Montana Law Review

Volume 30
Issue 2 *Spring 1969*

Article 8

1-1-1969

Official Written Statements

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OFFICIAL WRITTEN STATEMENTS

THE GENERAL RULE

Evidence of a statement which is made other than by a witness while testifying in court and is offered to prove the truth of the matter stated is hearsay evidence.[1] Such evidence is inadmissible unless it meets the conditions of an exception established by law. One of the important exceptions to the hearsay rule is the admission of Official Written Statements as evidence. The common law doctrine of this exception is that a written statement of a public official which he had a duty to make, and which he has made upon personal knowledge and observation, is admissible as evidence of the facts stated therein.[2] This exception is also referred to as the Public Documents exception, but the term Official Written Statementse is preferable because it is less ambiguous. Official Written statements are those writings made by a public employee,[3] under the authority of an express or implied duty. On the other hand, the term Public Documents does not limit the statement to those made by a public officer or employee. Under this term, the statement may or may not be admissible depending on how public is interpreted.

The Official Statement as evidence qualifies as an exception to the hearsay rule because it is supported by a special necessity and a probability of trustworthiness. The necessity principle, which is found in all the exceptions to the hearsay rule, is not strictly applied in the Official Statement exception. Something less than impossibility of obtaining testimony from the declarant is sufficient to allow admission of the Official Statement as evidence. Were there no exception for Official Statements public officials would find themselves spending the greater part of their "working" time testifying as witnesses. The exception is also justified by the fact that the official written statement is probably more reliable than the memory of a public official. His memory would, in many situations, need refreshing through reference to the Official Statement.

The second condition for allowing the exception is that there is a probability of trustworthiness to the evidence. The Official Statement exception is trustworthy because only those statements of a public official which he had a duty to make will be admitted, and the presumption is that the duty has been properly performed.[4] No express statute or regulation should be needed for creating the duty or authority to

[1]Uniform Rules of Evidence, Rule 63; Calif. Evid. Code § 1200 (1965).

[2]McCormick, *Evidence*, §§ 291-295 (1954); 5 Wigmore, *Evidence*, §§ 1630-1684 (3d ed. 1940) (hereinafter cited as Wigmore); 32 C.J.S. Evidence, §§ 626-675.

[3]A public employee is an officer, agent or employee of a public entity. Whether the official is elected or appointed would seem of no significance.

[4]R.C.M. 1947, § 93-1301-7 (15) provides the prima facie presumption that "official duty has been regularly performed."

make the statement. It is the existence of the duty and not the source which is the governing circumstance.[5] Whether any given statement was made under an official duty depends upon the subject matter of the statement, its form, and the nature of the office. Where the nature of the office requires or renders appropriate the making or recording of a certain statement, that statement is made or recorded under an official duty.[6] When it is part of the duty of a public officer to make a statement as to a fact coming within his official cognizance, it is safe to presume that the duty has been correctly performed. However, the statement is admissible only so far as the duty exists to make it. Another element which makes the statement trustworthy as evidence is the fact that the official who prepared the statement did not prepare it with the expectation that it would be entered as evidence in future litigation. He probably was completely unbiased in preparing the report or record. He was merely performing his duty under the authority expressly or impliedly granted in him as a result of his position.

TYPES OF OFFICIAL STATEMENTS

Official Statements emanate from different sources. They may be broadly classified as emanating from a certain territory and sovereign department. They may issue from four jurisdictions: local; another state; foreign State; or Federal. They may be prepared by three classes of officials: legislative, judicial, or executive or administrative. Classification of Official Statements focuses on the form and custody of the statement. Official Statements may be included within three types: records, returns or reports, and certificates. Distinctions between the three types may have important consequences in determining admissibility of the statement.

A record is a series of statements recorded by entries in a single volume or file. They are usually made regularly and are preserved in official custody. A record is generally admissible without statutory authority to keep it. Wherever there is a duty or authority for a public officer to do an act or observe an occurrence, there is an implied duty or authority to enter in a record what was done or observed. By statute in Montana, public writings, which are records of acts,[7] are divided into four classes: laws, judicial records, other official documents, and public records, kept in Montana, of private writings.[8] A return is a statement made from something personally done or observed by a public officer, while a report is a statement dealing with the results of his investigation of something that occurred outside his presence. A return or report is drawn separately as occasion demands. Generally

