the provisions of section 14867-9, et seq., of the General Code are limited to persons residing in Ohio at the time of the award, but that, in view of the evident purpose of the sections to honor those whose special bravery merited special recognition by the United States government, irrespective of the branch of service or particular unit thereof, such award may be made to any person who has been awarded the Medal of Honor or the Distinguished Service Cross or the Silver Citation Star by the United States of America for the most distinguished gallantry, although at the time of entrance into the service such person was a resident of another state.

Respectfully,
GILBERT BETTMAN,
Attorney General.

3965.

PARK CONCESSIONS—PRIVATE PERSON MAY SECURE LICENSE WHEN—SALE AND DISTRIBUTION OF PROFITS FROM NATURAL PRODUCTS OF PARK.

SYLLABUS:

1. *The Board of Trustees of The Ohio State Historical Society, where not expressly prohibited, has the power to grant to private parties a license to erect and use refreshment booths in the public parks confided to its charge, providing the Society retains the right of supervision, regulation and control, providing such use is not inconsistent with the purpose for which a particular park may have been created and providing the booths are not placed in such numbers or such a manner as to interfere unreasonably with the free and uninterrupted use of the land by the public as a park.*

2. *The Society has the right to grant a license for carrying on such concessions, not inconsistent with the purpose for which a particular park may have been created, as fall properly within the category of park purposes, if the operation of such concessions does not unreasonably interfere with the free and uninterrupted use of the land by the public as a park.*

3. *The Society has the right to sell such agricultural products as are derived from the park land naturally, but it has no right to engage in an affirmative program of farming.*

4. *Profits derived from said parks must, under Section 2288, General Code, be paid into the nearest convenient county treasury or the state treasury, as the state treasurer directs.*

COLUMBUS, OHIO, January 19, 1932.

HON. C. B. GALBREATH, *Secretary, The Ohio State Historical Society, Columbus, Ohio.*

DEAR SIR:—Recently I received the following communication from you:

"The Ohio State Archaeological and Historical Society holds and administers in trust for the State, a number of park properties. I am directed by the Board of Trustees of that Society to ask your opinion in regard to earnings of such properties.

Does the Board of Trustees of the Society have authority to enter

into contract with private parties to erect and use refreshment booths in such parks and apply the profits arising from rentals of the same for the up-keep of such parks?

Does the Society have authority to use other profits arising from concessions or products from such parks for improvements on the same?"

It is patent that, as an organization having charge of parks for the State of Ohio, The Ohio State Historical Society has not only such powers as are given to it expressly, but that it possesses such implied powers, where they are not expressly prohibited, as are necessary, customary or incidental in the conduct of a park. Having this fundamental principle in mind, it is necessary to determine whether the right to contract with private parties to erect and use refreshment booths in the parks under consideration may be implied.

In *Bailey* vs. *City of Topeka,* 97 Kans. 327, it appeared that the city of Topeka had granted to certain individuals, for pay, the exclusive right to operate refreshment and lunch stands in a municipal park. It was claimed that this was a wrongful diversion from park purposes. However, the court disapproved such contention, stating:

"We see nothing in the conduct referred to that is inconsistent with the public character of the park, or that conflicts with the terms of the gift. The exclusive character of the privilege conferred is not the basis of any legitimate objection. For as no one has a right to engage in the activities referred to except by permission of the city, no one is wronged by the monopoly created. The concessions granted do not amount to the leasing of any part of the park. (*The State, ex rel. Attorney General* vs. *Schweickardt,* 109 Mo. 496, 19 S. W. 47.) Nor do they involve the loss of control over it by the public officers. Clearly it is not inconsistent with the conditions imposed by the donor of the property that visitors to the park should be afforded facilities for obtaining refreshments, * * *. No reason exists why they should not pay a fair price for what they eat or drink, * * *. The city might through its employees furnish these conveniences directly, collecting reasonable charges therefor. The fact that a profit resulted would not render the transaction objectionable. The incidental revenue would not characterize the transaction as commercial rather than governmental. Substantially the same result is accomplished by authorizing certain individuals to attend to the business of supplying the wants of the public with respect to the matters referred to, retaining so much of the proceeds as will fairly compensate them for their services and investment, and turning the residue over to the city. The following text, and the cases supporting it, are in point at least to the extent of indicating that the facilities undertaken to be supplied are appropriate to the conduct of a public park:

'Under a power to control and regulate parks the municipal authorities may provide for the * * * refreshment of persons frequenting them, which in their discretion they may do by granting privileges to private persons to furnish food or refreshments * * * with the right to erect necessary structures incident thereto which will not interfere with the rights of the public, and may give a license to use a building in a park for the purpose of a restaurant, which rights and privileges may be made exclusive, the municipality in all cases retaining the right of

regulation and control over the manner of conducting the business.' (28 Cyc. 938.)

The suggestion is made that, if the present course of the city officers is held to be legitimate, there is nothing to prevent them at their pleasure from turning the park into a mere amusement resort, abounding in alluring catchpenny devices and dominated by a spirit of commercialism. This does not follow. That the power of regulation and management might be so abused as to warrant the interference of a court may be conceded. But we find in what has already been done no close approach to the danger line." (pp. 329-330.)

