377.

MOTOR VEHICLES — CHAUFFEUR — INCIDENTAL OPERATION OF EMPLOYER'S VEHICLE, CHAUFFEUR, WHEN.

SYLLABUS:

The amendment of Section 6290, *General Code, by the* 91st *General Assembly,* 116 *O.L.* 286, *defining the term "chauffeur' does not serve to include within the definition of this term an employe who operates his employer's motor vehicle as an incident to his employment for other purposes, and the driving of such motor vehicle on behalf of his employer merely as incidental to the performance of the duties of his regular employment, does not make such employe a "chauffeur." (Opinions of the Attorney General for* 1934, *Vol. I, page* 193, *followed.)*

COLUMBUS, OHIO, April 1, 1937.

FRANK T. CULLITAN, *Prosecuting Attorney, Cleveland, Ohio.*

DEAR SIR: This is to acknowledge receipt of your recent communication, which reads as follows:

> "We respectfully request an opinion from you concerning the interpretation of Paragraph 15, Section 6290 of the General Code of Ohio, which defines the term 'chauffeur.'
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> On February 24, 1934, the Attorney General of Ohio defined the meaning of the word 'chauffeur' and it is stated in 1934 Attorney General Opinions No. 2312 at page 195 that an employee who operates his employer's motor vehicle is not a 'chauffeur' within the meaning of Paragraph 15 of Section 6290 of the General Code of Ohio, if the operation of such vehicle is merely incidental and secondary to his employment for other purposes.
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> On March 11, 1935, certain changes were made in Section 6290 but Paragraph 15 remained the same.
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> On September 4, 1935, there again were certain additions made to Section 6290 and there was an addition made to Paragraph 15, which now reads:
>
> > ' "Chauffeur" means any operator who operates a motor vehicle as an employe or for hire, or any operator whether or not the owner of the vehicle operating such vehicle for transportation, for gain, compensation or profit, either (1) persons, or (2) property owned by another.'

When an employee of a company solicits orders for and sells beer and in the course of his employment delivers the beer from the truck, which truck is owned by the employer, is it necessary for the employee to secure a chauffeur's license?

We should appreciate an opinion from you concerning this matter."

Your question involves a consideration of the last amendment of Section 6290, General Code, in so far as that section defines the term "chauffeur" as used in the statutes requiring such persons to be licensed. This section was twice amended by the 91st General Assembly, first in House Bill 112, 116 O.L. 286, defining the term "chauffeur" as set forth in your letter, and again in House Bill 538, 116 O.L. 474, passed May 23, 1935, seven days after the passage of House Bill 112, making no further change in the definition of this term.

Specifically, I understand your inquiry to be one of whether or not the opinion of my predecessor rendered February 24, 1934, is still declarative of the law with respect to employes who operate their employers' motor vehicles as an incident in the performance of other duties. The factual situation you present apparently is one where truck drivers are not employed primarily as such but, I presume, rather in some other capacity since you make specific reference to this 1934 opinion. Of course, if under the facts you present the truck drivers may be said to be employed as such they were required under the law prior to the amendment above referred to to be licensed as chauffeurs. See Opinions of the Attorney General for 1930, Vol. I, page 164 and Opinions of the Attorney General for 1933, Vol. III, page 165. The amendment of Section 6290, General Code, here under consideration, did not contract the definition of "chauffeur" in this respect and obviously such opinions are still applicable.

It might be further observed in passing that in your letter you refer to what apparently constitutes peddling beer from trucks. As to this, the provisions of Section 6064-20, General Code, as to the locality where a licensee may conduct his business under a license issued by the Department of Liquor Control, might be worthy of consideration. No opinion is, however, expressed as to this phase of your inquiry.

Prior to amendment by House Bill 112, supra, the term "chauffeur" was defined as follows:

"'Chauffeur' means any operator who operates a motor vehicle as an employee or for hire."

By the above mentioned amendment, there was added to this definition the following:

> "Or any operator whether or not the owner of the vehicle, operating such vehicle for transporting, for gain, compensation or profit, either (1) persons, or (2) property owned by another."

A mere cursory reading of the new language added to the definition of "chauffeur" would indicate that the intention of the legislature in passing this amendment was to enlarge the definition theretofore contained in the law by making it include the operator of a vehicle, first, whether or not the owner, and, second, who transports either another's property or persons, so long as he does it for gain, compensation or profit.

It becomes necessary to consider what construction was placed upon the previous definition of the term "chauffeur" prior to this amendment.

As to the first apparent purpose of the amendment, being that the law shall apply to persons regardless of ownership, reference is made to an opinion of this office appearing in Opinions of the Attorney General for the year 1930, Vol. I, page 164, at 166, wherein it was said:

> "The definition of chauffeur, however, as contained in paragraph 15 of Section 6290, supra, does not only include the operator of a motor vehicle as an employee, but also includes one who operates a motor vehicle for hire. I am of the view that any operator who operates a motor vehicle for hire is a chauffeur within the meaning of the section regardless of who owns the motor vehicle operated by him. In other words, if a motor vehicle is operated for hire, the pertinent consideration is the use to which the vehicle is put and not the ownership thereof. Certainly a taxicab driver is operating a motor vehicle for hire and is a chauffeur as defined in the section regardless of who owns the taxicab."

The next apparent purpose of the amendment, being that to include the hauling of property owned by another, as well as persons, was held to be within the purview of the former law in an opinion appearing in Opinions of the Attorney General for 1933, Vol. III, page 1765, the tenth branch of the syllabus reading as follows:

> "If a person owns a truck and drives it himself for contract hauling for commercial purposes, he is required to take out a chauffeur's license."

