2873.

PEDDLER—LICENSE NOT REQUIRED WHEN DELIVERY AND COLLECTION MADE ON DATE SUBSEQUENT TO TAKING OF ORDER BY HOUSE TO HOUSE SOLICITATION—PEDDLER DEFINED.

SYLLABUS:

A person who goes from house to house and takes orders for merchandise but who makes delivery at a later date, at which time collection is made, is not required to secure a peddler's license under the provisions of sections 6347, et seq., General Code.

COLUMBUS, OHIO, June 29, 1934.

HON. WAYNE L. ELKINS, *Prosecuting Attorney, Ironton, Ohio.*

DEAR SIR:—This will acknowledge receipt of your communication, which reads in part as follows:

> "On March 1, 1934, at the request of our County Auditor, I rendered an opinion on whether or not Wholesalers or Retailers are required to have a peddler's license, a copy of which opinion I enclose herein.
>
> Several merchants, residents of West Virginia, are regularly selling goods, such as feeds, etc., in Lawrence County. These merchants send their agents to Lawrence County, who go from house to house and take orders for goods. Then later the goods are delivered to the customers by automobile truck and collection made at the time of delivery. The merchants in Lawrence County are making complaint, claiming that these West Virginia merchants are peddlers paying neither license nor tax as required by the General Code of Ohio.
>
> Our law does not define the term 'peddler,' and therefore it is difficult to determine just who is a 'peddler' in each instance, and for that reason I should like to have your opinion."

Section 6347, General Code, reads as follows:

> "When a person files with the auditor of a county, under oath, which may be administered by such auditor, a statement of his stock in trade in conformity with the law requiring the listing of such stock for taxation by merchants or others, and pays to the treasurer of such county the proportionate amount of taxes on such stock in trade in conformity with law, and complies with the terms set forth in section sixty-three hundred and forty-nine, such auditor shall issue to him a license to peddle such stock anywhere in this state."

Section 6349, General Code, provides the method for computing the license fees to be charged such peddlers. By virtue of section 6347, supra, a peddler is required to take out a license in only one county, and this license permits him to peddle his stock in trade over the entire state, subject to the right of municipalities to require an additional license. Your inquiry raises the question as to what constitutes peddling within the meaning of section

6347, supra. Webster defines peddling as traveling about and selling small wares. The following is to be found in 21 R. C. L. 184:

> "It is another necessary requisite of peddling that the delivery must be made at the time of sale; the sale and delivery must be one transaction. The authorities are almost unanimous in holding that a person who solicits and obtains orders for goods by the display of samples, and delivers none of the goods at the time of sale, is not a peddler. It must follow *a fortiori,* that one who takes orders without samples is not a peddler; and so it is generally held. There has grown up a drummer or commercial traveler class which is entirely different from the peddler class and the distinction has been recognized and respected. The difference between the two classes is easy to state in terms of the mischievous situation to be remedied by legislative regulations of peddlers. Those soliciting orders for future delivery almost universally do so for reliable solvent principals and, furthermore, the buyer has a period of time before delivery and payment within which to discover and rescind for fraud. Those cases cannot be explained on the theory that the drummer is held not to be a peddler because acting for another, for it is clear that an agent may be a peddler. They must be based on the principle that the manner of making the sale, namely by order, excludes the existence of peddling. In a few states, however, it is held that one who goes about from house to house taking orders for consumers for goods to be delivered in the future is a peddler. In accordance with the weight of authority it is further held that one is not a peddler although, in addition to securing the order for the goods, he subsequently delivers them. Then, of course, one who merely delivers goods previously ordered of another is not a peddler."

The term "peddling" is defined in 38 C. J. 778 as follows:

> "Going around from house to house, or from customer to customer, and selling goods, to sell at retail from place to place, going from house to house, carrying the goods to be offered for sale, traveling about and selling small wares. A single sale, if there is nothing more, scarcely comes under the denomination of 'peddling.' The term 'peddling' refers to the manner in which the business is carried on, and not to the business itself. However, it has been defined as the occupation of an itinerant vendor of goods who sells and delivers the identical goods he carries with him, and not the business of selling by sample and taking orders for goods to be thereafter delivered and to be paid for wholly or in part upon their subsequent delivery."

In 34 Am. Law Reg. 569, it was stated that there are four elements required to constitute a peddler, namely:

> "1. That he should have no fixed place of dealing, but should travel around from place to place;
>
> 2. That he should carry with him the wares he offers for sale, not merely samples thereof;
>
> 3. That he should sell them at the time he offers them, not merely enter into an executory contract for future sale; and
>
> 4. That he should deliver them then and there, not merely contract to deliver them in the future."

In the case of *City of St. Paul* vs *Briggs*, 83 Minn. 290, it was said that a peddler within the generally accepted meaning of the word is a small retail dealer who carries his merchandise with him, traveling from place to place and from house to house, exposing his goods for sale and selling them.