[5] 5 Wigmore, § 1633.
[6] *Id.*
[7] R.C.M. 1947, § 93-1001-2.
[8] R.C.M. 1947, § 93-1001-6.

an express statutory authority to make the statement is necessary to allow admission of a report. A certificate is an official representation that some act or event has or has not occurred. This type includes a certified copy which is a copy of a statement, signed as a true copy by the officer who has custody of the original. A certificate is given to an applicant's use. It is not preserved by the public officer and it is not a series of entries in a single file. As with a report, an express statutory authority is necessary for its admission.[9]

THE EXCEPTION IN MONTANA

A. Under R.C.M. 93-1001.

Before the adoption of the *Uniform Official Reports as Evidence Act* in Montana[10] the only official statements which qualified as admissible evidence were public writings[11] within the meaning of R.C.M. 1947 § 93-1901. This chapter is very limited as to what statements are admissible. Generally, only records made in the performance of a duty are admitted under this chapter. Thus, reports of public officers are not included within the scope of the chapter.

The Supreme Court of Montana has held that the record of a selective service board, required by Federal law to be preserved, was admissible to prove that the defendant was older than a certain age where the Federal law required registration of persons older than that age and where defendant was registered.[12] In another decision[13] the Montana Court held an official document from Yugoslavia admissible as evidence under R.C.M. 1947, § 93-1001-30 (8),[14] where the document was a certificate executed by the Minister of Justice of Yugoslavia. As has been stated, public writings, which include official documents, are defined, by statute as the written acts or records of public officers, whether of Montana, another state, the United States, or a foreign country.[15] Official documents may be proved by the original or a certified copy, and include documents of a sister state, a foreign country or

[9] 5 Wigmore, § 1636.

[10] R.C.M. 1947, §§ 93-901-1 o 901-5.

[11] R.C.M. 1947, § 93-1001-2: "Public writings are: 1. The written acts or records of the acts of the sovereign authority, of official bodies and tribunals, and of public officers, legislative, judicial and executive, whether of this state, of the United States, of a sister state, or of a foreign country; 2. Public records, kept in this state, of private writings."

[12] *State v. Kocher*, 112 Mont. 511, 119 P.2d 35 (1941). In this case defendant was charged with the crime of committing lewd and lascivious acts upon a female child, and the statute required that a defendant must be over the age of eighteen.

[13] *In Re Esate of Ginn*, 136 Mont. 338, 347 P.2d 467 (1959). This case involved a petition for determination of reciprocity of inheritance rights on behalf of heirs living in Yuogslavia. The documents presented in evidence were used to prove reciprocity.

[14] This section provides that an official document of a foreign country may be proved with a certificate that the document is valid and subsisting in such country.

[15] R.C.M. 1947, § 93-1001-2.

the United States.[16] Thus, if a statement is a record made in the performance of a duty it probably would be admitted in Montana without regard to the jurisdiction of the preparing public officer.

R.C.M. 1947, § 93-1001-32 has been cited several times by the Montana Court in determining admissibility of Official Statements. This provision provides:

> Entries in public or other official books or records, made in the performance of his duty by a public officer of this state, or any other person in the performance of a duty specially enjoined by law, are prima facie evidence of the facts stated therein.[17]

In *State v. Vinn*,[18] the Court admitted a county school census, which was required to be preserved by law, as prima-facie evidence of the age of the prosecuting witness. The case of *State v. Ray*[19] was an action for larceny of public funds brought against a county treasurer. The State, over defendant's objection, introduced the report of a deputy state examiner as to the result of his investigation of the county office. The report was based on books, records and affidavits in the office, and was authorized by a statute. The precise question was whether the entries made in the report were "entries in public or other official books or records" within the meaning of the statute.[20] The Court held that the statement was not within the meaning of the statute, and therefore, it was inadmissible as evidence as a public record.[21] Thus, in effect, the principle deductible from *State v. Ray* is that records made by public officers of Montana are admissible as prima-facie evidence of the facts therein, but that reports of investigations by public officers concerning causes and effects are inadmissible as public records.

In 1921 the Montana Court held that letters to third persons were not public records.[22] In that case letters written by the forest supervisor at the United States forestry office were denied admission because they were merely incidental to the affairs of the office, which, while relating to the affairs of the office, did not constitute public records. Further, the Court stated that even if the letters were public records, they were

[16]R.C.M. 1947, § 93-1001-30.

