

## Opinion No. 52

Theaters—Licenses—Taxation—Motion Picture Theaters—Statutes—Attorney General, Opinions Thereof.

**Held:** That Section 84-3201 (2434) Revised Codes of Montana, 1947, as amended, does not apply to motion picture theaters unless the theater presents other performances that bring it within the section.

That Section 84-3205 (2439) Revised Codes of Montana, 1947, was impliedly repealed by Chapter 91, Laws of 1937, and that the carrying forward of Section 84-3205 into the 1947 Codes and the adoption of the Codes by the 1951 Legislative Assembly does not thereby revive Section 84-3205.

December 22, 1951.

Mr. Lloyd A. Murrills  
County Attorney  
Glacier County  
Cut Bank, Montana

Dear Mr. Murrills:

You have asked me whether the County Treasurer should collect license taxes from motion picture theaters under the provisions of either or both Sections 2434 or 2439, Revised Codes of Montana, 1935, which are Sections 84-3201 and 84-3205, respectively, of the 1947 Revised Codes of Montana.

In giving you my opinion I shall consider these Sections, 84-3201 and 84-3205, supra, separately.

On January 3, 1935, the Attorney General in opinion No. 18 at page 17 of Volume 16, held that Section 84-3201 (2434) Revised Codes of Montana, 1947, did not apply to motion picture theaters as such. I quote from the opinion as follows:

"Section 2434, R. C. M., 1921 relating to theater licenses, was enacted in 1903, before the day of moving pictures. After moving pictures began to be shown generally, the legislature evidently felt that this section did not apply to them, or that they should pay a different license and therefore enacted Section 2439 R. C. M. 1921, which applies to moving pictures exclusively. As long as a

place exhibits moving pictures, the \$25 per annum license is therefore all that it would be required to pay." (Emphasis supplied)

Section 84-3201 (2434), supra, has been amended three times since the above mentioned opinion was written—in 1935, 1945, and 1949. It now reads as follows:

"1. Each proprietor of a billiard, pool, or bagatelle table not kept exclusively for family use, for each table three dollars and seventy cents (\$3.70) per quarter, but no license must be granted for a term less than three (3) months; and for a bowling alley ten dollars (\$10.00) annually for each alley

2. The manager or lessee of every theater (not a variety or concert theater) one hundred dollars (\$100.00) per annum; except that in towns of a population of three thousand five hundred (3500) or less, in cases where no monthly license is paid, a license of two dollars (\$2.00) for each single performance must be paid; for each single exhibition of opera or concert singer (not exhibited in any theater where a yearly license is paid); for each variety or concert theater, whether an admittance fee is charged or not, seventy-five dollars (\$75.00) per month; for every circus or menagerie, including side-shows, one hundred and twenty-five dollars (\$125.00) per day; but no license must be collected from any amateur exhibition or concert for school or charitable or religious purposes, from any county, district or state agricultural fairs, rodeo associations, or from any veterans organizations not conducted for private gain.

Provided the county treasurer shall not issue any license for circuses, side-shows, carnivals, menageries, wild west shows, animal shows or tent shows to be held or performed within a period of thirty days just prior to or during the holding of any local, county, district or state fair or rodeo without first obtaining the written consent of the board of county commissioners of the county where application is made for such licenses to operate such shows.

3. For each pawnbroker, fifty-five dollars (\$55.00) per quarter.

4. For each keeper of an intelligence office, ten dollars (\$10.00) per quarter.

5. For each keeper of a shooting gallery, for gain, fifteen dollars (\$15.00) per quarter." (emphasis supplied)

The underlined has been added since the 1935 opinion was written.

Whether Section 84-3201 (2434), supra, is applicable to motion picture theaters depends upon two contentions:

(1) That it was applicable to motion picture theaters in 1935; or,

(2) That because of the subsequent amendments it has been made to apply to movie theaters.

I agree with the reasoning and the holding of Opinion No. 18 of Volume 16 that the Section did not apply to motion picture theaters at the time the opinion was written. Besides, there is language in *State ex rel. Griffin v. Greene*, 104 Mont. 460; 67 Pac. (2d) 995, indicating that Section 84-3201 (2434) does not apply to motion picture theaters. In this case Chapter 91, Laws of 1937, providing for the licensing of motion picture theaters, was attacked on constitutional grounds. See page 464 of the Montana Reports, where it is said:

"It is contended that the classification is arbitrary because it excludes vaudeville and other forms of entertainment from the operation of the Act. This contention cannot be sustained. There is no showing made here that there are any exclusively vaudeville theaters in the state to which the Act could be made applicable if the legislature so desired. If there be any such they are separately taxed under an existing statute (sec. 2434, Rev. Codes). Moreover, we cannot say that there is not such a substantial difference between them and a moving picture theater to justify different treatment by the legislature. A strictly vaudeville theater, where it exists, offers employment and a means of livelihood to many more people than the moving picture theater. This difference alone would justify different treatment, or at least warrant us in assuming that the legislature in making the classi-

fication did so in the exercise of judgment and discretion, and not arbitrarily." (emphasis supplied)

In addition, it is to be noted that none of the amendments since 1935 have changed the wording of that part pertaining to theaters. This indicates a legislative acquiescence in the interpretation of Opinion 18, supra.

