affidavit may be taken by the officer and
  13 exonerates him from liability for discharging the witness
  14 when arrested.\*\*
- 15 <u>NEW SECTION</u> Section 20. Repealer. Sections 26-1-107, 16 26-1-108, and 26-1-621, MCA, are repealed.

-End-

Approved by Committee on Judiciary

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2	INTRODUCED BY DANG Remove , All Sparth
3	BY REQUEST OF THE MONTANA SUPREME COURT AND THE
4	MONTANA SUPREME COURT COMMISSION ON THE RULES OF EVIDENCE
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1	(2) "Cumulative evidence" is additional evidence of
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5	(3)(4) "Direct evidence" is that which proves the a
6	fact <del>in-disputedirectly,</del> without an inference or
7	presumption, and which in itself, if true, conclusively
8	establishes that fact. for-example,-if-the-factin-dispute
9	beonagreementy-the-evidence-of-a-witness-who-was-present
10	<del>and-witnessed-the-making-of-it-is-direct</del>
11	(4)—(a)(5) **Indirectevidence* **Circumstantial
12	evidence" is that which tends to establish the a fact in
13	dispute by proving another and which, though true, does not
14	of itself conclusively establish that fact but affords an
15	inference or presumption of its existence. For-examples—a
16	witnessprovesanadmissionofthe-party-to-the-fact-in
17	<del>disputerThis-proves-a-fact-from-which-the-fact-indi</del> spute
18	<del>is-inferreds</del>
19	(b)Indirect-evidence-is-of-two-kinds+
20	<del>(i)inferences;-and</del>
21	<del>(ii)-presumptions-</del>
22	(5)(6) "Prima facie evidence" is that which suffices
23	for the proof of proves a particular fact until contradicted
24	and overcome by other evidence. For-examples-the-certificate

1	but-it-may-afterward-be-rejected-upon-proof-that-there-is-no
2	such-record*"
3	Section 3. Section 26-1-201, MCA, is amended to read:
. 4	#26-1-201. Questions of law. All Except as provided in
5	Article II. section 7. of the Montana constitution. all
6	questions of law, including the admissibility of testimony,
7	the facts preliminary to such admission, the construction of
8	statutes and other writings, and other rules of evidence,
9	$\frac{1}{2}$
10	low-addressed-to-itw-Whenever-the-knowladge-of-the-court-isy
11	bythiscodermadeevidenceofa-facty-the-court-is-to
12	declare-such-knowledge-to-the-juryy-which-is-bound-to-sccept
13	<del>î be</del> n
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15	*26-1-202. Questions of fact. *** If a trial is by
16	jurys all questions of facty-where the trial is by jurys
17	other than those mentioned in 26-1-201 ere-to must be
18	decided by the jury: and all evidence thereon is to must be
19	addressed to them, except when as otherwise provided by this
20	code law. If the trial of a question of fact is not by jury.
21	all evidence thereon must be addressed to the trial courts
22	which shall decide such question."
23	Section 5. Section 26-1-203, MCA: is amended to read:
24	■26-1-203• Who to judge effect <del>or <u>and</u> value</del> of
25	evidence. The jury, subject to the control of the court, in

-3-

of-a-recording-afficer-is-prima-facie-evidence-of-a-records

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1	the-cases-specified-in-this-coder is the judge of the effect
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6	"26-1-302. Witness presumed to speak the truth how
7	presumption rebutted. A witness is presumed to speak the
8	truth. This-presumptions-howevers-mayberepelledbythe
9	monner-in-which-he testifies, by-the-character-of-his
10	testimony,byevidenceaffectinghismotivesorhis
11	<del>characterfortruthyhonestyyorintegrityyorby</del>
12	contradictory-evidences-and the Jury or the court in the
13	absence of a jury is the exclusive judge of his credibility.
14	This presumption may be controverted and overcome by any
15	matter that has a tendency to disprove the truthfulness of a
16	witness* testimony; such matters include but are not limited
17	to:
18	(1) the demeanor or manner of the witness while
19	testifying:
20	12) the character of the witness* testimony:
21	(3) bias of the witness for or against any party
22	involved in the case:
23	141 interest of the witness in the outcome of the
24	litigation or other motive to testify falsely:

1	integrity:
2	(6) the extent of the witness capacity and
3	opportunity to perceive or capacity to recollect or to
4	communicate any matter about which he testifies:
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11	evidence. The jury is to be instructed by the court on all
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14	ewidence is not arbitrary but to be exercised with legal
15	discretion and in subordination to the rules of evidence;
16	(2) that they are not bound to decide in conformity

21 (3) that a witness false in one part of his testimony 22 is to be distrusted in others;

with the declarations of any number of witnesses which do

not produce conviction in their minds, against a less number

or against a presumption or other evidence satisfying their

17

18

19

20

minds;

23 (4) that the testimony of an-accomplice a person
24 legally accountable for the acts of the accused ought to be
25 viewed with distrusty-and-the-evidence of-the-oral

25

(5) the witness\* character for truth. honesty. or

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4 4 4 4 4 4 4 4 4 4 4 4 4 4 4 4 4 4 4	 r <del>ith-coutio</del> n;

(5)--thut-evidence-is-to-be-estimated-not-only--by--its
own--intrinsic---weight--but--olso---according-to-the-evidence
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to 151 that if weaker and less satisfactory evidence is offered when and it appears that it is within the power of the party to offer stronger and more satisfactory was within the power of the party evidence, the evidence offered should be viewed with distrust.

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

"26-1-401. Who has the burden of producing evidence."

The party holding the offirmative of the issue must produce the evidence to prove it; therefore; the initial burden of proof-lies producing evidence as to a particular fact is on the party who would be defeated if no evidence were given on either side. Thereafter: the burden of producing evidence is on the party who would suffer a finding against him in the absence of further evidence."

Section 9. Section 26-1-402, NCA, is amended to read:

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Except as otherwise provided by laws a party must-prove his

own-off-reative allegations Evidence need not be given in

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allegation is an essential part of the statement of the

fight-or-title-on-which-the-couse-of-action-is-foundedynor
eveninsuchcasewhen-the-allegation-is-a-denial-of-the
existence-of-o-documenty-the-custody-of-which-belongs-to-the
opposite porty has the burden of persuasion as to each fact
the existence or nonexistence of which is assential to the
claim for relief or defense he is asserting."

Section 10. Section 26-1-501, MCA, is amended to read:

"26-1-501. Inference defined. An "inference" is a deduction which the reason of the jury makes trier of fact.

may make from the fects-proved, without an express direction of the law to that effect evidence."

