surveyor has appointed a deputy and fixed his compensation within the appropriation made therefor by the board of county commissioners, the county auditor is authorized to pay the compensation of such deputy by the issue of warrants on the county treasury in the manner provided by law.

Respectfully,
GILBERT BETTMAN,
Attorney General.

276.

FRANCHISE TAX—CINCINNATI SYMPHONY ORCHESTRA—NO LIABILITY FOR 1929 TAX—NOT CORPORATION FOR PROFIT ON JANUARY 1, 1929.

SYLLABUS:

The Cincinnati Symphony Orchestra Association Company is not required to file report and pay the franchise tax for 1929 as it was not a corporation for profit on January 1, 1929.

COLUMBUS, OHIO, April 8, 1929.

The Tax Commission of Ohio, Columbus, Ohio.

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

> "Under date of March 6th you rendered to the Secretary of State an opinion holding that The Cincinnati Symphony Orchestra Association Company had the right to file an amendment changing the company from one 'for profit' to one 'not for profit.' In this connection would you please advise us whether The Cincinnati Symphony Orchestra Association Company would be liable for the 1929 franchise tax; inasmuch as the amendment changing the corporation from profit to not for profit was filed after January 1, 1929, the date when the liability for franchise fee for the current year attached?
>
> Would you please, also, give us an opinion covering the case of The Williams Foundry & Machine Company which was dissolved by order of the court on January 21, 1929. Would this company be liable for the 1929 franchise tax, which case comes under the same general section?"

You refer to my Opinion Number 158, rendered March 6, 1929, to the Secretary of State, upon inquiry as to whether The Cincinnati Symphony Orchestra Association Company had the right to amend its articles of incorporation from a corporation for profit to one not for profit, and said opinion held, as stated in the syllabus, that:

> "When articles of a corporation have been filed in the office of the Secretary of State, purporting to be a corporation for profit, but which contain a purpose clause which clearly sets forth a purpose which is not only evidently that of a corporation not for profit, but which precludes the exercise of any purpose for profit and which corporation has, pursuant to such organization, acted solely as a corporation not for profit, its articles may be amended to eliminate such contradictory statements and set forth that it is, in fact, a corporation not for profit."

It is also stated in said opinion that:

"It appears that the purpose clause of The Cincinnati Symphony Orchestra Association Company, as originally filed, does not set forth a purpose which could possibly be for profit, as it is expressly provided that the only source of revenue shall be a reasonable admission fee for concerts and there is placed in the articles a limitation upon this admission fee which would prevent such fee being in an amount in excess of actual costs of maintaining the orchestra and defraying expenses. * * * * * * * * * *

The company in question was, however, organized for a purpose not for profit as set forth in its purpose clause. In substantiation of this intention, all the stockholders agreed to waive their rights to receive dividends and further agreed to donate same to the corporation in the event that profits were made.

* * * * * * * * *

In the case of *State ex rel.* vs. *Kerns, Auditor,* 104 O. S. 550, it was held that an independent agricultural society, which was organized as a corporation for profit but which had, in fact, acted as a corporation not for profit, was entitled to aid from the county auditor under a section of the law providing for such aid being given to similar organizations not for profit. In this case, the court looked to the actual purposes for which the society was organized and activities which had been carried on subsequent to the organization, rather than to the fact that this society had been erroneously organized as a corporation for profit."

Although the articles of incorporation of said Orchestra Association Company showed that it was organized for profit, in reality its purpose and its organization was not for profit as disclosed in its purpose clause.

Section 5495-2, General Code, as enacted 112 O. L. 410, reads as follows:

"Within thirty days after the taking effect of this act and annually, thereafter, between the first day of January and the thirty-first day of March each corporation, incorporated under the laws of this state for profit, and each foreign corporation for profit, doing business in this state or owning or using a part or all of its capital or property in this state, or having been authorized by the Secretary of State to transact business in this state, shall make a report in writing to the Tax Commission in such form as the commission may prescribe. It shall be the duty of the commission to furnish corporations, on request, copies of the forms prescribed by it for the purpose of making such report."

This section requires that each corporation, incorporated under the laws of this state for profit, shall make a report in writing to the Tax Commission between the first day of January and the thirty-first day of March annually.

As the facts submitted and considered in Opinion No. 158, supra, disclose that the purpose clause as set forth in the articles of the corporation clearly evidence the purpose which was not only a corporation not for profit, but which precluded the exercise of any purpose for profit, and said corporation pursuant to its organization acted solely as a corporation not for profit, it is concluded that said corporation from the time of its organization was a corporation not for profit and therefore not required to file a report and to pay the 1929 franchise tax.

You also request an opinion "covering the case of The Williams Foundry & Machine Company which was dissolved by order of the court on January 21, 1929. Would this company be liable for the 1929 franchise tax?"

As you do not state the facts under which said corporation was dissolved, and whether or not it was in the hands of a receiver who continued to carry on the business of the corporation after his appointment, I am unable to formulate an opinion in answer to your question.

If you will supply me with the necessary information in regard to the dissolution of this corporation, I shall then furnish you with an opinion based thereon.

Respectfully,
GILBERT BETTMAN,
Attorney General.

277.

PARTITION FENCES—BUILDING BY TOWNSHIP TRUSTEES—TERMS OF SECTIONS 5908, ET SEQ., GENERAL CODE, APPLICABLE—EXCEPTION.

SYLLABUS:

Township trustees are to follow the terms of Sections 5908, *et seq., in the building of partition fences and collecting costs incurred thereby from adjoining land owners unless such fences will be of no benefit to their lands.*

COLUMBUS, OHIO, April 8, 1929.

HON. JOHN R. PIERCE, *Prosecuting Attorney, Celina, Ohio.*

DEAR SIR:—Your letter of March 20, 1929, is received by this office, which is as follows:

> "Section 5910 places upon the trustees the duty to proceed and assign equal shares of partition fences where a dispute has arisen, and the proper notices have been given. Section 5913 for the method of constructing the fence, in case the parties fail to do so, but apparently this section has been declared unconstitutional in 80 O. S. 746. The question is what procedure can be followed, if any by the trustees to have fence built and collect the costs of construction from the parties.
>
> I will appreciate your opinion in regard to this matter."

It appears that your question is prompted by your conclusion that Sections 5913, et seq., of the General Code were declared unconstitutional by the Supreme Court in the case of *Beech* vs. *Roth,* 80 O. S. 746.

While the case of *Roth et al. Trustees, et al.,* vs. *Beech,* 80 O. S. 746, affirms the judgment of the Circuit Court of Medina County, 18 O. C. (n. s.) 579, yet it does not do so for the reason given by the Circuit Court, that is, that Sections 5913, et seq., are unconstitutional, but affirms it for the reasons set forth in the case of *The Alma Coal Company* vs. *Cozard, Treasurer,* 79 O. S. 34. In the Alma Coal Company case the court held that Sections 5913, et seq., were not generally unconstitutional but only in their application to the facts in that case, as the coal company's land was unenclosed and would reap no benefit from the fence.

With reference to the constitutionality of Sections 5913, et seq., of the General Code, Rockel at page 236, Section 387, of his Complete Guide for Ohio Township Officers says as follows: