DEAR SIR:—I am in receipt of your letter submitting for my examination and approval an abstract of title, copy of real estate option, authority of controlling board, encumbrance estimate No. 810, and deeds to the state of Ohio, covering the proposed purchase of approximately 300 acres of land situated in survey No. 15757, Union Township, Scioto County, Ohio, from William J. O'Brien and Ella Crowe.

An examination of the abstract of title submitted, which is certified by the abstracter under the date of January 26, 1931, indicates that William J. O'Brien and Ella Crowe, his sister, have a good and marketable fee simple title to said land, that they own, respectively, a six-tenths undivided interest and a four-tenths undivided interest therein, and that the land is free and clear of all encumbrances, with the exception of the taxes for 1930 and 1931.

In one of the instruments in the chain of title, being a deed from Robert Cooper and Rosa Cooper, his wife, to John W. O'Brien, dated November 13, 1896 (Item No. 10, Abstract), the notary public who took the acknowledgment failed to sign his name. This deficiency is rectified by a quit claim deed from Robert and Rosa Cooper to the state of Ohio.

Encumbrance estimate No. 810 indicates that there remains in the proper appropriation account a sufficient balance to pay the purchase price of this land. I call your attention, however, to the fact that the encumbrance record bears only the names of William J. O'Brien and Margaret E. O'Brien, his wife. Inasmuch as Ella Crowe is the owner of an interest in this land, I suggest that the encumbrance record be corrected so as to include the name of Ella Crowe.

The warranty deed executed by William J. O'Brien, and Margaret E. O'Brien, his wife, and by Ella Crowe and Frank R. Crowe, her husband, is properly executed with the release of the dower interests, and conveys a fee simple title to the state of Ohio.

I am herewith returning to you all of the papers enumerated above as having been received.

Respectfully,
GILBERT BETTMAN,
Attorney General.

3175.

GOVERNOR—POWER TO SUMMON MILITIA TO EXECUTE THE LAWS IN CONNECTION WITH NATIONAL AIR RACES AT CLEVELAND, OHIO, DISCUSSED.

SYLLABUS:

Whether the militia shall be summoned in order to execute the laws in connection with the National Air Races at Cleveland is within the discretion of the governor.

COLUMBUS, OHIO, April 23, 1931.

HON. FRANK D. HENDERSON, *Adjutant General of Ohio, Columbus, Ohio.*

DEAR SIR:—Recently I was asked the following inquiry by your predecessor:

"I should like to be informed if it is possible for the state to declare the Cleveland Airport and the surrounding territory a military district during the time the National Air Races might be held.

The Cleveland Airport is municipal owned and is leased by the State of Ohio for use of Ohio National Guard Aviation.

I hope that I may be favored with an early reply, inasmuch as the Cleveland Chamber of Commerce, the author of the inquiry, is anxious to settle this point before proceeding with other arrangements."

May I say that the "declaration of a military district" is a term which is wholly unknown to legal phraseology in Ohio. Upon consultation with one of the assistants in the office of your predecessor, I was informed that the term had no meaning, either, which was peculiar to military usage in Ohio, but was merely the diction employed in a letter to your predecessor, from The Cleveland Chamber of Commerce. Understanding that the real intent in the mind of the Cleveland interrogators is to secure the aid of members of the Ohio military in order to cope with the policing and traffic problems resulting from such a congregation of people and vehicles as a National Air Race naturally elicits, the inquiry resolves itself into the question: May some unit of the Ohio Militia be called out for such duty during the National Air Races at the Cleveland Airport and vicinity?

Pertinent constitutional and statutory provisions are involved which I shall proceed to consider. Article III, section 5, Ohio Constitution:

"The supreme executive power of this state shall be vested in the governor."

Article III, section 6, Ohio Constitution:

"He (the governor) * * * shall see that the laws are faithfully executed."

(words in parenthesis the writer's)

Article III, section 10, Ohio Constitution:

"He (the governor) shall be commander-in-chief of the military and naval forces of the state, except when they shall be called into the service of the United States."

(words in parenthesis the writer's)

Article I, section 4, Ohio Constitution:

" * * * the military shall be in strict subordination to the civil power."

