6862 et seq., General Code, rather than Section 3600, General Code, and a memorial of such proceedings entered upon the land title registration certificate.

Respectfully,
GILBERT BETTMAN,
Attorney General.

4874.

TRUSTEES OF OHIO STATE HISTORICAL SOCIETY—MAY GRANT RIGHT TO PRIVATE PERSONS TO ERECT REFRESHMENT STANDS IN PUBLIC PARKS—PROCEEDS FROM SUCH LICENSES PAID INTO STATE TREASURY.

SYLLABUS:

1. *The Board of Trustees of The Ohio State Historical Society, where not expressly prohibited, possesses the power to grant to private parties the right to erect and use refreshment booths upon the public parks confided to its care, providing the Society reserves the right of supervision, regulation and control and providing such booths are not placed in such numbers or in such a manner as to interfere unreasonably with the frec and uninterrupted use of the land by the public as a park.*

2. *Where funds are received by the Board of Trustees of The Ohio State Historical Society from licenses or privileges granted in connection with its care and custody of state public parks, such funds belong to the State and should, pursuant to the provisions of section 24 of the General Code, be paid weekly into the State Treasury.*

COLUMBUS, OHIO, January 6, 1933.

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? An early opinion on these points will be highly appreciated."

It is patent that, as trustee administering 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. There are a number of pertinent decisions which touch upon this question.

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 rights, within a park which had been donated to the city, to operate refreshment and lunch stands. It was claimed that this was a wrongful diversion from the purposes for which the land was donated. 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 pleasure, amusement, comfort, and refreshment of persons frequenting them, which in their discretion they may do by granting privileges to private persons to furnish food or refreshments, or means of innocent entertainment, 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.)

The holding of the case is succinctly stated in the first paragraph of the syllabus as follows:

> "The action of a city in granting to individuals, for pay, exclusive rights within a public park to operate refreshment and lunch stands, and to rent boats and bathing suits and towels and dressing rooms, does not constitute a use of the park for other than public purposes, nor is it in conflict with provisions of the deed of gift by which the city acquired the property, to the effect that it should be used for the benefit of the public, and should be inalienable by deed, gift, lease, or other method."

Likewise in *Gushee* vs. *City of New York,* 58 N. Y. S. 967, the court made the following statement which is relevant to the facts both in that case and in our problem:

> "That, in the control and management of the public parks of a great city, it is perfectly proper to furnish not only such innocent amusements as may enhance the pleasure of those who resort to the parks, but such opportunities for rest and refreshment for themselves and their animals as may be required, will not be disputed. * * * . Whether, in doing those things, the authorities shall act themselves, or whether they shall be performed by private persons under an agreement with the park authorities, must be left very largely to the discretion of those who have control of the parks. If, in their judgment, it shall seem better that the furnishing of refreshment shall be farmed out to some person for a consideration, subject to the regulation and control of the authorities, it cannot be said, as a matter of law, that such discretion is beyond their power." (pp. 970-971.)

In *State* vs. *Schweickardt,* 109 Mo. 496, the relator sought to contest the validity of a contract by which the City of St. Louis granted to one Schweickardt the exclusive privilege of selling refreshments in a municipal park. The court, in upholding the contract and making it clear that this was not a diversion of the land from park purposes, said:

> "With these approved definitions and with the power to 'regulate * * * all parks * * * belonging to the city,' it doubtless fell strictly within the legitimate and expressly given power of the municipality to provide rules for the management and government of the park, and among them to secure the services of some one who should provide for the comfort of those who should visit the park, for the purpose of enjoying the recreations incident to such localities. This could be accomplished in the way already discussed or in some other mode; but in no case could the mere method of securing the labor of a public caterer be termed a lease of the park in any proper sense of that term. It seems, too, to be a matter of common knowledge that refreshments, both solid and liquid, refreshments of an intoxicating nature, are customarily served to the visitors of the great parks of this country, Central Park, New York; Fairmount Park, Philadelphia, and Golden Gate Park in San Francisco. On this basis of fact and of custom it cannot be regarded as any diversion of the legitimate uses of the park to have refreshments

served in the manner contemplated by the ordinance and contract aforesaid." (pp. 510-511.)

Again, the case of *Dodge* vs. *North End Association,* 189 Mich. 16, provides further authority on the same point, the case holding, as concisely stated in the second paragraph of the syllabus, that:

> "A pavilion erected in a park to serve the purpose of a waiting room for cars and of shelter for those who made use of the park, and as a refreshment stand, and properly situated therefor, did not invade the limitations of the dedication whereby it was expressly stipulated that the property should be used for a public park and for no other purpose."

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 pleasure, amusement, comfort, and *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,* or means of innocent entertainment, amusement, or recreation, 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. 1103-1104.) (Italics the writer's.)

In keeping with the principles enunciated in the cases just reviewed, 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 which you may have in mind, expressly prohibited from doing so, it may, by its Board of Trustees, enter into conrtacts with private parties for the erection and use of refreshment booths in parks under its control, providing the Society retains the right of supervision, regulation and control and providing that the booths are not placed in such numbers or in such a manner as to interfere 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 *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.

The next question which becomes imminent is whether the Society may apply the profits arising from the grant of refreshment privileges, to the upkeep of such parks. Section 24 of the General Code provides:

> "On or before Monday of each week every state officer, state institution, department, board, commission, college, normal school or university receiving state aid shall pay to the treasurer of state all moneys, checks and drafts received for the state, or for the use of any such state officer, state institution, department, board, commission, college, normal school or university receiving state aid, during the preceding week, from taxes, assessments, licenses, premiums, fees, penalties, fines, costs, sales, rentals or otherwise and file with the auditor of state a detailed, verified statement of such receipts. * * * ."

The Ohio State Historical Society (until the recent amendment of April 4, 1931, "The Ohio State Archaeological and Historical Society") is a corporation not for profit organized in 1885 under the general corporation laws of the State of Ohio; while the language of the section just quoted is perhaps not specific with reference to the situation where a corporation is utilized as an agency of the state by being vested with authority to control and manage state property, yet in my opinion the clear intent of this section is to require the payment weekly into the Treasury of all moneys received by an agency so employed in the state service. Consequently, the Society should pay any incidental receipts from licenses, fees, etc., into the State Treasury.

The conclusion which I have reached with reference to these funds renders unnecessary any discussion of their disposition otherwise by the Society. Originating, as they do, from state property, they should be paid into the State Treasury, there to await proper appropriation for any purposes which the legislature may deem advisable.

In specific answer to your inquiry, my conclusions may be stated as follows:

1. The Board of Trustees of The Ohio State Historical Society, where not expressly prohibited, possesses the power to grant to private parties the right to erect and use refreshment booths upon the public parks confided to its care, providing the Society reserves the right of supervision, regulation and control and providing such 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.

2. Where funds are received by the Board of Trustees of The Ohio State Historical Society from licenses or privileges granted in connection with its care and custody of state public parks, such funds belong to the State and should, pursuant to the provisions of section 24 of the General Code, be paid weekly into the State Treasury.

Respectfully,
GILBERT BETTMAN,
Attorney General.