

construction of a similar statute was made in *State vs. Gormley, supra* (53 Wash. 543); the court saying of an incumbent elected to succeed himself:

"He cannot decline to qualify, and continue in office under his former tenure. One in this situation must hold under his new term or not at all. The term of office will not expire until the successor, though it be himself, is elected and qualified under the decision in the Tallman case (24 Wash. 426, 64 Pac. 759), but, unless he qualifies under his new tenure he forfeits the right to hold under either' and there is no reason why it should not be held that paragraph 221, subdivision 9, is a lawful and constitutional provision, so far as it requires the incumbent re-elected to an office to qualify as prescribed by law for the new term, *or suffer the loss of the office.*"

It should be stated that in the foregoing case the court also considered and quoted the paragraph 381 of the Arizona Revised Statutes, 1913, Civil Code, which provides that there shall be elected in each precinct "at the general election to be held in the year 1914, and biennially thereafter, one justice of the peace, who shall hold his office for the term of two years from the first day of January following his election, and *until his successor is elected and qualified.*" Obviously, the foregoing italicized provision is identical to the provision in sections 4255 and 4384 of the Ohio General Code.

In other words, the court concluded that even though the additional term (until his successor is elected and qualified) is, while it exists, ordinarily as much a part of the term of the incumbent as is his regular term, and no vacancy is created when the successor fails to qualify, such does not follow when the successor who is elected and who fails to qualify is the incumbent of the office.

Hence, it seems clear that, under the foregoing authorities, the mayor and marshal here under consideration may not now continue in office under their old term and thus receive their former salary.

The facts submitted by the solicitor clearly authorize a distinction between the legal question predicated thereon and the questions under consideration by the court in the Ohio cases cited by him. These Ohio cases are accordingly not controlling in a determination of the question here under consideration and should be distinguished therefrom.

Specifically answering your inquiry, it is my opinion that incumbents in the office of mayor and marshal of a village who were reelected to the same offices may not refuse to qualify for their new terms and retain office under their old terms for the purpose of avoiding a salary reduction made by council before the time for the commencement of such officers' new terms.

Respectfully,

JOHN W. BRICKER,

Attorney General.

2312.

CHAUFFEUR—INTERPRETATION OF SECTION 6290, GENERAL CODE—
PERSON EMPLOYED FOR PRIMARY PURPOSE OF OPERATING
MOTOR VEHICLE AND SO OPERATES MOTOR VEHICLE MUST
BE REGISTERED AS CHAUFFEUR.

SYLLABUS:

1. *An employe who operates his employer's motor vehicle is not a "chauffeur" within the contemplation of Section 6290 of the General Code, if the operation of*

such vehicle is merely incidental and secondary to his employment for other purposes. 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."

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.*

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.*

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 performance 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.*

6. *Operators of state, county or city owned motor vehicles employed primarily to drive motor vehicles are "chauffeurs" within the contemplation of Section 6290 of the General Code, even though they are classified on the payrolls as "laborers" or otherwise.*

7. *A regular school bus driver or a substitute school bus driver is a "chauffeur" within the contemplation of Section 6290 of the General Code, regardless of the ownership of the school bus.*

8. *A taxicab operator, operating solely within the city limits, does not require a state chauffeur's license if the municipality by ordinance has imposed a local "driver's" license.*

9. *An operator of a motor vehicle used to deliver mail who is employed by the Post Office Department and uses a government owned motor truck, is not a "chauffeur" within the contemplation of Section 6290, General Code.*

COLUMBUS, OHIO, February 24, 1934.

HON. GLEN M. DAILY, Registrar of Motor Vehicles, Columbus, Ohio.

DEAR SIR: I am in receipt of your recent communication which reads as follows:

"In the matter of chauffeur registration this bureau has attempted to be guided by Opinion No. 1691 rendered by your predecessor under date of March 28, 1930. From that opinion we are unable to advise the inquiring public as to exactly who is and who is not a chauffeur. Because we are confronted daily with this problem, will you kindly give us your opinion at the earliest possible date of the following?