An examination of the above quoted constitutional provisions evinces the fact that the supreme executive power of Ohio is vested in the governor who is enjoined to see that the laws of the state are faithfully executed; that the governor is constituted commander-in-chief of the state's military and naval forces; and that special precaution is taken to state that the military shall be in strict subordination to the civil power. By the authority of these fundamental declarations one reaches the conclusion logically that the military forces are a component of the state's executive power; and one further finds that judicial fiat corroborates it. In *State* v. *Coulter,* Wright's Reports, 421, the Supreme Court states at page 424:

"The militia is an arm of the executive power."

See also, Opinions of the Attorney General for 1917, Vol. I, p. 32, at p. 33.

Coming to the more specific problem of determining under what circumstances this particular arm of the executive power may be summoned to action, one finds that, upon it, both the constitution and the legislature speak. Article IX, section 4, Ohio Constitution:

> "The governor shall commission all officers of the line and staff, ranking as such; and *shall have power to call forth the militia, to execute the laws of the state, to suppress insurrection, and repel invasion.*"
>
> (italics the writer's)

Article IX, section 1, Ohio Constitution:

> "All white male citizens, residents of this state, being eighteen years of age, and under the age of forty-five years, shall be enrolled in the militia, and *perform military duty, in such manner, not incompatible with the constitution and laws of the United States, as may be prescribed by law.*"
>
> (italics the writer's)

Section 5202, General Code:

> "The national guard may be ordered by the governor to aid the civil authorities to suppress or prevent riot or insurrection, or to repel or prevent invasion, and shall be called into service in all cases before the militia."

Section 5270, General Code:

> "When there is a tumult, riot, mob or body of men acting together with intent to commit a felony, or to do or offer violence to person or property, or by force and violence break or resist the laws of the state, or there is a reasonable apprehension thereof, the commander-in-chief may issue a call to the commanding officer of any regiment, battalion company, troop or battery to order his command or part thereof, describing it, to be and appear, at a time and place therein specified, to act in aid of the civil authorities."

It is thus seen that by Article IX, section 4 of the Constitution, the governor is given the express "power to call forth the militia, to execute the laws of the state, to suppress insurrection, and repel invasion." On its face, this provision is susceptible to two interpretations. First, it might be said that the intention is to enumerate four independent powers which the governor shall have—i. e.—the power to call forth the militia, the power to execute the laws of the state, the power to suppress insurrection and the power to repel invasion. On the other hand, it may be argued that said provision is intended to enumerate just one power—the power to call forth the militia—and that it is intended, by the phrases which follow, merely to enumerate the purposes for which the governor may call forth the militia, so that the real meaning would best be expressed in the following words:

> "The governor * * * shall have power to call forth the militia in order to execute the laws of the state, in order to suppress insurrection and in order to repel invasion."

I am inclined to favor the latter interpretation. This position does not, in the least, strain the ordinary meaning of words, for it is just as common (if not commoner) for one to say "I am going to the store *to buy* a hat," as it is to say, "I am going to the store *in order to buy* a hat." Furthermore, in opposition to the first interpretation of independent, enumerated powers, is the fact that preceding sections of the Constitution elsewhere vest the supreme executive power in the governor (art. III, sec. 5) and enjoin him to see that the laws are faithfully executed (art. III, sec. 6). Therefore, to say that the expression, "to execute the laws of the state," as used in article IX, section 4, merely intended to give again the general power to execute the laws, would be to reduce the expression to inutility which, I believe, is subversive of the rule requiring an interpretation, wherever reasonably possible, that effectuates all the various provisions of a constitution.

In 12 Corpus Juris 707, it is stated:

> "The presumption and legal intendment is that each and every clause in a written constitution has been inserted for some useful purpose * * *."

See also 8 Ohio Jurisprudence 131-132. Additional support accrues to the second interpretation from the fact that article IX, in which the ambiguous provision is found, is entitled "Militia," and that all of its sections relate to the military. From this, one naturally deduces that section four thereof, in dealing with the execution of laws, pertains to the part which the militia may have in their execution. In view of these reasons I believe that article IX, section 4, expressly empowers the governor to call forth the militia in order to execute the laws of the state.