Section 11. Section 26-1-601, MCA, is amended to read:

"26-1-601. Complete---list List of conclusive

presumptions. The following presumptions and-no-others are

deemed conclusive:

(1)--a-malicious-and-guilty-intenty-from the deliberate
commission-of-an-unlawful-act for the purpose-of-injuring
another:

19 <del>(2)-the-truth-of-the-facts-recitedy-from-the-recital</del>
20 <del>in-a-written-instrument-between-the-parties-thereto-or-their</del>
21 <del>successors-in-interest-by-a-subsequent-titles-but-this--rule</del>
22 <del>does-not-apply-to-the-recital-of-a-considerations</del>

(37(1) the truth of a declaration, act, or omission of a party, as against that party in any litigation arising out of such declaration, act, or omission, whenever a party he

2	intentionally and deliberately led another to believe a
3	particular thing true and to act upon such belief <del>y-he-connut</del>
4	im-any-litigation-arising-out-of-such-declarationyactyor
5	<del>omission-be-permitted-to-fals#fy-it</del> ;
6	(4)12) that a tenant is not permitted to deny the
7	title of his landlord at the time of the commencement of the
8	relation;
9	<del>(5)the-issue-of-a-wife-cohabitingwithherhusbon</del> d
10	whoisnotimpotentisindisputablypresumedtobe
11	<del>legitiaatet</del>
12	t6)(3) the judgment or order of a court, when which is
13	declared by <del>this code</del> <u>statute</u> to be conclusive <del>; but such</del>
14	judgmentor-order-must-be-alleged-in-the-pleadings-if-there
15	be-en-opportunity-to-do-so;-if-there-be-no-such-opportunity+
16	the-judgment-or-order-may-be-used-as-evidence;
17	(77)(4) any other presumption which, by statute, is
18	expressly made conclusive.*
19	Section 12. Section 26-1-602, MCA, is amended to read:
20	"26-1-602. <del>Definitionondexamplesof</del> disputable
21	Disputable presumptions. All other presumptions are

has, by his--own such declaration, act, or omission,

1	(2)	that—an An unlawful act was done with an unlawful
2	intent <sub>fa</sub>	
3	(3)	that-s A person intends the ordinary consequence

5 (4) that--a A person takes ordinary care of his own concerns.

of his voluntary acts

- 7 (5) that evidence Evidence willfully suppressed would be adverse if producedta
- 9 (6) that--higher More satisfactory evidence would be 10 adverse from inferiory-being-producedt if weaker and less 11 satisfactory evidence is offered and it is within the power 12 of the party to offer more satisfactory evidence.
- 13 (7) that-money Money paid by one to another was due to the latters. 14
- 15 (B) that—a A thing delivered by one to another belonged to the latterta 16
- 17 (9) that—on When the instrument evidencing an 18 obligation has been delivered up to the debtor. the 19 cblication has been paid+
- 20 (10) that -- former Prior rent or installments have been 21 paid when a receipt for latter later rent or installments is 22 produced+\_
- 23 (11) that-things Ihings which a person possesses are 24 owned by himta
- (12) that--e A person is the owner of property from 25

evidence. The following are of that kind:

satisfactory--if---uncontradicted.-- They--are--denominated

"disputable presumptions" and may be controverted by other

(1) that a A person is innocent of crime or wrongto

22

23

24

1	exercising if he exercises acts of ownership over it or from	011
2	there is common reputation of his ownershipts	

11

12

14

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18

19

- (13) that-a A person in possession of an order on himself for the payment of money-on or the delivery of a thingy has paid the money or delivered the thing accordingly.
- 7 (14) that—a ▲ person acting in a public office was regularly appointed to itt.
- 9 (15) that official duty has been regularly
  10 performed?
  - (16) that—a A court or judger acting as such, whether in this state or any other state or country, was acting in the lawful exercise of its or his jurisdictions.
  - (17) that--a A judicial record, when not conclusive, does still correctly determine or set forth the rights of the parties.
    - (18) that—all matters within an issue were laid before the jury and passed upon by them, and, in like-manner, that all matters within a submission to arbitration were laid before the arbitraturs and passed upon by them,
- 21 (19) that--private <u>Private</u> transactions have been fair 22 and regularts
- 23 (20) that the <u>The</u> ordinary course of business has been 24. followed:
- 25 (21) that—a A promissory note or bill of exchange was

- 1 given or endorsed for a sufficient consideration;
- 2 (22) thet-en An endorsement of a negotiable promissory
  3 note or bill of exchange was made at the time and place of
  4 making the note or billts.
- (23) that-a A writing is truly dated;
- 6 (24) that—a A letter duly directed and mailed was
  7 received in the regular course of the mailts
- 8 (25) <u>There is an</u> Identity of persons from when there is
  9 an identity of name; names.
- 10 (26) thet--a A person not heard from in 7 years is
  11 deadts
- 12 (27) that-sequiescence <u>Acquiescence</u> followed from a

  13 belief that the thing acquiesced in was conformable to the

  14 right or facts.
- 15 (28) that things Ihings have happened according to the ordinary course of nature and the ordinary habits of lifet.
- 17 (29) that—persons Persons acting as partners have 18 entered into a contract of partnershipts
- 19 (30) thet--a A man and a woman deporting themselves as
  20 husband and wife have entered into a lawful contract of
  21 marriagets
- 22 (31) that a A child born in lawful wedlock, there being
  23 no divorce from bed and board, is legitimate;
- 24 [32] that—a A thing once proved to exist continues as 25 long as is usual with things of that nature.

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(33)	that-the	The	law	has	been	aber	edt_
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(34)-thot-o-document-or-writing-more-than-30-years--old is--genuiney--when-the--same-has-been-since-generally-acted upon-as--genuine--by--persons--having--an--interest--in--the question--and-its-custody-has-been-satisfactorily-explained;

(35)[34] that a A printed and published book purporting to be printed or published by public authority was so printed or published;

(36)(35) that-e A printed and published book purporting to contain reports of cases adjudged in the tribunals of the state or country where the book is published contains correct reports of such cases.

(37+(36) that-a A trustee or other person whose duty it was to convey real property to a particular person has actually conveyed to himma when-such Ihis presumption applies when it is necessary to perfect the title of such person or his successor in interests.

the public of land for a burial ground for 5 years, with the consent of the owner and without a reservation of his rights, is-presumptive-evidence-of-his-intention he intended to dedicate it to the public for that purpose;

(39)(138) that—there There was a good and sufficient consideration for a written contract.

Section 13. Section 26-1-607, MCA, is amended to read:

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

- (1) when the <u>writing or</u> entry was made against the interest of the person making it;
- 9 (2) when it was made in a professional capacity and in the ordinary course of professional conduct;
  - (3) when it was made in the performance of a duty specially enjoined by law."

