

Opinion No. 42**Driving While Intoxicated—Statutes,
Repeal of—Abatement of Actions**

HELD: 1. Sections 32-1107 and 32-1108, R.C.M., 1947, were not repealed until July 1, 1955, and those sections were in full force and effect during the period from March 10, 1955, until July 1, 1955. There was no hiatus or gap in time during which there was not a valid law in Montana governing the driving of a motor vehicle while intoxicated.

2. In a case where judgment of conviction was pronounced prior to July 1, 1955, and the case was not appealed within the time allowed by law, the judgment is final, and is not affected by the repeal of Sections 32-1107 and 32-1108, R.C.M., 1947. No such conviction may be set aside, and no fine may be returned or driver's license restored.

3. All pending appeals from judgments of conviction upon charges of driving while intoxicated under Sections 32-1107 and 32-1108, R.C.M., 1947, should be prosecuted to judgment in the District Courts.

December 6, 1955.

Mr. Gordon T. White
County Attorney
Valley County
Glasgow, Montana

Dear Mr. White:

You have requested my opinion on several questions raised by the enactment of Chapter 263, Laws of 1955, known as the "Montana Uniform Act Regulating Traffic on Highways." This chapter repealed more than thirty-five existing statutes regulating highway traffic, and replaced them with a complete codification in one hundred fifty-nine (159) sections.

Your first question is as follows:

Were sections 32-1107 and 32-1108, R.C.M., 1947, in fact repealed on March 10, 1955, the date of approval of Chapter 263, Laws of 1955, by the Governor, thereby leaving a hiatus or gap in time when there was no valid law in Montana governing the driving of

a motor vehicle while intoxicated, due to the fact that Chapter 263 was not effective until July 1, 1955?

Section 158 of Chapter 263, *supra*, is the repealing clause, and provides:

"Section 158. Repeal. That sections 32-107, Revised Codes of Montana, 1947, as amended by section 1, chapter 94, laws of 1949, 31-108, Revised Codes of Montana, 1947, as amended by section 1, chapter 118, laws of 1949, 31-109, 32-801, 32-802, 32-803, 32-804, 32-805, 32-806, 32-1011, 32-1015, 32-1017, 32-1101, 32-1102, 32-1103, Revised Codes of Montana, 1947, as amended by section 1, chapter 70, laws of 1949, 32-1104, 32-1105, 32-1106, 32-1107, 32-1108, 32-1109, 32-1111, 32-1132, 32-1133, 32-1134, 32-1135, 32-1136, 32-1137, 32-1138, 32-1139, 32-1140, 32-1141, 32-1142, 32-1146, 32-1611, 32-1612, 69-1913, 69-915, Revised Codes of Montana, 1947, and all acts and parts of acts in conflict herewith are hereby repealed." (emphasis supplied.)

Section 159, of Chapter 263, *supra*, provides for the time of taking effect:

"Section 159. Time of Taking Effect. This act shall be in full force and effect from and after July 1, 1955."

The act was approved by the Governor on March 10, 1955.

It is a fundamental principle of law that all portions of an act, the repealing clauses as well as the constructive provisions, take effect at the same time unless there is a positive command within the act itself that they take effect at different dates. No such positive command appears in Chapter 263, *supra*. Only one effective date is specified, and that date is July 1, 1955. The rule of law in such cases was concisely stated in Board of Education of Ogden vs. Hunter, 48 Utah 373, 159 Pac. 1019:

"The law is also well settled that in case a statute is made effective only from a future date, but, in terms repeals the former law upon the subject, the repealing clause becomes effective only at the time the statute goes into effect . . ."

Other cases to the same effect are State vs. Paul, 87 Wash. 83, 151 Pac. 114; State vs. Williams, 173 Ind. 414, 90 N.E. 754; Grant vs. Alpena, 107 Mich. 335, 65 N.W. 230; State vs. Edwards, 136 Mo. 360, 38 S.W. 73; Schneider vs. Hussey, 2 Ida. 8, 1 Pac. 343; Ex Parte Ah Pah, 34 Nev. 283, 119 Pac. 771; Atkinson vs. N.P. Ry. Co., 53 Wash. 673, 102 Pac. 876; Walker vs. Lanning, 74 Wash. 253, 133 Pac. 462.

The principle has also been endorsed in Montana in the cases of In re McDonald, 49 Mont. 454, 143 Pac. 947, and State ex rel. Hay vs. Anderson, 49 Mont. 387, 142 Pac. 210.

It is therefore my opinion that Sections 32-1107 and 32-1108, R.C.M., 1947, were not repealed until July 1, 1955, and that those sections were in full force and effect during the period from March 10, 1955, until July 1, 1955. There was no hiatus or gap in time during which there was not a valid law in Montana governing the driving of a motor vehicle while intoxicated.

You have also asked whether records of convictions should be expunged, fines remitted, and drivers' licenses restored in those cases where persons were convicted of driving while intoxicated during the period March 10, 1955, to July 1, 1955.

Since there was a valid law which governed driving while intoxicated during the period mentioned, convictions secured under that law were regular and proper, and may not be set aside. However, a similar problem is raised by the actual repeal of Sections 32-1107 and 32-1108, *supra*, on July 1, 1955. It has been contended that such a repeal of a penal statute without a clause specifically saving all pending prosecutions immediately abates all actions then pending, including those on appeal, and discharges all judgments of convictions secured under the law during its existence. The last of these contentions, that the repeal of a penal statute discharges all judgments of conviction secured under it, has never been given serious consideration by the courts. Such a discharge of judgments would amount to a legislative pardon, and an infringement of the power constitu-

tionally granted to the executive branch. (See 89 A.L.R. 1518, 1519, and cases cited.)

The rule has been stated in Montana in this manner:

“The general rule, applicable here is that, when a statute of this character is repealed without a saving clause, it must be considered, **except as to proceedings past and closed**, as if it had never existed . . .” (emphasis supplied.) (First National Bank vs. Barto, et al., 72 Mont. 437, 233 Pac. 963.)

It is therefore my opinion that in a case where judgment of conviction was pronounced prior to July 1, 1955, and the case was not appealed within the time allowed by law, the judgment is final, and is not affected by the repeal of Sections 32-1107 and 32-1108, supra. No such conviction may be set aside, and no fine may be returned or driver's license restored.

A different situation is involved in those cases in which a judgment of conviction was appealed within the time allowed by law. A number of such cases have been called to my attention, and are now pending in the district courts of the state. Since each such case involves a different set of facts, with possibly different legal consequences, no general principle may be laid down. Further, it would not be proper for this office to attempt to decide legal questions which are presently before the courts.

It is therefore my opinion that all appeals from judgments of conviction upon charges of driving while intoxicated under Sections 32-1107 and 32-1108, R.C.M., 1947, should be prosecuted to judgment in the district courts.

Very truly yours,
ARNOLD H. OLSEN,
Attorney General.