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*

an officer earns a sum in excess of one hundred dollars ($100 00) *for one year and in a later year earns a sum below one hundred dollars* ($100.00), *such excess above one hundred dollars* ($100.00) *earned in such previous year may not be paid the officer in the later year.*

COLUMBUS, OHIO, June 29, 1934.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—This will acknowledge receipt of your communication, which reads as follows:

"You are respectfully requested to furnish this department your written opinion upon the following:

Section 3019 of the General Code reads as follows:

'In felonies wherein the state fails, and in misdemeanors wherein the defendant proves insolvent, the county commissioners, at the first meeting in January, shall make an allowance to justices of the peace and constables, in the place of fees, but in no year shall the aggregate allowance to such officer exceed the fees legally taxed to him in such causes, nor in any calendar year shall the aggregate amount allowed such officer and his successor, if any, exceed one hundred dollars. If there be a successor, said amount shall be prorated on the basis of lost fees.'

QUESTION 1: Where an affidavit is filed before a justice of the peace charging a person with the commission of a felony, and such justice does not find sufficient evidence to bind the person over to the grand jury, and therefore dismisses him, is this a case of felony wherein the state fails to convict, and therefore be considered by the county commissioners in making an allowance in lieu of fees to the justice of peace and constable, under the provisions of Section 3019?

QUESTION 2: In case a person charged with a felony before a justice of the peace is bound over to the grand jury and the grand jury fails to indict, is this a case of a felony where the state fails to convict, and which the county commissioners may take into consideration in their allowance under Section 3019?

QUESTION 3: In a case in which the defendant is charged with a felony before a justice of the peace, is bound over to the grand jury, the grand jury indicts, and afterward the indictment is nolled, is this a case of felony in which the state failed to convict, and which may be taken into consideration by the county commissioners in making allowance in lieu of fees under Section 3019?

QUESTION 4: In a case where a person is charged with a misdemeanor before a justice of the peace, and the justice has final jurisdiction in such misdemeanor and finds the person guilty, but is unable to collect the costs from the defendant, is this a misdemeanor in which the defendant proves insolvent, and which the county commissioners may consider in making the allowance under Section 3019, whether or not the justice has required the complaining witness to give security for costs?

QUESTION 5: In case a person is charged with a misdemeanor before a justice of the peace, in which case the justice has final juris-

diction, and such person is found guilty and sentenced to jail for the non-payment of fine and costs, and is credited with $1.50 per day against his fine and costs for each day he remains in jail, is this a case of a misdemeanor in which the defendant proves insolvent, and which may be taken into consideration by the county commissioners in making their allowance under Section 3019?

QUESTION 6: In a case where a person is charged with a misdemeanor before a justice of the peace, and is bound over to the grand jury, indicted, tried and convicted, and the costs are not paid by the defendant, is this a case of misdemeanor where the defendant proves insolvent and which may be taken into consideration by the county commissioners in making their allowance under Section 3019?

QUESTION 7: Under Section 3019, if county commissioners, in 1933 made an allowance to the justice of peace and constable in the sum of $50.00, although the fees earned were $125.00, may the difference between the allowance of $50.00 made in 1933, and the $100.00 maximum, be allowed and paid in the year 1934?

QUESTION 8: If the county commissioners, in 1933, under section 3019, made an allowance to a justice of the peace and constable in the sum of $100.00, although the fees earned were $125.00, may the additional $25.00 be included in the allowance of $100.00 for 1934, where the fees earned in 1934 were but $75.00?"

Section 3019, General Code, is quoted in full in your letter. Sections 3020 and 3021, General Code, were passed at the same time that section 3019 was passed and are *in pari materia* with that section. These sections read as follows:

Section 3020. "In ascertaining the amount of fees taxed by a justice of the peace, to make such allowance, in cases where such officer was authorized to take security for costs, it must appear that he exercised reasonable care in taking such security. Until satisfied by the certificate of such justice of the peace or by other proof, to the satisfaction of the commissioners, that the prosecuting witness was indigent and unable to pay the costs or procure security thereof, and that the officer exercised due care in taking such security, such officer's fees in such causes shall not be included in ascertaining the amount so to be allowed."

Section 3021. "Where such officer takes security for costs that at the time of taking is insufficient, the commissioners, in making allowance to him, shall not take into account his fees in such case."