Section 14. Section 26-1-622, MCA, is amended to read: m26-1-622. Official reports and records made pursuant to federal law prima facie evidence. An official written report or record, or duly certified copy thereof, that a person is <u>dead or alive</u>: missingvi missing in actionvi interned in a neutral countryvi or beleaguered, besieged, or captured by an enemy or is dead or is alive; made by any officer or employee of the United States authorized by the act-referred-to-in-26-1-621 or by eny other law of the United States to make same, shall be received in any court, office, or other place in this state as prima facie evidence that such person is <u>dead or alive</u>; missingvi missing in action interned in a neutral countryvi or beleaguered.

besieged, or captured by an enemy or-is-dead-or-is-alive, as
the case may be.\*

Section 15. Section 26-1-623, MCA, is amended to read: "26-1-623. Presumption of authenticity of finding, report, or record. For the purposes of 26-1-621—and 26-1-622, any finding, report, or record or duly certified copy thereof purporting to have been signed by such an officer or employee of the United States as is described in soid-sections that section shall prima facile be deemed to have been signed and issued by such an officer or employee pursuant to law, and the person signing same shall prima facile be deemed to have acted within the scope of his authority. If a copy purports to have been certified by a person authorized by law to certify the same, such certified copy shall be prima facile evidence of his authority so to certify."

Section 16. Section 26-1-805, MCA, is amended to read:

#26-1-805. Dector-patient privilege. A Except as

provided in Rule 35. Montana Rules of Civil Procedure. a

licensed physician or surgeon cannot, without the consent of

his patient, be examined in a civil action as to any

information acquired in attending the patient which was

necessary to enable him to prescribe or act for the

patient."

\*26-2-104. Disobedience — how punished. Disobedience to a subpoena or a refusal to be sworn or to answer as a witness or to subscribe an affidavit or deposition, when required, may be punished as a contempt by the court or officer issuing the subpoena or requiring the witness to be so sworn, to so answer, or to so subscribe; and if the witness be a party, his complaint or answer may be stricken out.

Section 18. Section 26-2-302, MCA, is amended to read:

"26-2-302. Witness required to answer questions. A

witness must answer questions legal and pertinent to the
matter in issue though his answer may establish a claim
against himself, but he need not give an answer which will
have a tendency to subject him to punishment for a felony,
nor need he give an answer which will have a direct tendency
to degrade his character unless it be to the very fact in
issue or to a fact from which the fact in issue would be
presumed. But a witness must answer as to the fact of his
previous conviction for felony."

Section 19. Section 26-2-404, MCA, is amended to read:

"26-2-404. Affidavit of arrested witness —
exoneration of arresting officer. (1) An officer is not
liable to-the-porty for making the arrest in ignorance of
the facts creating the exoneration but is liable for any
subsequent detention of the porty witness if such porty

Section 17. Section 26-2-104, MCA, is amended to read:

1 elaim witness claims the exemption and make makes an 2 affidavit stating that:

3

7

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- (a) he has been served with a subpoena to attend as a witness before a court, officer, or other person, specifying the same, the place of attendance, and the action or proceeding in which the subpoena was issued;
- (b) he has not thus been served by his own procurement with the intention of avoiding arrest; and
- 9 (c) he is at the time going to the place of 10 attendance, returning therefrom, or remaining there in 11 obedience to the subpoena.
- 12 (2) The affidavit may be taken by the officer and
  13 exonerates him from liability for discharging the witness
  14 when arrested.
- 15 <u>NEW SECTION.</u> Section 20. Repealer. Sections 26-1-107, 16 26-1-108, and 26-1-621, MCA, are repealed.

-End-

1	BILL NO. 355
2	INTRODUCED BY AND Kemen fully Sparth
3	BY REQUEST OF THE MONTANA SUPREME COURT AND THE
4	MONTANA SUPREME COURT COMMISSION ON THE RULES OF EVIDENCE
5	
6	A BILL FOR AN ACT ENTITLED: "AN ACT TO GENERALLY REVISE AND
7	CLARIFY THE LAWS RELATING TO EVIDENCE; AMENDING SECTIONS
8	26-1-101, 26-1-102, 26-1-201 THROUGH 26-1-203, 26-1-302,
9	26-1-303, 26-1-401, 26-1-402, 26-1-501, 26-1-601, 26-1-602,
.O	26-1-607, 26-1-622, 26-1-623, 26-1-805, 26-2-104, 26-2-302,
. 1	AND 26-2-404, MCA; REPEALING SECTIONS 26-1-107, 26-1-108,
.2	AND 26-1-621, MCA.*
3	
.4	BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:
5	Section 1. Section 26-1-101, MCA, is amended to read:
.6	#26-1-101. General definitions. (1) The "Direct
.7	examination is the first examination of a witness by the
.8	party-producing-him-is-denominated-the-Mdiract-examination*;
9	on a particular matter. "Cross examination" is the
0	examination of the same a witness woon the same matter by
1	the adverse by a partyy-the meross-examination - The direct
2	examination mustbe-completed-before the cross-examination
3	begins-unless-the-court-otherwisedirects other than the
4	direct examiner.
5	(2) "Judicialevidence" "Evidence" is the meansy

sanctioned by-laws of ascertaining in a judicial proceeding the truth respecting a question of facts including but not limited to witness testimony, writings, physical objects, or other things presented to the senses. 5 (3) A "leading question" is a question which suggests to the witness the answer which the examining party desires is-denominated-re-i-"leading---question"---or---"suggestive question" --- On--a--direct examination-leading-questions-are not-allowedy-except-in-the-sound-discretion-of-the-court 10 under-special-circumstances-making-it-appear-that-the 11 interests-of-justice-require-it. 12 (4) "Proof" is the---effect---of---evidencey 13 establishment of a fact by evidence. (5) A "witness" is a person whose declaration under 14 15 oath is received as evidence for any purpose, whether such 16 declaration be made on oral examination or by deposition or 17 affidavit.\* 18 Section 2. Section 26-1-102, MCA: is amended to read: 19 "26-1-102. Definitions kinds of evidence. 20 (1) (a) "Conclusive evidence" or "unanswerable-evidence" is 21 that which the law does not permit to be contradicted. For example, the record-of-a-court--of--competent--jurisdiction 22 23 connet-be-contradicted-by-the-parties-to-its 24 (b) No evidence is by law made conclusive or 25 unanswerable unless so declared by this-code statute.

THIRD READING

HB 355

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such-recordy\*

(2)	<b>∞Cumulative</b>	evidence.	is additional	ev i dence	of
the same	character to	the same	point.		