1. Is an operator of a motor vehicle a chauffeur when the driving is secondary to other employment? To be more specific, an employe is hired to perform certain duties, part of which consist of driving a motor vehicle. Does this make such employe a chauffeur?

2. Is a salesman, employed as such, a chauffeur when operating a motor vehicle owned by his employer either in the delivery of goods or calling upon customers for orders, or both? This is with particular reference to operators making deliveries of milk and bread.

3. Is an employe, hired by a gas company to read gas meters, a chauffeur when operating a motor vehicle owned by the company in the performance of his duties?

4. Is a repairman, or 'trouble shooter', employed as such by a telephone company or an electric light or service company, a chauffeur when operating a motor vehicle owned by the company in the performance of his duties?

5. Is a farm hand a chauffeur when part of his duties consist of driving a truck to and from market for his employer who owns the truck and products carried?

6. Do operators of state, county, or city owned motor vehicles employed primarily to drive motor vehicles and who drive motor vehicles require chauffeur registrations even though such operators are classified on payrolls as 'laborers' or otherwise?

7. Is a driver of a school bus, including a substitute driver, a chauffeur regardless of whether such school bus is publicly owned or owned by the driver or any other person?

8. Is a taxi-cab operator a chauffeur regardless of the ownership of the taxi-cab and regardless of whether or not a municipality by ordinance imposes a local 'driver's license' upon such operator?

9. Is an operator of a motor vehicle used to deliver mail a chauffeur whether or not the motor vehicle is owned by the operator or by the U. S. Government?

10. Is a person a chauffeur who hauls his neighbor's milk to market in his own truck for which compensation is received?"

Section 6302, General Code, provides as follows:

"A person operating a motor vehicle, as chauffeur, shall file, annually, by mail or otherwise, with the director of highways, or his duly authorized agent, upon blanks prepared under the authority of the director of highways, an application for registration. The director of highways shall appoint examiners and cause examinations to be held at convenient points throughout the state, as often as may be necessary.

Before any certificate of registration is granted, the applicant shall pass such examination as to his qualifications as the director of highways shall require. No chauffeur's certificate of registration shall be issued to any person under sixteen years of age. Every application for certificate of registration as chauffeur shall be sworn to before some officer authorized to administer oaths, and must contain the name and address of the applicant, together with a statement that he is of sound mind and memory and physically competent to operate a motor vehicle, together with a description of the vehicle, the trade name and kind or kinds of motor vehicles he is competent to operate, and whether or not such applicant has been convicted of violating a provision of this chapter or the penal statutes relating thereto, giving the date or place of such conviction, and the provisions of law so violated. Such said application for registration as chauffeur of a motor bicycle, motorcycle or motor tricycle shall be accompanied with a registration fee of one dollar, and such said application for registration as chauffeur of any other motor vehicle shall be accompanied by a registration fee of three dollars."

Section 6303, General Code, relates to non-residents registered as chauffeurs in their state of residence.

Section 12624, which is part of the criminal code, provides:

“Whoever operates a motor vehicle as a chauffeur, without filing in the office of the director of highways the application required by law and paying the legal fee therefor, shall be fined not more than fifty dollars or suspended from the right to apply for registration as a chauffeur for one year, or both.”

Section 12625, General Code, provides for an additional penalty for subsequent offenses.

Subsection 14 of Section 6290, General Code, provides:

“14. ‘Operator’ includes any person who drives or operates a motor vehicle upon the public highways.”

Subsection 15 of Section 6290 lays down the legislative definition of chauffeur as follows:

“15. ‘Chauffeur’ means any operator who operates a motor vehicle as an employee or for hire.”