Does the fact that this code section has been amended several times since the writing of the opinion and after motion picture theaters came into existence make the law now include these theaters? I think not.

Section 43-510, Revised Codes of Montana, 1947, answers this latter question. It reads:

"(9) Effect of Amendment.

Where a section or a part of a statute is amended, it is not to be considered as having been repealed and re-enacted in the amended form, but the portions which are not altered are to be considered as having been the law from the time when they were enacted, and the new provisions are to be considered as having been enacted as the time of the amendment."

The Supreme Court of Montana has often said:

"Where a statute or section of the Code is amended merely by adding to or taking therefrom, the portions carried forward in the new law is not a new law, but has been the law since the beginning." *State ex rel. State Board of Equalization v. Jacobson*, 107 Mont. 461, 464; 86 Pac. (2d) 9. *In re Wilson's Estate* 102 Mont. 178; 56 Pac. (2d) 733; 105 A. L. R. 367. *Northern Pacific Railway Co. v. Dunham*, 108 Mont. 338; 90 Pac. (2d) 506.

This statutory construction shows that the portion of Section 84-3201 (2434) relating to theaters is the same law today as it was in 1935 when Opinion 18, Volume 16, supra, was written.

Therefore, it is my opinion that Section 84-3201 (2434) Revised Codes of Montana, 1947, as amended, does not apply to motion picture theaters unless the theater presents other performances that bring it within the section.

Turning now to Section 84-3205 (2439) Revised Codes of Montana, 1947, we note that it was enacted in 1913 and reads now, as it did then, as follows:

"(2439) Moving Pictures Shows— Amount of License. No license shall be required for the operation or exhibition of moving picture shows in any city, town, or village where the population does not exceed one thousand five hundred. In all other cities the license shall be twenty-five dollars per year."

By Chapter 91, Laws of 1937, the Legislature passed a more comprehensive licensing act for motion picture theaters than Section 84-3205 (2439), supra. This act provides for licensing by the State Board of Equalization, and that the license fees be based upon the gross proceeds from ticket sales.

On February 5, 1940, in Opinion No. 196, at page 208 of Volume 18, Opinions of the Attorney General, the Attorney General held:

"Since Chapter 91, Laws of 1937, is in conflict with Section 2439, R. C. M., 1935, (now Section 84-3205, R. C. M., 1947) in respect to the movie theaters to be taxed, in the amount of the tax, in the officers charged with collection of the tax and the use of the funds collected said Section 2439 is repealed by said Chapter 91."

To hold that Section 84-3205 is now operative would require either overruling the opinion made in 1940, or finding that subsequent acts of the Legislature have served to re-enact this section. Section 2439, Revised Codes of Montana, 1935, has been carried forward into the 1947 codes as Section 84-3205, but has never been amended since it was first enacted in 1913.

The Supreme Court of Montana said in *State ex rel. Barr v. District Court*, 108 Mont. 433; 91 Pac. (2d) 399, that although an opinion of the Attorney General is not binding upon the Supreme Court, even though acquiesced in by several legislative sessions, it is entitled to respectful consideration and will be upheld if not palpably erroneous. I do not find Opinion 196 of Volume 18 erroneous.

Does the carrying forward of this section into the 1947 Codes and the adoption of the Codes by the 1951 Legislative Assembly now make Section 84-3205, (2439) operative? I think not. The Code Commissioners in annotating noted that this Section had been held to have been impliedly repealed by Chapter 91, Laws of 1937, in Opinion No. 196 of Volume 18. By Section 4 of Chapter 266, Laws of 1947, it was contemplated by the Legislature that Code Sections that might have been repealed by implication would be placed in the 1947 Codes. This Section 4 reads in part:

"The following modifications in the requirements by Chapter 184, Session Laws of Montana, 1945, are hereby made and the Code Commissioner is hereby authorized to eliminate from the Revised Codes of Montana of 1947, the following matters now specified in said Chapter 184. \* \* \*

(d) References to opinion of the Attorney General excepting those cases where the Attorney General has held an Act unconstitutional or no longer operative." (emphasis supplied)

Moreover, when a statute repealed by implication is carried forward into the new Codes it does not thereby become a law. *State v. Zorn*, 99 Mont. 63; 41 Pac. (2d) 513, and *State v. Holt*, 121 Mont. 459; 194 Pac. (2d) 651.

Therefore, it is my opinion that Section 84-3205 (2439), Revised Codes of Montana, 1947, was impliedly repealed by Chapter 91, Laws of 1937, and that the carrying forward of Section 84-3205, into the 1947 Codes and the adoption of the Codes by the 1951 Legislative Assembly does not thereby revive Section 84-3205.

Very truly yours,  
ARNOLD H. OLSEN  
Attorney General