To the same effect are: *Gushee* vs. *N. Y. C.,* 58 N. Y. S., 967, 970-971; *State* vs. *Schweickardt,* 109 Mo., 496, 510-511; *Dodge* vs. *North End Ass'n.,* 189 Mich 16.

In discussing the power of municipal corporations in respect to municipal parks, Corpus Juris lays down these general rules which, I feel are equally applicable to the power of The Ohio State Historical Society with respect to the parks confided to its care:

"The municipal authorities may provide for the * * * *refreshment* of persons frequenting parks; and the city may either provide the means itself or grant privileges to private persons to do so." (44 C. J., 1101). (Italics, the writer's.)

"The proper municipal authorities may grant privileges to private persons to furnish *food or refreshments* * * * in public parks, with the right to erect necessary structures incident thereto, and these rights and privileges may be made exclusive, provided the municipality retains the right of supervision, regulation, and control; but they can not sell, lease or permit the use of, a public park, square, or common, for purposes, or on terms and conditions, which are inconsistent with the purpose for which the property was intended or which will unreasonably impair or interfere with the right of the public to use the premises." (44 C. J., 1103.) (Italics, the writer's.)

In keeping with the principles enunciated in the above cases, it is clear that the power of granting concessions for furnishing refreshments in a public park may be reasonably implied as customary and incidental to conducting a park, and if The Ohio State Historical Society is not, with reference to any one of the parks in mind, expressly prohibited from doing so, it may, by its Board of Trustees, enter into contracts with private parties licensing them to erect and use refreshment booths in parks in its charge, providing the Society retains the right of supervision, regulation and control, providing such use is not inconsistent with the purpose for which a particular park may have been created, and providing the booths are not placed in such numbers or in such a manner as to interfere unreasonably with the free and uninterrupted use of the land by the public, as a park.

In arriving at this conclusion, I am not unaware of the case of *City of Columbus* vs. *Biederman,* 16 N. P. (N. S.) 140. There, it appeared that the City of Columbus sought to restrain the defendant from selling refreshments in a municipal park and to require her to remove her booth therefrom, that the city's director of public service had granted such permission to the defendant, but that it had never been authorized or sanctioned by the city council. No claim was made that the permission granted by the director was a diversion of the land from proper park purposes. The only question at issue was whether the director

of public service had the power to grant such a concession. Section 3714, General Code, placed the care, supervision and control of public parks in the municipal council, while Section 4324, General Code, merely placed their management in the director. Under these statutes it was merely determined that the granting of such concessions belonged to the city council and not to the director of public service.

Your inquiry further calls for a consideration of the power of the Society to grant concessions other than for refreshment purposes. Generally, it may be stated that the Society has the power to grant only such concessions as are necessary, customary or incidental to *park purposes,* and that it can not grant even those if they are inconsistent with the purpose for which a particular park is created, or if they would unreasonably interfere with the right of the public to use the premises. For example, the Society would have no right to grant the privilege of selling automobiles or of conducting a shoe factory, for such enterprises are wholly foreign to the conduct of a park.

Your inquiry, too, necessitates some comment about the *products* derived from such parks. Generally, I think it may be safely said that the Society has the right to sell such agricultural products as are derived from the land naturally, such as fruit derived from trees found in the park or hay derived from a natural growth of grass, but that it has no implied right, under the power of conducting a park, to enter upon an affirmative program of farming.

The next question which becomes imminent is whether the Society may apply the profits derived from these parks to their upkeep. Section 2288, General Code, provides:

> "As often as may be so required, each receiver of the public works of the state, register or receiver of a school land office, and *other collector or receiver of revenue of the state,* except state and county treasurer, shall pay into the nearest convenient county treasury or the state treasury, as the treasurer of state shall direct, all moneys by him collected or received, since making the last payment." (Italics, the writer's.)

Inasmuch as the park properties in question, belong to the state, any profits arising from them would belong to the state, and not to the Society; and, therefore, under said Section 2288, such profits must be paid into the nearest convenient county treasury or the state treasury, as the state treasurer shall direct.

Respectfully,
GILBERT BETTMAN,
Attorney General.

3966.

APPROVAL, BONDS FOR THE FAITHFUL PERFORMANCE OF THEIR DUTIES AS RESIDENT DIVISION DEPUTY DIRECTOR AND RESIDENT DISTRICT DEPUTY DIRECTOR IN MORROW COUNTY—IVAN R. AULT—K. B. GRAHAM.

COLUMBUS, OHIO, January 19, 1932.

HON. O. W. MERRELL, *Director of Highways, Columbus, Ohio.*

DEAR SIR:—You have submitted two bonds, each in the penal sum of $5,000.00 for my approval. Upon one the name of Ivan R. Ault appears as principal and the Glenn Falls Indemnity Company appears as surety, and the bond is conditioned to cover the faithful performance of the duties of the principal as Resident