Inasmuch as the question “Who is a chauffeur within the contemplation of these sections?” has been a controversial one for a number of years, I shall give a short resume of the more important opinions of this office on the subject rendered by me and my predecessors in office. The legislative definition of the term “chauffeur” was identical to the present definition when construed in these other opinions.

In an opinion of my immediate predecessor in office, found in Opinions of the Attorney General for 1930, Vol. 1, at page 164, it was held as disclosed by the syllabus:

1. An operator of a school bus used to transport pupils to and from a schoolhouse is a chauffeur within the meaning of Section 6290, General Code, and should be registered after having made application and successfully passed an examination as to qualifications as set forth in Section 6302, General Code.

2. Any person who is employed for the purpose of operating a motor vehicle, and so operates a motor vehicle, must be registered as a chauffeur.”

At page 166 of this opinion, it was stated:

“ * * * it follows from what has been said that when a truck driver, delivery car driver or any other person *is employed to operate a motor vehicle* belonging to the employer, be it a *county, township, corporation or natural person*, he is clearly a chauffeur within the meaning of the section here under consideration.” (Italic the writer’s).

In a later opinion, found in Opinions of the Attorney General for 1930, Vol. I, page 511, it was held as disclosed by the syllabus:

"1. When the director of public safety of a municipality or the superintendent or any engineer of the waterworks of such municipality operates municipally owned motor vehicles, he is not a chauffeur within the meaning of Section 6290, General Code, and is not required to be so registered.

2. The operation of a motor vehicle of the employer by an employe, which operation is incidental, intermittent and secondary to his employment for some other purpose, does not necessarily make such employe a chauffeur within the meaning of the law.

3. Police patrols or fire trucks belonging to or used by the police or fire departments of a municipality are not motor vehicles within the meaning of the law relating to the registration of chauffeurs, and, therefore, members of such police or fire departments assigned to operate such patrols or trucks are not chauffeurs within the meaning of the law and are not required to be so registered."

At pages 512 and 513, it was reiterated:

"* * * 'When a truck driver, delivery car driver or any other person is employed to operate a motor vehicle belonging to the employer, be it a county, township, corporation or natural person, he is clearly a chauffeur within the meaning of the section here under consideration. A person employed to operate a motor vehicle belonging to the employer certainly operates it "as an employe."

"* * * it is obvious that the director of public service, the superintendent and engineers of the waterworks are not employed to operate motor vehicles of the municipality in the sense that a truck driver is employed for that purpose. Of course, such officials or employes may operate such vehicles incidentally in the performance of their duties. The question for determination then becomes whether or not a person who is employed primarily for some service to be rendered to the employer other than the operation of the employer's motor vehicles is 'employed to operate a motor vehicle belonging to the employer', notwithstanding the fact that incident to such person's employment, he may be called upon from time to time to operate such motor vehicle. * * * a chauffeur is defined in Section 6290, General Code, as 'Any operator who operates a motor vehicle as an employe * * *.' Perhaps a strict construction of this language might lead to the conclusion that whenever an employe operates a motor vehicle belonging to his employer in connection with his employment, notwithstanding the fact that such operation may be purely incidental to the duties he was employed to perform, such person is operating that motor vehicle 'as an employe' and is, therefore, a chauffeur within the meaning of the law. I am unable to subscribe to such strict construction.

* * * In the last analysis, this law should be given a rational and common sense construction." (Italics the writer's.)

Another opinion of my predecessor found in Opinions of the Attorney General for 1930, Vol. I, page 310, held as disclosed by the first branch of the syllabus:

"1. Persons employed by a board of education to drive a school wagon or motor van for the transportation of school pupils must be duly registered as a 'chauffeur' after making application therefor and successfully passing an examination as to his qualifications, in the manner provided in Section 6302, General Code."

In my opinion No. 1885, rendered November 17, 1933, it was held as disclosed by the tenth branch of the syllabus:

"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."