The element of gain, compensation or profit has always been a necessary element in determining who is a chauffeur, since the statute heretofore covered only employes or operators for hire. Profit, compensation or gain is recognized as a necessary incident to employment or hire.

The question resolves itself into a consideration as to what effect may be given to this amendment, particularly with reference to the matter of incidental employment. When a law is amended, there is a presumption that it was the purpose of the General Assembly to effect some change or difference in the effect or operation of such law, but that presumption prevails only to the extent of the change in the language thereof. In *Board of Education* vs. *Boehm,* 102 O.S. 292, this principle is set forth in the first branch of the syllabus:

> "When an existing statute is repealed and a new and different statute upon the same subject is enacted, it is presumed that the legislature intended to change the effect and operation of the law to the extent of the change in the language thereof."

Close scrutiny of the additional language added to the definition of "chauffeur" by the 91st General Assembly reveals no inference on the part of the legislature from which may be implied any intention to bring within the definition of the term "chauffeur" those operators of motor vehicles who may be operating a motor vehicle of another transporting either persons or property for gain or compensation so long as such operation is purely incident to some other employment. In so far as this matter of incidental operation of a motor vehicle is concerned, the statute is in no respects different than it was before amendment. The opinion of this office referred to in your letter reported in Opinions of the Attorney General for 1934, Vol. I, page 193, referred to a number of cases where employes are incidentally engaged in the operation of their employers' motor vehicles. The second, third, fourth and fifth branches of the syllabus of that opinion read as follows:

> "2. A salesman who solicits orders, as well as delivers the products which he himself sells, such as a bread or milk salesman, is not a "chauffeur" within the contemplation of Section 6290 of the General Code merely because incidental to such employment he operates a motor vehicle owned by his employer.
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> 3. An employe, hired by a gas company to read gas meters and whose regular duties consist of reading such, is not a 'chauffeur' within the contemplation of Section 6290 of the General Code merely because he operates a motor vehicle owned by his employer in the performance of such duties.
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> 4. A person employed by a telephone or electric light company as repairman or 'trouble shooter', merely because he operates a motor vehicle owned by his employer in the per-

formance of such duties, is not a 'chauffeur' within the contemplation of Section 6290 of the General Code.

5. A person whose primary and regular employment is that of a farm hand is not a 'chauffeur' within the contemplation of Section 6290 of the General Code merely because occasionally he drives his employer's truck to and from market carrying farm products."

The previous law having been construed as not applying to cases of incidental operation or motor vehicles, the conclusion is inescapable that had the General Assembly intended to change this law so as to render that construction no longer applicable or justified, the terms of the amended statute would have been so changed as to effectuate that intention. This principle is clearly stated in Lewis' Sutherland Statutory Construction, 2nd Edition, Vol 2, pages 929 and 930, wherein it is said:

"It is presumed that the legislature is acquainted with the law; that it has a knowledge of the state of it upon the subjects upon which it legislates; that it is informed of previous legislation and the construction it has received. * * * The re-enactment of a statute after a judicial construction of its meaning is to be regarded as a legislative adoption of the statute as thus construed. So, where the terms of a statute which has received a judicial construction are used in a later statute, whether passed by the legislature of the same state or country, or by that of another, that construction is to be given to the later statute; for if it were intended to exclude any known construction of a previous statute, the legal presumption is that its terms would be so changed as to effectuate that intention."

While not directly pertinent to a determination of the specific question here under consideration, it may be observed in closing that the legislature has heretofore amended statutes so as to remove any possible uncertainty or ambiguity theretofore existing. The previous statute was somewhat ambiguous in its application to drivers of motor vehicles who were transporting for gain or profit property of another, as well as persons, and also somewhat ambiguous in its application to operators of motor vehicles who were operating their own conveyances; it required opinions of this office to extend the previous statute to cases of this nature. An amendment of this nature so recognized by the Supreme Court was the act of May 28, 1919, 108 O.L. Pt. 1, 707, amending Section 4736, with respect to the filing of remonstrances with a

county board of education against the transfer of territory from one school district to another. In the decision of the case of *Board of Education* vs. *Board of Education,* 112 O. S. 108, the court said at p. 114, after referring to such amendment:

> "This amendment removed any uncertainty in the act, if any theretofore existed, and specifically gave the filing of the remonstrance the effect contended for by defendant in error."

In view of the foregoing and in specific answer to your inquiry, it is my opinion that the amendment of Section 6290, General Code, by the 91st General Assembly, 116 O.L. 286, defining the term "chauffeur" does not serve to include within the definition of this term an employe who operates his employer's motor vehicle as an incident to his employment for other purposes, and the driving of such motor vehicle on behalf of his employer merely as incidental to the performance of the duties of his regular employment, does not make such employe a "chauffeur."

Respectfully,
HERBERT S. DUFFY,
Attorney General.

378.

APPROVAL—CONTRACT FOR THE IMPROVEMENT OF HIGHWAYS IN THE CITY OF AKRON, OHIO.

COLUMBUS, OHIO, April 1, 1937.

HON. JOHN J. JASTER, JR., *Director of Highways, Columbus, Ohio.*

DEAR SIR: You have submitted for my approval a contract by and between the State of Ohio by John J. Jaster, Jr., Director of Highways, and the City of Akron, Ohio, by its City Council, providing for the cooperation of the City of Akron, Ohio, with the State of Ohio for the improvement of a portion of Miller Avenue, Steiner Avenue, Ira Avenue, South Main Street and High Street, described as follows:

> "The separation of grades of the tracks of the Baltimore and Ohio Railroad Company, the Erie Railroad Company and the Pennsylvania Railroad Company and South Main Street and East Miller Avenue, located at a point near the intersection of South Main Street and Miller Avenue in Akron, Summit County, State of Ohio."