[17]A similar provision is R.C.M. 1947, § 93-1001-38 which states:
An entry made by an officer, or board of officers, or under the direction and in the preesnce of either, in the course of official duty, is prima-facie evidence of the facts stated in such entry.

[18]50 Mont. 27, 144 P. 773 (1944). Defendant was charged with statutory rape. The census was admitted, after identification by the superintendent of schools, to prove that the prosecutrix was under eighteen years of age. See also *Smith v. Armstrong*, 121 Mont. 377, 198 P.2d 795 (1948). Reports made by the livestock inspector were admitted as public records, in an action for conversion.

[19]88 Mont. 436, 294 P. 368 (1930).

[20]R.C.M. 1947, § 93-1001-32.

[21]*Supra*, note 18 at 444.

[22]*Ryan v. Morrison*, 59 Mont. 30, 195 P. 836 (1921).

not identified as required by statute to entitle them to be admitted in evidence.[23]

B. Under R.C.M.LL93-901

In order to supplement the chapter on public writings and in order to allow more official statements to be entered as evidence, in 1937, Montana adopted the *Uniform Official Reports As Evidence Act*.[24] The principal provision of this Act, which is parallel to R.C.M. 1947, § 93-1001-32, provides:

> Written reports or findings of fact made by officers of this state, on a matter within the scope of their duty as defined by statute, shall, in so far as relevant, be admitted as evidence of the matters stated therein.[25]

Although this section parallels R.C.M. 1947, § 93-1001-32, it is much broader and more flexible than the latter statute with respect to the types of statements within its scope. R.C.M. 1947, § 93-1001-32 covers only "entries in public or other official books or records," whereas R.C.M. § 93-901-1 covers "written reports or findings of fact." The former includes records, while the latter includes all reports within the scope of the statutory duty of the officer, so that it seems broad enough to cover letters and memoranda and investigative reports. It also seems to dispense with the common law requirement of personal knowledge,[26] although usually the report would be based in part on personal knowledge and in part on the statements of others. The official probably has a special competence, from experience or study, for gathering and interpreting the information available, thus, allowing the admission of more Official Statements is reasonable and desirable. If the statement is made by a public officer in the performance of the functions of his office and concerns acts which he is required to do, or about which it was his duty to make findings, it should fall within the Official Written Statements exception to the hearsay rule.

It is difficult to determine the precise effect of decisions and Montana statutes in combination because the decisions have not been frequent enough to develop a general rule. The only reported case interpreting R.C.M. § 93-901-1 is *Richardson v. Farmers Union Oil Company*.[27]

The *Richardson Case* involved an action for personal injuries sustained when a fuel oil container exploded. Air Force accident reports,

[23] *Id.* at 37. (If they were public records, they were records of the United States government and could be admissible only under R.C.M. 1907, § 7924 (R.C.M. 1947, § 93-1001-30 (9)).

[24] 9A Uniform Laws Annotated 571 (1965); R.C.M. 1947, §§ 93-901-1 to 901-5; the act has been adopted in various forms by twenty-nine states.

[25] R.C.M. 1947, § 93-901.1.

[26] *See generally* McCormick, *Can The Courts Make Wider Use of Reports of Official Investigation?*, 42 Iowa L. R. 363 (1956); Comment, *Evaluative Reports by Public Officials—Admissible as Official Statements?*, 30 Texas L. Rev. 112 (1952).

[27] 131 Mont. 538, 312 P.2d 184 (1957).

written under the authority of an Air Force regulation, were prepared by various military personnel. There was a delay of over three weeks from the time of the fire before an examination of the fuel oil was made, and it did not appear that anyone connected with the preparation of the reports was an expert on fuels and their tendencies. The final report sought to be admitted contained various incompetent opinions and conclusions establishing the cause of the explosion. The Supreme Court of Montana found that the first report prepared contained an unsupported opinion, that this opinion was carried forward to later reports, that the later reports did not use the wording of the foundational reports, and that no expert's conclusion was used to establish the cause of the explosion, yet a conclusion as to the cause was in the report. The Court held that the sources of information were not sufficient to justify admission of the report.[28] The Court also held that the report was not admissible undedr R.C.M. 1947, § 93-901-1, because it was not prepared by an officer of Montana as is required by that statute.[29]