In the case of *South Bend* vs. *Martin*, 142 Ind. 31, it was said that a "peddler is a petty chapman, or other trading person going from town to town, or to other men's houses and traveling, either on foot or with horse or horses, or otherwise carrying to sell or exposing to sale any goods, wares, or merchandise."

The above definitions of the word "peddler" would seem to exclude the persons doing business as stated in your letter.

In the case of *State* vs. *Wells*, 69 N. H. 424, it was held that one who solicits orders for a firm having a permanent place of business in the state, without carrying any goods except those which have been previously ordered by his customers, or exposing any goods for sale, is not doing "business as a hawker or peddler," nor "exposing for sale or selling" goods, within the meaning of a statute requiring a license from peddlers.

In the case of *Stuart* vs. *Cunningham*, 88 Ia. 191, it was held that a person who delivers goods previously sold by another person is not a peddler within the meaning of an ordinance declaring that every person who sells or offers for sale any goods, etc., along the streets or at private houses shall be deemed a peddler and required to procure a license.

In the case of *Hewson* vs. *Englewood*, 55 N. J. L. 522, it was held that an agent who delivers from a wagon goods previously ordered and takes other orders for subsequent delivery is not a huckster, peddler or itinerant vendor within the meaning of the statute requiring a license from such persons.

The above principles have been adopted by the courts of this state. The Supreme Court of Ohio in the case of the *Great Atlantic and Pacific Tea Company* vs. *Village of Tippecanoe*, 85 O. S. 120, held as disclosed by the syllabus:

> "In view of the guaranties of the Bill of Rights, Section 3673 of the General Code, cannot be so interpreted as to authorize a municipal council to impose a license fee upon merchants who do not sell upon the public streets or places, but only solicit orders and negotiate future sales at the residences of their customers."

The following appears at page 126:

> "It has a fixed place from which it does business; it does not carry about the merchandise which it offers for sale; it does not sell at the time it offers for sale, but enters into contracts for future sales; it does not carry on negotiations or any part of its business upon the streets, highways or public places, but at the residences of its customers. That these features broadly and substantially distinguish its business from that carried on by hawkers, peddlers and hucksters is made clear by the dictionaries and numerous cases cited in the briefs. The apparent attempt of the village council to exercise the power assumed to be conferred by Section 3673 of the statute to require license from those who at the residences of their customers bargain to sell or solicit orders for goods, wares, or merchandise by retail, and the attempt of its officers to enforce the ordinance with that interpretation seems to require that to the interpretation of the section there be applied a limitation which the constitution imposes."

The above case was approved and followed in *City of Wooster* vs. *Evans*, 92 O. S. 504.

In addition to the above principles which would indicate that the transactions in question do not constitute "peddling", it would appear that an opposite conclusion to the one herein reached would raise serious constitutional objections on the basis of an interference with interstate commerce.

In view of the above and without further extending this discussion, it is my opinion that a person who goes from house to house and takes orders for merchandise but who makes delivery at a later date, at which time collection is made, is not required to secure a peddler's license under the provisions of sections 6347, et seq., General Code.

Respectfully,
JOHN W. BRICKER,
Attorney General.

2874.

CRIMINAL LAW—UNDER SECTION 3019, GENERAL CODE, JUSTICE OF PEACE AND CONSTABLE NOT ENTITLED TO ALLOWANCE IN FELONY CASES WHEN—ALLOWANCE BY COUNTY COMMISSIONERS IN MISDEMEANOR CASES MADE WHEN.

SYLLABUS:

1. *The allowance provided in section* 3019, *General Code, for a justice of the peace and constable may not be paid them in felony cases where the justice of the peace, as an examining magistrate, does not find sufficient evidence to bind the defendant over to the grand jury.*

2. *The allowance provided in section* 3019, *General Code, for a justice of the peace and constable may not be paid them in felony cases where the justice of the peace, as an examining magistrate, binds the accused over to the grand jury and the grand jury fails to indict such accused.*

3. *The allowance provided in section* 3019, *General Code, for a justice of the peace and constable may not be paid them in felony cases where the justice of the peace, as an examining magistrate, binds the accused over to the grand jury and the grand jury indicts the accused but before the trial the indictment is nolled.*

4. *County commissioners are unauthorized to make the statutory allowance provided in section* 3019, *General Code, for a justice of the peace and constable in misdemeanor cases where the defendant is tried and convicted, unless the county commissioners are satisfied the justice of the peace exercised reasonable care in requiring security for costs and unless the defendant is insolvent and such costs could not be collected from him by the proper legal proceedings. The mere fact that the defendant serves his costs in jail does not prevent the justice of the peace and constable from receiving the fees provided in section* 3019, *General Code.*

5. *County commissioners may make an allowance under section* 3019, *General Code, in excess of one hundred dollars* ($100.00) *during any one year if the excess has been earned by the officer in some previous year during which no allowance, or one below the statutory limit, was made, but such officer may not be allowed more than one hundred dollars* ($100.00) *for services during any one year. Where*