## 13) "Corroborative evidence" is additional evidence of a different character to the same point.

fact in dispute directly, without an inference or presumption, and which in itself, if true, conclusively establishes that fact. For example, if the fact in dispute be on agreement, the evidence of a witness who was present and witnessed the making of it is direct.

evidence is that which tends to establish the a fact in dispute by proving another and which, though true, does not of itself conclusively establish that fact but affords an inference or presumption of its existence. For example, a witness proves an admission of the porty to the fact in dispute. This proves a fact from which the fact in dispute in-inferred:

tb:--Indirect-evidence-is-of-two-kindse

20 tit--inferencest-and

<del>(ii)-presumptions</del>

ff161 "Prima facie evidence" is that which suffices

for the proof of proves a particular fact until contradicted
and overcome by other evidence. For example, the certificate

of a recording officer is prima-facte evidence of a record,

Section 3. Section 26-1-201, MCA, is amended to read:

"26-1-201. Questions of law. All Except as provided in

Article II. Section 7. of the Montana constitution. all

questions of law, including the admissibility of testimony,

the facts preliminary to such admission, the construction of

statutes and other writings, and other rules of evidence,

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but-it-may-afterward-be-rejected-upon-proof-that-there-is-no

Section 4. Section 26-1-202, MCA, is amended to read:

"26-1-202. Questions of fact. All If a trial is by
jury. all questions of fact. where the trial is by jury.

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Section 5. Section 26-1-203. MCA, is amended to read:
#26-1-203. Who to judge effect or and value of
evidence. The jury, subject to the control of the court. In

---4

1	the coses-specified-in-this-coder is the judge of the effect
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10	testimonybyevidenceoffectinghis-motivesorhis
11	character—for—truths—homestys—or—integritys—or—by
12	contradictory evidences and the jury or the court in the
13	absence of a jury is the exclusive judge of his credibility.
14	This presumption may be controverted and overcome by any
15	matter that has a tendency to disprove the truthfulness of a
16	witness* testimony; such matters include but are not limited
17	<u>to:</u>
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24	litigation or other motive to testify falsely:
25	15) the witness* character for truth, honesty, or

1	integrity:
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3	opportunity to perceive or capacity to recollect or to
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14	evidence is not arbitrary but to be exercised with legal
15	discretion and in subordination to the rules of evidence;
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17	with the declarations of any number of witnesses which do
18	not produce conviction in their minds, against a less number

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The party holding the offirmative of the issue must produce the evidence to prove its therefore, the initial burden of proof. Her producing evidence as to a particular fact is on the party who would be defeated if no evidence were given on either side. Thereafters the burden of producing evidence is on the party who would suffer a finding against him in the absence of further evidence."

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Except as otherwise provided by laws a party must-prove his

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support of a negative allegation, except when such negative
allegation is an assential part of the statement of the

*+4us-st-sts-sts-nu-mutcu-rus-coass-st-mcctou-ta-toquocdi-uo
eveninsuchcasewhen-the-allegation-is-o-denial-of-th
existence-of-u-documenty-the-custody-of-which-belongs-to-th
opposite porty has the burden of persuasion as to each fac
the existence or nonexistence of which is essential to th
claim for relief or defense he is asserting."
Section 10. Section 26-1-501, MCA, is amended to read
*26-1-501. Inference defined. An *inference* is
deduction which the reason of the jury makes trier of fac
max make from the fects-provedy-without-an-express-direction
of the law to that effect syidence."
Section 11. Section 26-1-601, MCA, is amended to read
"26-1-601. Gompletelist list of conclusiv
presumptions. The following presumptions and no others ar
deemed conclusive:
(1)a-malicious-and-guilty-intenty-from the deliberat
commission-of-on-unlawful act for-thepurpose-ofinjurin
anothers
<del>(2)thetruthof-the-facts-racitady-from-the-recita</del>
in-o-written-instrument-between-the-porties-thereto-or-thei
successors-in-interest-by-a-subsequent-titley-but-this-rul
does-not-apply-to-the-recital-of-a-consideration;

a party. as against that party in any litigation arising out

of such declaration, act, or omission, whenever e-porty he

131111 the truth of a declaration, act, or omission of

1	has, by his own <u>such</u> declaration, act, or omission,
2	intentionally and deliberately led another to believe a
3	particular thing true and to act upon such beliefy-he-connot
4	in-any-litigation-origing-out-of-such-declarationsactsor
5	omission-be-parmitted-to-folsify-it;

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44)121 that a tenant is not permitted to deny the title of his landlord at the time of the commencement of the relation:

(5) -- the issue-of-a-wife-coholiting-with-her-husband
who---is--not--impotent--is--indisputably--presumed--to--be
legitimate:

declared by this code statute to be conclusive; when which is declared by this code statute to be conclusive; but such judgment or order must be alleged in the pleadings if there be no such opportunity the judgment or order may be used as evidence;

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

Section 12. Section 26-1-602, MCA, is amended to read:

"26-1-602. Befinition—and—examples—of—disputable
Disputable presumptions. All other presumptions are

setisfactory—if—uncontradicteds—They—are—denominated

"disputable presumptions" and may be controverted by other
evidence. The following are of that kind:

(1) that-a A person is innocent of crime or wrongta

1	(2)	that on AD	unlawful	act was	done	with	an	unlawful
,	intent+.							

- 3 (3) that-s A person intends the ordinary consequence
  4 of his voluntary acts
- (4) that—a A person takes ordinary care of his own
- 7 (5) that-evidence <u>Evidence</u> willfully suppressed would 8 be adverse if producedta
- 9 (6) that—higher Nore satisfactory evidence would be
  10 adverse from inferiors—being-produced; if weaker and less
  11 satisfactory evidence is offered and it is within the power
  12 of the party to offer more satisfactory evidence.
- 13 (7) that-money Money paid by one to another was due to
  14 the latters.
- 15 (8) that—a A thing delivered by one to another
  16 belonged to the latter.
- 17 (9) that on when the instrument evidencing an obligation has been delivered up to the debtor. the
- 20 (10) that—former Prior rent or installments have been
  21 paid when a receipt for latter later rent or installments is
  22 producedta
- 23 (11) that-things Things which a person possesses are owned by himms.
- 25 (12) that--a A person is the owner of property from

exercises	acts	of	ownership	over	it or	from
there is common reputation	of h	is	ownership†,			

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- (13) that-a A person in possession of an order on himself for the payment of money or delivered the thing accordingly.
- 7 (14) that—a A person acting in a public office was regularly appointed to itta
- 9 (15) that official duty has been regularly
  10 performed:
  - (16) that—a A court or judger acting as such, whether in this state or any other state or country, was acting in the lawful exercise of its or his jurisdictions.
  - (17) that--a A judicial record, when not conclusive, does still correctly determine or set forth the rights of the parties.
  - (18) that all matters within an issue were laid before the jury and passed upon by them, and, in like manner, that all matters within a submission to arbitration were laid before the arbitrators and passed upon by them;
  - (19) that--private <u>Private</u> transactions have been fair and regulary.
  - (20) that the Ing ordinary course of business has been followeds.
- 25 (21) that-a A promissory note or bill of exchange was

1	given o	r endorsed	for	sufficient	considerations.
---	---------	------------	-----	------------	-----------------

- 2 (22) that—an An endorsement of a negotiable promissory
  3 note or bill of exchange was made at the time and place of
  4 making the note or bill+a.
- 5 (23) that-a A writing is truly dated:

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- (24) that a letter duly directed and mailed was received in the regular course of the mailt.
- 8 (25) <u>There is an identity of persons from when there is</u>
  9 an identity of names.
- 10 (26) that—a A person not heard from in 7 years is
  11 deadts
- 12 (27) that-acquiencence Acquiescence followed from a

  13 belief that the thing acquiesced in was conformable to the

  14 right or faction
- 15 (28) that-things <u>Things</u> have happened according to the 16 ordinary course of nature and the ordinary habits of lifets
- 17 (29) that—persons Persons acting as partners have
  18 entered into a contract of partnershipts
- 19 (30) that—a A man and a woman deporting themselves as
  20 husband and wife have entered into a lawful contract of
  21 marriageta
- 22 (31) that-s A child born in lawful wedlock, there being
  23 no divorce from bed and board, is legitimateta
- 24 (32) that—a A thing once proved to exist continues as
  25 long as is usual with things of that naturage.