Your first three questions relate to a situation where a person has been charged with the commission of a felony but has been dismissed for various reasons prior to an actual trial. You present the question whether or not in these three instances the "state has failed" within the meaning of that phrase as used in section 3019, supra. In connection with these three questions, I call your attention to an opinion to be found in Opinions of the Attorney General for 1932, Vol. III, page 1460. The first branch of the syllabus of that opinion reads as follows:

"There is no way by which a justice of the peace may be paid for his services as an examining magistrate, either in misdemeanor or felony

cases, where the grand jury fails to indict a person who has been charged with a crime before such magistrate, except in misdemeanor cases wherein the complainant, as provided by Section 13432-20, General Code, has been required by the justice of the peace to be liable for the costs in the event that the complaint is dismissed."

My immediate predecessor in that opinion seemed to be of the opinion that before the state failed in a felony prosecution, as that expression is used in section 3019, supra, there must be an actual trial and the accused found not guilty of the felony with which he has been charged. From the opinion at pages 1461 and 1462, I quote the following passages:

"The provisions of Section 3019 cannot be construed as covering the situations presented by your inquiry, since the allowance authorized by the provisions of that section can be made only to the extent and in the manner provided therein. See 15 C. J. 324.

* * * * * * * * *

There is no statute authorizing the taxing of the costs of an examining magistrate against the state where a grand jury fails to indict a person bound over by a justice of the peace acting as an examining magistrate, either in a misdemeanor or felony case. The mere fact that no compensation is provided for or allowance made in those cases wherein the accused is not indicted by a grand jury after being bound over by a justice of the peace is one of the burdens which attaches to the office of a justice of the peace and which is assumed when a person is elected thereto. This is so even though the services performed in criminal proceedings by a justice of the peace as an examining magistrate are required by statute. The fact that a justice may not receive compensation for certain services rendered is not unique to the law. According to Taft, Chief Justice of the Supreme Court of the United States, in the case of *Tumey* vs. *State of Ohio*, 50 A. L. R. 1243, at p. 1250:

'For hundreds of years the justices of the peace of England seemed not to have received compensation for court work.'"

It is to be noticed that your second question is the specific question passed upon in the above opinion. From the above opinion, I quote that part of the letter requesting such opinion:

"* * * The specific inquiry is this. An individual was charged with a felony in a justice of the peace court and was bound over to the grand jury. The grand jury failed to indict. Is there any means by which the justice of the peace is entitled to collect his fees and those of his constable?"

If the above opinion is correct, it is dispositive of your second question.

Your first question is an even stronger case and is *a fortiori* answered by the 1932 opinion. Where a person is bound over to the grand jury and the grand jury fails to indict, and as a result this is held not to be a case where the state has failed, surely how much stronger is the case where the defendant is never bound over to the grand jury.

I also am of the opinion that your third question falls within the holding of the 1932 opinion. Your third question presents a situation where the defendant has been indicted but such indictment is *nolled.* In such a case it cannot be said that the state has failed. The defendant could be reindicted and tried for the same offense. Consequently, the state has not failed and the justices of the peace and constables may not receive their fees under the provisions of section 3019, supra.

In answering these three questions, I am not unaware of former opinions of this office which are directly in conflict with the 1932 opinion. An example of this is an opinion to be found in Opinions of the Attorney General for 1917, Volume I, page 226. However, I am of the view that the 1932 opinion is the better expression of the law relative to this question, and I concur in the conclusions therein reached.

Your fourth, fifth and sixth questions are somewhat related. In all three questions the defendant has been tried and convicted of a misdemeanor. The main point running through these three inquiries is as to the question of whether or not the defendant is insolvent within the meaning of that term as used in section 3019, supra. In your fourth question you ask whether or not this statutory allowance may be given by the county commissioners, regardless of whether or not the justice of the peace required the complaining witness to give security for costs. Section 13432-20, General Code, authorizing justices of the peace to require security for costs, reads as follows:

> "When the offense charged is a misdemeanor, the magistrate or court before issuing the warrant, may require the complainant, or if he consider the complainant irresponsible, may require that he procure a person, to be liable for the costs if the complaint be dismissed, and the complainant or other person shall acknowledge himself so liable and such court or magistrate shall enter such acknowledgment on his docket. Such bond shall not be required of an officer authorized to make arrests when in the discharge of his official duty, or other person or officer authorized to assist the prosecuting attorney in the prosecution of offenders."