In "Cyclopedia of Automobile Law, Annotated," by Blashfield, Vol. I, at pages 169 and 170, it is stated:

"* * * Even where the statute defines a chauffeur as *any person operating or driving a motor vehicle as an employee or for hire*, one who drives an automobile on behalf of his employer merely as incidental to the performance of the duties of his regular employment is ordinarily not a chauffeur, within the statute, as where a defendant telephone repairer used an automobile furnished him by his employer to convey himself and necessary material from place to place. (Citing *People vs. Dennis*, 166 N. Y. S. 318).

A soldier in active service though required to operate a motorcycle with due care, is not a chauffeur within such statutes, and need not procure a license as such. (Citing *American Automobile Ins. Co. vs. Struve*, 218 S. W. 534)." (Italics the writer's.)

In Babbitt's "Motor Vehicle Law," it is stated at page 299:

"A chauffeur has been defined as 'one who drives or operates an automobile.' The word 'chauffeur', however, as now used, means one hired to drive a motor vehicle, a professional operator driving for another, and this *also implies that driving is his chief and not his incidental employment*. Hence an employee whose duties only incidentally require him to operate a motor vehicle is not a 'chauffeur', as in the case of a telephone repairman (citing *People vs. Dennis*, 166 N. Y. S. 318), a traveling salesman (citing *Matthews vs. State*, 214 S. W. 339), or a soldier (citing *American Auto Ins. Co. vs. Struve*, 218 S. W. 534.)" (Italics the writers).

See also *Day vs. Bush* (La.), 139 So. 42.

It is my conclusion that the following general propositions are dispositive of the first six questions you ask:

a. The operation of a motor vehicle of the employer by the employe, which operation is incidental and secondary to his employment for some other purpose, does not make such employe a chauffeur within the meaning of subsection 15 of Section 6290, General Code.

b. Any person who is employed *for the primary purpose of operating a motor vehicle* and so operates a motor vehicle must be registered as a chauffeur.

1. With reference to question number one, it is clear that an employe who operates his employer's motor vehicle is not a "chauffeur" within the contemplation of Section 6290 of the General Code, if the operation of such vehicle is merely incidental and secondary to his employment for other purposes. 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."

2. With reference to question number 2, it is clear from former opinions of this office, as well as from court decisions of other states, that a salesman who solicits orders as well as delivers products sold by him, such as a salesman soliciting orders for milk or bread, and delivering the orders which he sells, is not a "chauffeur" within the contemplation of Section 6290 of the General Code, as he is not employed primarily to operate the employer's motor vehicle, the operation of such motor vehicle being merely incidental and secondary to the performance of the primary duty of selling such products.

3. An employe hired by a gas company to read gas meters, merely because he operates a motor vehicle owned by his employer in the performance of such duties, is not a chauffeur within the contemplation of Section 6290, General Code, as the operation of such motor vehicle is merely incidental and secondary to his employment for the purpose of reading meters.

4. A person employed by a telephone or electric light company as a repairman or as a "trouble shooter," merely because he operates a motor vehicle owned by the employer in the performance of such duties, is not a chauffeur within the contemplation of Section 6290 of the General Code, as the operation of such motor vehicle is merely incidental and secondary to his employment for the purpose of making repairs.

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. Such operation is merely secondary to his primary duties or employment as a farm hand and the law in such a case must be given a rational and common sense construction.

6. Operators of state, county or city owned motor vehicles employed *primarily* to drive motor vehicles are chauffeurs within the contemplation of Section 6290, General Code, even though they are classified on the payrolls as "laborers" or otherwise.

7. With reference to your seventh question, I call your attention to Opinions of the Attorney General for 1930, Vol. I, page 164, which held as disclosed by the first branch of the syllabus:

"An operator of a school bus used to transport pupils to and from a schoolhouse is a chauffeur within the meaning of Section 6290, General Code, and should be registered after having made application and successfully passed an examination as to qualifications as set forth in Section 6302, General Code."