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/271	that-the	The	שבו	has	heen	shaveds.
[22]	THET THE	11111	100	1165	oven	COCALCAL

t34)-that-a-document-or-writing-more-than-30-years--old
is--genuiney--when--the-same-has-been-since-generally-acted
upon-as--genuine--by--persons--having--an--interest--in--the
question--and-its-custody-has-been-satisfactorily-explained;

(35)(34) that—a A printed and published book purporting to be printed or published by public authority was so printed or published;

†36}135] that-a ∆ printed and published book purporting to contain reports of cases adjudged in the tribunals of the state or country where the book is published contains correct reports of such casesta

#371(36) that-a A trustee or other person whose duty it was to convey real property to a particular person has actually conveyed to him. when-such Ihis presumption applies when it is necessary to perfect the title of such person or his successor in interests.

the public of land for a burial ground for 5 years, with the consent of the owner and without a reservation of his rights, is-presumptive-evidence-of-his-intention he intended to dedicate it to the public for that purposets

(39)(38) that—there There was a good and sufficient consideration for a written contract.\*

25 Section 13. Section 26-1-607, MCA, is amended to read:

w26-1-607. When writings of a decedent prima facie evidence. The entries and other writings of a decedent, made at or near the time of the transaction and when the decedent was in a position to know the facts stated therein, may be read-as are prima facie evidence of the facts stated therein, in the following cases:

- (1) when the <u>writing or</u> entry was made against the interest of the person making it;
- 9 (2) when it was made in a professional capacity and in10 the ordinary course of professional conduct;
  - (3) when it was made in the performance of a duty specially enjoined by law.\*\*

Section 14. Section 26-1-622, MCA, is amended to read:

#26-1-622. Official reports and records made pursuant
to federal law prima facie evidence. An official written
report or record, or duly certified copy thereof, that a
person is dead or alive: 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 any
officer or employee of the United States authorized by the
ect-referred-to-in-26-1-621-or-by-eny-other law of the
United States to make same, shall be received in any court,
office, or other place in this state as prima facie evidence
that such person is dead or alive; missing; missing in
action; interned in a neutral country; or beleaguered,

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21.

besieged, or captured by an enemy or-is-dead-or-is-alive, as
the case may be.\*

20.

Section 15. Section 26-1-623. MCA, is amended to read:

"26-1-623. Presumption of authenticity of finding.

report, or record. For the purposes of 26-1-621—and

26-1-622, any finding. report. or record or duly certified
copy thereof purporting to have been signed by such an
officer or employee of the United States as is described in

said-sections that section shall prima facie be deemed to
have been signed and issued by such an officer or employee
pursuant to law, and the person signing same shall prima
facie be deemed to have acted within the scope of his
authority. If a copy purports to have been certified by a
person authorized by law to certify the same, such certified
copy shall be prima facie evidence of his authority so to
certify."

Section 16. Section 26-1-805, MCA, is amended to read:

"26-1-805. Doctor-patient privilege. A Except as

provided in Rule 354. Montana Rules of Civil Procedure. a

licensed physician or surgeon cannot, without the consent of

his patient, be examined in a civil action as to any
information acquired in attending the patient which was
necessary to enable him to prescribe or act for the
patient."

25 Section 17. Section 26-2-104. MEAN is amended to read:

to a subpoena or a refusal to be sworn or to answer as a witness or to subscribe an affidavit or deposition, when required, may be punished as a contempt by the court or efficer issuing the subpoena or requiring the witness to be so sworns to so answers or to so subscribe; and if the witness be a party, his complaint or answer may be stricken out.\*

Section 18. Section 26-2-302, MCA, is amended to read:

"26-2-104. Disobedience - how punished. Disobedience

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

Section 19. Section 26-2-404, MCA, is amended to read:

"26-2-404. Affidavit of arrested witness —
exoneration of arresting officer. (1) An officer is not
liable to the party for making the arrest in ignorance of
the facts creating the exoneration but is liable for any
subsequent detention of the party witness if such party

elaim witness claims the exemption and make makes an affidavit stating that:

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- (a) he has been served with a subpoena to attend as a witness before a court, officer, or other person, specifying the same, the place of attendance, and the action or proceeding in which the subpoena was issued;
- 7 (b) he has not thus been served by his own procurement 8 with the intention of avoiding arrest; and
- 9 (c) he is at the time going to the place of 10 attendance, returning therefrom, or remaining there in 11 obedience to the subpoena.
- 12 (2) The affidavit may be taken by the officer and 13 exonerates him from liability for discharging the witness 14 when arrested.\*\*
- NEW SECTION. Section 20. Repealer. Sections 26-1-107,
   26-1-108, and 26-1-621, MCA, are repealed.

~End~

HB 0355/02 48th Legislature

1	HOUSE BILL NO. 355
2	INTRODUCED BY SANDS, RANIREZ, ADDY, SPAETH, YARDLEY
3	BY REQUEST OF THE MONTANA SUPREME COURT AND THE
4	MUNTANA SUPREME COURT COMMISSION ON THE RULES OF EVIDENCE
5	
6	A BILL FOR AN ACT ENTITLED: "AN ACT TO GENERALLY REVISE AND
7	CLARIFY THE LAWS RELATING TO EVIDENCE; AMENDING SECTIONS
B	26-1-101, 26-1-102, 26-1-201 THROUGH 26-1-203, 26-1-302,
9	26-1-303, 26-1-401, 26-1-402, 26-1-501, 26-1-601, 26-1-602,
10	26-1-607, 26-1-622, 26-1-623, 26-1-805, 26-2-104, 26-2-302,
11	AND 26-2-404, MCA; REPEALING SECTIONS 26-1-107, 26-1-108,
12	AND 26-1-621, MCA.*
13	
14	BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:
15	Section 1. Section 26-1-101, MCA, is amended to read:
16	#26-1-101. General definitions. (1) The <u>#Direct</u>
17	examination" is the first examination of a witness by-the
13	party-producing-him-is-denominated-the-#direct-examination#;
19	on a particular matter. "Cross examination" is the
20	examination of thesame a witness upon-the-same-matter-by
21	the-adverse by_a partyy-the-across-examination=v-fhedirect
22	exominationmustbe-completed-before-the-cross-examination
23	begins-unless-the-court-otherwisedirects other than the
24	direct_examiner•
27	
25	(2) ####################################

sanctioned-by-lawy of ascertaining in a judicial proceeding the truth respecting a question of facts including but not limited to witness testimony, writings, physical objects, or other things presented to the senses.