Sections 3020 and 3021, supra, require in effect that justices of the peace exercise reasonable care in requiring security for costs before the county commissioners should make them the allowance provided in section 3019, supra. It is therefore necessary for the county commissioners, in the reasonable exercise of their discretion, to determine whether or not the justice of the peace used reasonable care in taking security for costs as he is authorized to do under the provisions of section 13432-20, supra. This is a question for the county commissioners to determine in the valid exercise of their discretion. This principle is not only applicable to your fourth question but likewise to your fifth and sixth questions. In your fourth question you referred to the fact that the defendant is unable to pay the costs and inquire whether or not this is a case where the defendant proves insolvent within the meaning of section 3019. In your question you merely state that the justice of the peace is unable to collect the costs. This factor in and of itself is not, in my judgment, a compliance with the requirement that the defendant prove insolvent. The term "insolvent" has been variously defined. In 22 O. Jur. 113, the following is stated:

"At least two distinct meanings have been accorded to the term 'insolvency.' It is popularly used to denote the insufficiency of the entire property and assets of an individual to pay his debts. It is also used in a more restricted sense to express the inability of a party to pay his debts as they become due in the ordinary course of his business and it is in this latter sense that the term is used when merchants and traders are said to be insolvent."

In 32 C. J. 805, the following appears:

"'Insolvency' has been differently defined by different courts, the difference arising especially in cases where the term is applied to different classes of debtors. It may be said to have two distinct and well defined significations. In its general and popular meaning the term denotes the state of one whose entire property and assets, when converted into money without unreasonable haste or sacrifice, are insufficient to pay his debts; or his general inability to pay his debts; and it was similarly defined, but with some variation, in the Bankruptcy Act of 1898, the definition given in the last mentioned act being the same as in some of the state insolvency laws. But it is frequently used in the more restricted sense to express the inability of a person to pay his debts as they become due in the ordinary course of business. In the latter sense the term is generally used in bankruptcy and insolvency laws, when applied to persons in commercial pursuits, * * *."

In Bouvier's Law Dictionary the term "insolvent" is defined as "the condition of a person who is unable to pay his debts." It is apparent that the term "insolvent" as used in section 3019 may mean an inability to readily pay one's debts as they accrue, although he may have property which upon execution could pay such debts. On the other hand, the term may mean a situation where one's debts exceed one's assets; in other words, noncollectability. It is this latter interpretation that I think the legislature meant to give to the term "insolvent." In an opinion to be found in Opinions of the Attorney General for 1917, Volume III, page 2108, it was held as disclosed by the syllabus:

"Under section 3019 G. C. it is necessary that a person charged with a misdemeanor be tried, convicted and sentenced or plead guilty and have sentence passed upon him and that an attempt be made to collect the costs from him before the commissioners would be warranted in making the allowance in place of fees."

In an opinion to be found in Opinions of the Attorney General for 1915, Volume I, page 148, the following statement appears:

"Under the provisions of this section (3019 G. C.) no allowance can be made to the officers in misdemeanor cases, unless the defendant 'proves' insolvent. It may be a matter of common knowledge that a defendant is insolvent and that a judgment against him for fine and costs would be worthless, but within the meaning of the statute it could hardly be said that a defendant has been *proven* insolvent until there has been a conviction or a plea of guilty and until sentence has been passed and there is a commitment for failure to pay the penalty assessed."

It would appear that before the costs could be paid in your question (4) it must appear that there has been an attempt to collect the costs from the defendant by the proper legal proceedings and a failure to so collect. Likewise, the county commissioners must be satisfied the justice of the peace complied with sections 3020 and 3021 in exercising reasonable care to require security for costs.

Your fifth question is similar to your fourth question with the exception that the defendant serves his fine and costs in jail at the rate of one dollar and fifty cents ($1.50) per day. The mere fact that such costs are served by the defendant in jail would not in itself prevent the justice of the peace and constable from recovering their allowances under section 3019 if they are otherwise entitled to the same. In an opinion to be found in Opinions of the Attorney General for 1932, Volume I, page 193, it was held as disclosed by the syllabus:

> Fees of a constable in connection with the transportation of an insolvent person, convicted of a misdemeanor, to a workhouse cannot be paid by the county commissioners under section 3019, General Code, but can only be paid out of the treasury of the township where the sentence was imposed under the provisions of section 4132, General Code, and where an insolvent defendant has served his costs in jail an allowance to the officers, in place of fees other than transportation, may be made by the county commissioners under the provisions of section 3019, General Code, subject, however, to restrictions contained in that section and in sections 3020 and 3021, General Code."

Likewise, the mere fact that the defendant served his costs in jail would not be conclusive of the question of whether or not the defendant is insolvent. The answer to your fifth question is therefore the same as the answer to your fourth question.

Your sixth question presents no new facts which would take it out of the general rule as expressed in answer to your fourth question. The answer to your sixth question is therefore the same as the answer to your fourth question.