I am unable to differentiate between a regular and substitute school bus driver while performing the duty of transporting pupils to and from school, and moreover it is my opinion that the ownership of the bus in such a case is an

immaterial factor. They are clearly chauffeurs within the contemplation of Section 6290, General Code.

8. With reference to your eighth inquiry, I call your attention to the case of *Klein vs. City of Cincinnati, et al.*, 33 O. A. 137, which held as disclosed by the second and fourth branches of the syllabus:

"2. Sections 6302 and 6304, General Code, relating to licensing of chauffeurs, apply except in municipalities where council has acted under authority of Sections 3632 and 3714, authorizing municipalities to license drivers operating within limits of such municipality.

4. Section 3714, General Code, granting special power to municipal corporations to regulate use of street, being a grant of special power, controls Sections 6302 and 6304, General Code, relating to chauffeurs' licenses."

It was stated in this opinion at page 140:

"* * * Sections 6302 and 6304, General Code, would apply to districts of the state, except in municipalities where council has acted under authority of Sections 3632 and 3714, General Code, under which sections municipalities are authorized to license drivers within the limits of such municipalities. The construction above stated would give effect to all the laws enacted by the state, and a motorbus chauffeur operating within the limits of the city of Cincinnati would not be required to secure a state license; * * *."

Consequently a taxicab operator operating solely within the city limits would not require a state chauffeur's license as provided in Section 6290, et seq., of the General Code, if the municipality has by ordinance imposed a local "driver's" license on such operators.

9. With respect to your ninth question, I call your attention to the case of *Johnson vs. State of Maryland*, 254 U. S. 51, the headnotes of which read:

"A law of a State penalizing those who operate motor trucks on highways without having obtained licenses based on examination of competency and payment of a fee, can not constitutionally apply to an employe of the Post Office Department while engaged in driving a government motor-truck over a post-road in the performance of his official duty."

Consequently, it is my opinion that an operator of a motor vehicle used to deliver mail who is employed by the Post Office Department and uses a government owned motor truck, is not a "chauffeur" within the contemplation of Section 6290, General Code.

10. In response to your tenth inquiry, I direct your attention to the tenth branch of the syllabus of Opinion No. 1885, rendered to you on November 17, 1933. I believe you will find the principles therein set forth dispositive of this question.

Specifically answering your inquiries, it is my opinion that:

1. An employe who operates his employer's motor vehicle is not a "chauffeur" within the contemplation of Section 6290 of the General Code, if the operation

of such vehicle is merely incidental and secondary to his employment for other purposes. 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."

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.

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.

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 performance 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.

6. Operators of state, county or city owned motor vehicles employed primarily to drive motor vehicles are "chauffeurs" within the contemplation of Section 6290 of the General Code, even though they are classified on the payrolls as "laborers" or otherwise.

7. A regular school bus driver, or a substitute school bus driver is a "chauffeur" within the contemplation of Section 6290 of the General Code, regardless of the ownership of the school bus.

8. A taxicab operator, operating solely within the city limits, does not require a state chauffeur's license if the municipality by ordinance has imposed a local "driver's" license.

9. An operator of a motor vehicle used to deliver mail who is employed by the Post Office Department and uses a government owned motor truck, is not a "chauffeur" within the contemplation of Section 6290, General Code.

Respectfully,

JOHN W. BRICKER,

Attorney General.

2313.

NOTES—COUNTY COMMISSIONERS UNAUTHORIZED TO INCREASE RATE OF INTEREST ON NOTES OR ISSUE RENEWAL NOTES WHEN—

SYLLABUS:

1. *Where a board of county commissioners has issued and sold notes in anticipation of a bond issue and fails to provide for the issuance of such bonds when the notes mature, such board has no authority to issue renewal notes or to extend the time of payment of the original notes by agreeing to pay a higher rate of interest than that specified in such notes. However, if such notes are not paid upon presentation at maturity, they continue to bear interest at the rate specified therein until they are paid.*