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- (3) A "leading question" is a question which suggests to the witness the answer which the examining party desires to--denominated--a---#leading---question#---or---#suggestive question=v---On--a--direct-examination-leading-questions-are not-attomedy-except-in-the-sound--discretion--of--the--court under--special--circumstances--making--it--appear--that--the interests-of-justice-require-it.
- 12 (4) "Proof" is the---effect---of---evidencey the establishment of a fact by evidence. 13
- 14 (5) A "witness" is a person whose declaration under 15 oath is received as evidence for any purpose, whether such 16 declaration be made on oral examination or by deposition or affidavit." 17
- 18 Section 2. Section 26-1-102, MCA, is amended to read: 19 #26-1-102. Definitions kinds of evidence. 20 (1) (a) "Conclusive evidence" or-"unanswerable-evidence" is 21 that which the law does not permit to be contradicted. For 22 example: the record of a -- court -- of -- competent -- jurisdiction 23 connot-be-contradicted-by-the-parties-to-ity
  - (b) No evidence is by law made conclusive or unanswerable unless so declared by this-code statute.

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(2) "Cumulative evidence" is additional evidence of				
the same character to the same point.				
•				
131 "Corroborative evidence" is additional evidence of				
a different character to the same point.				
f5fibl "Direct evidence" is that which proves the a				
fact indisputedirectly without an inference or				
presumptiony and which in itself, if true, conclusively				
establishes that fact. For-exampley-if-the-factindispute				
beanagreementy-the-evidence-of-a-witness-who-was-present				
and-witnessad-the-making-of-it-is-direct.				
(4)(a)(5) "Indirectevidence" "Circumstantial				
evidence is that which tends to establish the g fact in				
dispute by proving another and which, though true, does not				
of itself conclusively establish that fact but affords an				
inference or presumption of its existence. Ferexempleye				
witnessprovesanadmissionofthe-party-to-the-fact-in				
dispute This-proves-6-fact-from-which-the-fact-indispute				
<del>is-inferredu</del>				
{b}Indirect-evidence-is-of-two-kinds+				
†††† <del>nferencesy-and</del>				
<del>(ff)-prosumptions-</del>				
(5)(6) "Prima facie evidence" is that which suffices				

1	But-At-Wak-atterward-pe-Lelecten-abou-brook tuge cuete-12 in
2	such-records"
3	Section 3. Section 26-1-201, MCA, is amended to read
4	*26-1-201. Questions of law. All Except as provided in
5	Article II. section 7. of the Montana constitution. all
6	questions of law, including the admissibility of testimony
7	the facts preliminary to such admission, the construction of
8	statutes and other writings, and other rules of evidence
9	are-to must be decided by the courtey-and-all-discussions-of
10	taw-addrassed-to-itw-Whenever-the-knowledge-of-the-court-is
11	bythiscodeymadeevidenceofa-facty-the-couft-is-to
12	dectare-such-knowtedge-to-the-juryy-which-is-bownd-to-accept
13	tto"
14	Section 4. Section 26-1-202, MCA, is amended to read
15	#26-1-202. Questions of fact. All If a trial is by
16	jurys_all questions of facty-where-thetrialisbyjurys
17	other than those mentioned in 26-1-201 areto must be

Section 5. Section 26-1-203, MCA, is amended to read:

#26-1-203. Who to judge effect or and value of
evidence. The jury, subject to the control of the court, in

which shall decide such question."

decided by the jury, and all evidence thereon is-to must be

addressed to them, except when as otherwise provided by this

code law. If the trial of a question of fact is not by jurys

all evidence thereon must be addressed to the trial courts

for-the-proof-of proves a particular fact until contradicted

and overcome by other evidence. For example, the certificate

of-a-recording-officer-is-prime-feete-evidence-of-a--recordy

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is to be distrusted in others;

1	the-coses-specified-in-this-code, is the judge of the effect
2	or <u>and</u> value of evidence addressed to it, except when the
3	evidence is declared to be conclusive. <u>The court is the</u>
4	judge_of_the_effect_and_value_of_evidence_addressed_to_it.*
5	Section 6. Section 26-1-302, MCA, is amended to read:
6	#26-1-302. Witness presumed to speak the truth how
7	<u>presumption_rebutted</u> . A witness is presumed to speak the
8	truth. This-presumption,-howevery-mayberepelledbythe
9	monnerinwhichhetestifiesybythecharacter-of-his
10	testimonybyevidenceaffectinghismotivesorhis
11	characterfortruthyhonestyyorintegrityyorby
12	contradictory-evidence; and the jury or the court in the
13	absence_of_a_jury is the exclusive Judge of his credibility.
14	This presumption may be controverted and overcome by any
15	matter that has a tendency to disprove the truthfulness of a
16	witness: testimony: such matters include but are not limited
17	to:
13	(1) the demeanor or manner of the witness while
19	testifyingi
20	(2) the character of the witness* testimony:
21	(3) bias of the witness for or against any party
22	involved in the case:
23	(4) interest of the witness in the outcome of the
24	litidation or other motive to testify falsely:

1	integrity:
2	161 the extent of the witness* capacity and
3	opportunity_to_perceive_or_capacity_to_recollect_or_to
4	communicate any matter about which he testifies:
5	(7) inconsistent statements of the witness:
6	181_an_admission_of_untruthfulness_by_the_witness:
7	191 other evidence contradicting the witness!
8	testimony."
9	Section 7. Section 26-1-303, MCA, is amended to read:
10	#26-1-303. Instructions to jury on how to evaluate
11	evidence. The jury is to be instructed by the court on all
12	proper occasions that:
13	(1) that their power of judging of the effect of
14	evidence is not arbitrary but to be exercised with legal
15	discretion and in subordination to the rules of evidence;

legally accountable for the acts of the accused ought to be viewed with distrusty--and--the--evidence--of--the--oral

(2) that they are not bound to decide in conformity

(3) that a witness false in one part of his testimony

(4) that the testimony of an-accomplice a person

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with the declarations of any number of witnesses which do

not produce conviction in their minds, against a less number

or against a presumption or other evidence satisfying their

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(5) the witness\* character for truth. honesty. or

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admissions-of-a-	porty-with-c	antion:

t5}--that-evidence-is-to-be-estimated-not-only--by--its
own--intrinsic--weight--but--also--according-to-the-evidence
which-it-is-in-the-pawer-of-ans-side-to-produce-and--of--the
other-to-centradict;-and-the-safere

tot151 that if weaker and less satisfactory evidence is offered when and it appears that it is within the power of the party to offer stronger and more satisfactory was within-the-power-of-the-party avidence, the evidence offered should be viewed with distrust."