In your seventh question you inquire as to the authority of the county commissioners where they have made an allowance in 1933 of fifty dollars ($50.00), although the fees earned were one hundred and twenty five dollars ($125.00), to pay the difference between the fifty dollars $50.00) and the one hundred dollars ($100.00) maximum in the year 1934. In other words, may the county commissioners pay fifty dollars ($50.00) in the year 1934 that they might have paid in the year 1933. In this connection, I call your attention to an opinion to be found in Opinions of the Attorney General for 1918, Volume II, page 1683. The syllabus of such opinion reads as follows:

> "Section 3019 G. C. does not aim to prohibit the allowance or payment of more than $100.00 during any one year if the excess has been earned by the officer in some previous year or years, during which no allowance, or one below the statutory limit, was made, but merely prevents an officer from being allowed more than $100.00 for services during any one year."

I also call your attention to an opinion to be found in Opinions of the Attorney General for 1925, page 258. The second branch of the syllabus of such opinion reads as follows:

"Section 3019, General Code, does not prohibit the allowance or payment of more than one hundred dollars during any one year if the excess has been earned by the officer in some previous year or years, during which no allowance, or one below the statutory limit, was made, but merely prevents an officer from being allowed more than one hundred dollars for fees taxed any one year."

I concur in the conclusions reached in the above opinions, and it is therefore my opinion, in specific answer to your seventh question, that the fifty dollars ($50.00) in question may be paid in the year 1934.

Your eighth question presents a situation where the justice of the peace and constable were allowed one hundred dollars ($100.00) in the year 1933, although the fees earned were one hundred and twenty five dollars ($125 00). You now ask whether or not the extra twenty five dollars ($25.00) may be paid in the year 1934, when the fees earned were seventy five dollars ($75 00). Section 3019 requires that the fees shall not exceed one hundred dollars ($100 00) for any calendar year. In the present case, if the twenty five dollars ($25.00) could be paid in 1934, it would be, in effect, permitting such justice of the peace or constable to receive one hundred and twenty five dollars ($125.00) for services rendered in 1933. This would be contrary to the clear intent of section 3019 and contrary to the conclusions reached in the 1918 and 1925 opinions quoted, supra.

It is therefore my opinion, in specific answer to your eighth question that the sum of twenty five dollars ($25.00) may not be paid in the year 1934. Summarizing, and in specific answer to your inquiries, it is my opinion that:

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 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 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 an officer earns a sum in excess of one hundred dollars ($100.00) for one year and in a later year earns a sum below one hundred dollars ($100 00), such excess above one hundred dollars ($100.00) earned in such previous year may not be paid the officer in the later year.

Respectfully,
JOHN W. BRICKER,
Attorney General.

2875.

APPROVAL—CONTRACT BETWEEN STATE OF OHIO FOR THE BOARD OF TRUSTEES OF OHIO STATE UNIVERSITY AND THE H. R. BLAGG COMPANY OF DAYTON, OHIO, FOR THE CONSTRUCTION AND COMPLETION OF A PROJECT KNOWN AS AN ADDITION TO MACK HALL.

COLUMBUS, OHIO, June 29, 1934.

HON. T. S. BRINDLE, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—You have submitted for my approval a contract between the State of Ohio, acting by the Department of Public Works, for the Board of Trustees of Ohio State University, Columbus, Ohio, and the H. R. Blagg Company of Dayton, Ohio. This contract covers the construction and completion of General Contract (Items I to XVI inclusive, together with alternates No. 1, No. 2, C and D), for a project known as addition to Mack Hall on the campus of Ohio State University, in accordance with the form of proposal dated June 6, 1934. Said contract calls for an expenditure of eighty-nine thousand and ninety-two dollars ($89,092.00).

You have submitted the certificate of the Auditor of State showing that there are available moneys from the special trust fund for dormitory purposes of Ohio State University, which moneys, when supplemented from the federal government, will be sufficient to cover the cost of erection of the improvement. You have also shown that the board of trustees of Ohio State University has authorized the construction of this project. In addition, you have submitted a contract bond upon which the Hartford Accident and Indemnity Company of Hartford, Connecticut, appears as surety, sufficient to cover the amount of the contract.

You have further submitted evidence indicating that plans were properly prepared and approved, notice to bidders was given, bids tabulated as required by law and the contract duly awarded. Also it appears that the laws relating to the status of surety companies and the Workmen's Compensation Act have been complied with.

Finding said contract and bond in proper legal form, I have this day noted my approval thereon and return the same herewith to you, together with all other data submitted in this connection.

Respectfully,
JOHN W. BRICKER,
Attorney General.