The statute clearly states that the report or finding of fact must be made by an officer of the State of Montana and the courts must follow that express requirement. It would seem that if a report was made under the statutory authority of another jurisdiction, it should be as admissible as a report made under an official duty by an officer of this state. The essential fact is the official duty.[30] One report should be no more trustworthy than the other. However, the Court's function is to interpret and apply the law as it exists and not to re-write it. Thus, any changes must be legislative.[31]

Two other major provisions of the *Uniform Official Reports As Evidence Act* as adopted in Montana provide protection for the adverse party. The first states that the party offering the report must deliver a copy of the report to the adverse party a reasonable time before trial, "unless in the opinion of the trial court and adverse party has not been unfairly surprised" by the failure to deliver a copy.[32] This provision should be sufficient to prevent an unfair advantage from occurring as a result of surprise. The other provision states that the adverse party may cross-examine the person making the report or any person furnishing information used in the report, but the fact that such testimony is not obtainable does not affect the admissibility of the report, unless the court finds the adverse party is unfairly prejudiced thereby.[33] Such provisions as these place a heavy responsibility on the trial judge, but

[28] *Id.* at 533.

[29] *Ibid.*

[30] 5 Wigmore, § 1633 at p. 518, § 1652.

[31] Texas has substantially adopted the *Uniform Official Reports As Evidence Act* and, as amended in 1961, it has included sections relating to admission of Federal, another state, and foreign statements. *See* Vernon's Ann. Civ. St. of Tex. art. 3731 a, §§ 1-6.

[32] R.C.M. 1947, § 93-901-2.

[33] R.C.M. 1947, § 93-901-3.

broad discretion in the trial judge should benefit, not hinder, the judicial function.

Montana did not adopt the provision of the *Uniform Act* which provides that acts inconsistent with the *Uniform Act* are repealed.[34] Although not expressly stated, the Official Statement exception is subject to statutes imposing classified or confidential use. The immediate purpose for keeping some reports confidential varies,[35] but the basic and ultimate reason is that the State has a justifiable interest in restricting the use of such reports.

C. Lack of Record as Proof of Non-Occurrence

Since the presumption is that an official fulfills his duty, it is logical that if a duty exists to record certain occurrences, and no record of such occurrences is found, then the absence of an entry is evidence that the situation did not occur.[36] The *Montana Rules of Civil Procedure* provide that a written statement signed by the custodian of a record that after diligent search no record has been found to exist is admissible as evidence that the records of his office contain no such record or entry.[37] This official statement as an exception is justified by the necessity for providing an uncomplicated method of proving the absence of a public record.

CONCLUSION

The general principle is that an Official Written Statement of a public officer which he had a duty to make will be admitted as evidence of the facts therein. This principle is given broad and flexible application in Montana by the *Uniform Official Reports As Evidence Act.* Even though written reports or findings of fact may now be admitted as evidence, other states which have passed the *Uniform Act* or similar provisions have held that opinions or conclusions as to the legal effect of the facts stated will not be admissible.[38] The act does provide for the admission of results of investigations, but it is necessary that the findings were made by officers of Montana. It seems desirable that the rule be extended to include reports made by any public officer, whether that

[34]*Uniform Official Reports As Evidence Act* § 6.

[35]e.g., *State v. Yegen,* 74 M 126, 238 P. 603 (1925) (bank reports made by state examiner); *Morrison v. City of Butte,* 150 Mont. 106, 431 P.2d 79 (1967) (accident report filed with police.) (This was not an Official Statement because it was not made by public officer, but the Court held the statement inadmissible because by statute it was confidential.).

[36]Wallace, *Official Written Statements,* 46 Iowa L. Rev. 256, 269 (1961).

[37]M.R. Civ. P., Rule 44 (6); *See also* Cal. Evid. Code 1284 (1965).

[38]See *Hartford Accident and Indemnity Co. v. Frazier,* 362 S.W.2d 417 (Tex. 1962) (conclusion in audit report); *Carson v. Metropolitan Life Ins. Co.,* 100 N.E.2d 197 (Ohio 1951). (In absence of any direct testimony as to suicide, statement in coroner's report that death was by suicide was an opinion, not a fact, and therefore inadmissible.)

officer be of Montana or not. This would, of course, result in admission of otherwise inadmissible testimony, but when the statements are subjected to the requirements of necessity and reliability, they should be no less valid as admissible evidence in one jurisdiction than in another. In any event, liberal application of the Official Written Statement exception to the hearsay rule would produce smoother trials, and would advance just determination of controversies.

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