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

"26-1-401. Who has the burden of producing evidence."

The party-holding-the-effirmative-of-the-issue-must--produce the-evidence-so-prove-tty-the-efforey-the initial burden of proof-lies producing evidence as to a particular fact is on the party who would be defeated if no evidence were given on either side. Thereafters the burden of producing evidence is on the party who would suffer a finding against bim in the absence of further evidence."

Section 9. Section 26-1-402, MCA, is amended to read:

"26-1-402. Who has the burden of persuasion. Each

Except as otherwise provided by laws a party must-prove—his

own--efftruntive—allegations—Evidence—need-not-be-given-in
support-of-a-negative-allegations—except—when-such--negative
allegation—is--an--assential—part—of-the-statement-of-the

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1	right-or-title-on-which-the-cause-of-action-is-foundedynor
5	eveninsuchcasewhen-the-allegation-is-a-denial-of-the
3	existence-of-a-document;-the-custody-of-which-belongs-to-the
4	opposite-party has the burden of mersuasion as to each faci
5	the existence or ponexistence of which is essential to the
6	claim for relief or defense he is asserting."
7	Section 10. Section 26-1-501, MCA, is amended to read
. 8	#26-1-501. Inference defined. An Winference is
9	deduction which the reason-of-the-jury-makes trigg of fact
10	may_make from the focts-provedy-without-on-express-direction
11	of-the-low-to-that-effect avidence."
12	Section 11. Section 26-1-601, MCA, is amended to read
13	#26-1-601. Completelist List of conclusive
14	presumptions. The following presumptions and-no-others are
15	deemed conclusive:
16	{i}a-malicious-and-guilty-intenty-from-the-deliberat
17	commission-of-an-unlowful-act-for-thepurposeofinjurin
18	enother;
19	<del>{2}thetruthof-the-facts-recitedy-from-the-recita</del>
20	in-a-written-instrument-betwoen-the-parties-thereto-or-thei
21	successors-in-interest-by-a-subsequent-titlat-but-thisrul
22	does-not-apply-to-the-recital-of-a-consideration;
23	(3)(1) the truth of a declaration, act, or omission of

a partye as against that party in any litigation arising out

of such declaration, act, or omission, whenever e-party he

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1	has, by hisown such declaration, act, or omission,
2	intentionally anddeliberately led another to believe a
3	particular thing true and to act upon such beliefy-he-eannot
4	in-any-litigation-arising-out-of-such-declarationyactyor
2	omission-be-permitted-to-falsify-it;
6	†4†121_that a tenant is not permitted to deny the
7	title of his landlord at the time of the commencement of the
8	relation;
9	(5)the-issue-of-e-wife-cohabitingwithherhusband
10	whaisnotimpotentisindisputablypresumedtobe
11	†egitimate;
12	<del>(6)</del> (3) the judgment or order of a court, when which is
13	declared by this-code statute to be conclusive;butsuch
14	judgmentor-order-must-be-offeged-in-the-pfeadings-if-there
15	be-an-opportunity-to-do-sot-if-there-be-no-such-opportunity+
16	the-judgment-or-order-may-be-used-es-evidence;
17	(7)(4) any other presumption which, by statute, is
18	expressly made conclusive."
19	Section 12. Section 26-1-602, MCA, is amended to read:
20	#26-1-602. Definitionandexamplesofdisputable
21	<u>Disputable</u> presumptions. All other presumptions are
22	satisfactoryifuncontradictedwTheyaredemominated
23	"disputable presumptions" and may be controverted by other

evidence. The following are of that kind:

(1) that-a A person is innocent of crime or wrongta

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1	(2) thatan An unlawful act was done with an unlawful
2	intent;
3	(3) that-a ≜ person intends the ordinary consequence
4	of his voluntary acts
5	(4) that——a ▲ person takes ordinary care of his own
6	concerns† <sub>4</sub>
7	(5) that-evidence Evidence willfully suppressed would
8	be adverse if produced <sub>f</sub> ,
9	(6) thathigher <u>More_satisfactory</u> evidence would be
10	adverse from-inferiory-being-produced; if weaker and less
11	satisfactory evidence is offered and it is within the power
12	of the party to offer more satisfactory evidence.
13	(7) that-money <u>Money</u> paid by one to another was due to
14	the latter
15	(8) that—e ▲ thing delivered by one to another
16	belonged to the latterta
17	(9) thatan When the instrument evidencing an
18	obligation <u>has been</u> delivered up to the debtor <u>. the</u>
19	obligation has been paid;
20	(10) thatformer <u>Prior</u> rent or installments have been
21	paid when a receipt for <del>latter later rent or installments</del> is

produced\*\*

owned by himta

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1	(2) thaten An unlawful act was done with an unlawfu
2	intent;
3	(3) thet-e ≜ person intends the ordinary consequence
4	of his voluntary acts
5	(4) that—a ▲ person takes ordinary care of his own
6	concerns† <sub>4</sub>
7	(5) that-evidence <u>Exidence</u> willfully suppressed would
8	be adverse if produced†æ
9	(6) thathigher <u>More satisfactory</u> evidence would be
0	adverse from-inferiory-being-produced; if weaker and les
1	satisfactory evidence is offered and it is within the power
2	of the party to offer more satisfactory evidence.
.3	(7) that-money <u>Money</u> paid by one to another was due to
4	the latter∳▲
.5	(8) thata A thing delivered by one to anothe
6	belonged to the latterts

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(11) that-things Ihings which a person possesses are

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exercisin	g lf_b	e exercises	acts	of.	ownership	over	it	or	from
there is	COMMON	reputation	of hi	s e	ounershipt.				

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- (13) thete A person in possession of an order on himself for the payment of moneyeren or the delivery of a thinge has paid the money or delivered the thing accordingly.
- 7 (14) that--e & person acting in a public office was 8 regularly appointed to Item
- 9 (15) that-official duty has been regularly
  10 performed.
- 11 (16) that—a A court or judger acting as such, whether
  12 in this state or any other state or country, was acting in
  13 the lawful exercise of its or his jurisdictions.
- 14 (17) that—a A judicial record, when not conclusive,
  15 does still correctly determine or set forth the rights of
  16 the partiests
  - (18) that--eff All matters within an issue were laid before the jury and passed upon by them, and, in like manner, that all matters within a submission to arbitration were laid before the arbitrators and passed upon by them;
- 21 (19) that--private Private transactions have been fair 22 and regularts
- 23 (20) that-the <u>The</u> ordinary course of business has been 24 followedta
- 25 (21) that--a A promissory note or bill of exchange was

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- given or endorsed for a sufficient consideration
- 2 (22) that-on An endorsement of a negotiable promissory
  3 note or bill of exchange was made at the time and place of
  4 making the note or billta
- 5 (23) thetre A writing is truly dated;
- 6 (24) that-a A letter duly directed and mailed was
  7 received in the regular course of the mailta
- 8 (25) <u>There is an identity of persons from when there is</u>
  9 an identity of names pages.
- 10 (26) that—a A person not heard from in 7 years is
  11 deadta
- 12 (27) that-acquiescence <u>Acquiescence</u> followed from a

  13 belief that the thing acquiesced in was conformable to the

  14 right or factta
- 15 (28) that-things Ihings have happened according to the
  16 ordinary course of nature and the ordinary habits of lifets
- 17 (29) that--persons Persons acting as partners have
  18 entered into a contract of partnershipts
- 19 (30) that—— A man and a woman deporting themselves as
  20 husband and wife have entered into a lawful contract of
  21 marriagets
- (31) thet-a & child born in lawful wedlock, there being
   no divorce from bed and board, is legitimate;
- 24 (32) that--o A thing once proved to exist continues as 25 long as is usual with things of that nature.

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(33	) that-the	The	Там	has	been	obeved+.

t347-that-a-dacument-or-writing-more-thon-30-years--old
t3--genutney--when--the--same-has-been-since-generally-acted
upon-as--genutne--by--persons--having--an--interest--in--the
question--and-its-custody-has-been-satisfactorily-axalainedt

t357£341 that-a A printed and published book purporting to be printed or published by public authority was so printed or published.

t367(35) that-a A printed and published book purporting to contain reports of cases adjudged in the tribunals of the state or country where the book is published contains correct reports of such casests.

t377(26) that-a Δ trustee or other person whose duty it was to convey real property to a particular person has actually conveyed to him. when—such Ihls presumption applies when it is necessary to perfect the title of such person or his successor in interests.

the public of land for a burial ground for 5 years, with the consent of the owner and without a reservation of his rights, is-presumptive-evidence-of-his-intention he intended to dedicate it to the public for that purposets.

†39<u>†(38)</u> that--there <u>There</u> was a good and sufficient consideration for a written contract.\*\*

Section 13. Section 26-1-607, MCA, is amended to read:

1 \*\*26-1-607\* When writings of a decedent prima facie
2 evidence. The entries and other writings of a decedent, made
3 at or near the time of the transaction and when the decedent
4 was in a position to know the facts stated therein, may-be
5 reed-es are prima facie evidence of the facts stated
6 therein, in the following cases:

- 7 (1) when the <u>writing\_or</u> entry was made against the B interest of the person making it;
- 9 (2) when it was made in a professional capacity and in 10 the ordinary course of professional conduct;
- 11 (3) when it was made in the performance of a duty
  12 specially enjoined by lawa"

Section 14. Section 26-1-622, MCA, is amended to read:

#26-1-622. Official reports and records made pursuant
to federal law prima facie evidence. An official written
report or record, or duly certified copy thereof, that a
person is dead\_or\_alixe: missing\*i missing in action\*i
interned in a neutral country\*i or beleaguered, besieged, or
captured by an enemy or-+-dead-or-is-alive, made by any
officer or employee of the United States authorized by the
ect--referred--to--in--26-1-62i--or--by-any-other law of the
United States to make same, shall be received in any court,
office, or other place in this state as prima facie evidence
that such person is dead\_or\_alixe: missing\*: missing in
action\*i interned in a neutral country\*i or beleaguered\*

besieged, or captured by an enemy or-is-dead-er-is-alive, as the case may be."

Section 15. Section 26-1-623, MCA, is amended to read:

#26-1-623. Presumption of authenticity of finding.

report, or record. For the purposes of 26-1-621---end

26-1-622, any finding, report, or record or duly certified

copy thereof purporting to have been signed by such an

officer or employee of the United States as is described in

said-sections that section shall prima facie be deemed to

have been signed and issued by such an officer or employee

pursuant to law, and the person signing same shall prima

facie be deemed to have acted within the scope of his

authority. If a copy purports to have been certified by a

person authorized by law to certify the same, such certified

copy shall be prima facie evidence of his authority so to

certify.\*\*

Section 16. Section 26-1-805, NCA, is amended to read:

"26-1-805. Doctor-patient privilege. A Except as

provided in Rule 35. Montana Rules of Civil Procedure. a

licensed physician or surgeon cannot, without the consent of
his patient, be examined in a civil action as to any
information acquired in attending the patient which was
necessary to enable him to prescribe or act for the
patient."

Section 17. Section 26-2-104, MCA, is amended to read:

1 w26-2-104. Disobedience — how punished. Disobedience
2 to a subpoena or a refusal to be sworn or to answer as a
3 witness or to subscribe an affidavit or deposition, when
4 required, may be punished as a contempt by the court or
5 officer issuing the subpoena or requiring the witness to be
6 so sworn, to so answer, or to so subscribe; and if the
7 witness be a party, his complaint or answer may be stricken
8 out.\*\*

Section 18. Section 26-2-302, MCA, is amended to read: #26-2-302. Witness required to answer questions. A witness must answer questions legal and pertinent to the matter in issue though his answer may establish a claim against himself, but he need not give an answer which will have a tendency to subject him to punishment for a felony, nor need he give an answer which will have a direct tendency to degrade his character unless it be to the very fact in issue or to a fact from which the fact in issue would be presumed. But--a-witness-must-answer-as-to-the-fact-of-his previous-conviction-for-felonyw" 

Section 19. Section 26-2-404. MCA, is amended to read:

"26-2-404. Affidavit of arrested witness -exoneration of arresting officer. (1) An officer is not
liable to-the-party for making the arrest in ignorance of
the facts creating the exoneration but is liable for any
subsequent detention of the party witness if such party

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L	ctain	witness_claims	the	exemption	and	make	makes	an
2	affidavit stating that:							

- 3 (a) he has been served with a subpoena to attend as a
  4 witness before a court, officer, or other person, specifying
  5 the same, the place of attendance, and the action or
  6 proceeding in which the subpoena was issued;
- 7 (b) he has not thus been served by his own procurement 8 with the intention of avoiding arrest; and
- 9 (c) he is at the time going to the place of 10 attendance, returning therefrom, or remaining there in 11 obedience to the subpoena.
- 12 (2) The affidavit may be taken by the officer and 13 exonerates him from liability for discharging the witness 14 when arrested.
- 15 <u>NEW SECTION</u>. Section 20. Repealer. Sections 26-1-107, 16 26-1-108, and 26-1-621, MCA, are repealed.

-End-