However, even if the first interpretation were accepted, and it were true that article IX, section 4, merely broadly empowers the governor to call forth the militia without stating the purpose for which he may call them, no one, bearing in mind that the governor is charged with the execution of laws and made commander-in-chief of the state military which is subordinate to the civil power, would hesitate in saying that one of the most obvious, implied purposes for which he could call them forth and for which they exist, is to aid in the execution of laws. Any doubt of this is dispersed by a declaration of the Supreme Court made in 1833, long before there was any constitutional provision stating that the governor could call forth the militia. In *State* v. *Coulter,* Wright's Reports, page 421 at page 424, the court said:

> "*The militia is an arm of the executive power;* and is a military force combining the citizen with the soldier, pervading the entire community, subject to the general laws, and *directly interested in their faithful execution.* A force everywhere present, whose interests and feelings are the interests and feelings of the people of whom they are a part—*a force ever ready to protect the civil officer from violence, and aid him in executing the laws, thus carrying out the principles of its organization as an arm of the executive,* and giving permanence and safety to our free institution. *The preservation of the public peace, the maintenance of law and order, is a fit and appropriate employment for free citizens in the performance of military duty;* a duty which makes them in fact, what they are held to be in theory, a bulwark of liberty."
>
> (italics the writer's)

Having determined that article IX, section 4, expressly empowers the governor

to call forth the militia in order to execute the laws, it becomes necessary to determine how this power is affected by sections 5202 and 5270, General Code, supra. A comparison of the provisions shows that article IX, section 4, grants to the governor a broad power to call forth the militia in order to execute the laws, without making any statement to limit it to their execution in any particular situation, while the instances enumerated in the aforesaid statutory provisions in which the governor may call forth the militia in order to execute the laws are less comprehensive. But these statutes do not state that the militia may not be called forth in other situations in order to execute the laws, and hence it may not be fair to say that they attempt to cut down the power of call granted by the constitution to the governor. However, but brief space is necessary to prove that any such an attempt, if it were made, would be void. The case of *State* v. *Brown,* 105 O. S., 479, 487, held:

> "What the constitution grants, no statute can take away."

And, In Re Hawke, 107 O. S. 341, 347, the court declared:

> "What is expressly delegated or granted in a Constitution cannot thereafter be expressly or impliedly denied or qualified by statute; neither may it be increased nor decreased by statute; if so, the statute becomes at once paramount to the Constitution. Were it otherwise, constitutional law could be, at the pleasure of the General Assembly, absolutely nullified by the enactment of any contrary, conflicting, or amendatory statute."

Occasions are not without judicial sanction in which state militia were held to have been validly called forth under the constitutional power granted to a governor, although the governor did not comply with certain requirements which the legislature attempted to prescribe as conditions precedent thereto. *Worth* v. *Commissioners,* 118 N. C. 112; *Chapin* v. *Ferry,* 3 Wash. 386. Note the concession by the dissenting opinion in the former case, that:

> " * * * the legislature has no authority to restrict the power of the governor to call out the militia * * *." (p. 123)

Of course, article IX, section 1 of the constitution provides that members of the militia shall "perform military duty, in such manner * * * as may be prescribed by law," but I do not believe this provision was intended to limit the express power given to the governor in article IX, section 4, to call forth the militia in order to execute the laws. Rather, the former section relates to such military duties as may be additionally prescribed by law—duties other than the duty to respond to the governor's call for the purposes which are enumerated in article IX, section 4. However, the legislature has prescribed that: (sec. 5204, G. C.)

> *"The Ohio national guard shall be governed by* the military laws of the state, *the orders of the commander-in-chief* and the code of regulations."
>
> (italics the writer's)

Having concluded that neither article IX, section 1, of the Constitution, nor sections 5202 and 5270 of the General Code, cuts down the power granted to the

governor in article IX, section 4, to summon the militia in order to execute the laws, I shall address myself to the specific question of whether this authorization is broad enough to empower the governor to summon the militia for duty at the National Air Races.

There may be a popular feeling that the governor can call forth the militia only on occasions of great chaos and turmoil when the enforcement of law by civil authorities has broken, or threatens to break, completely down. Whether this is attributable mostly to the fact that, as a matter of practice, the military is rarely called forth except in such instances, or to a feeling on the part of executives that they can not, in view of the extra expenditures of public money thereby necessitated and in view of the fact that summoning men for military duty takes them away from, and interferes with, their regular, private occupations, conscientiously discharge the obligations of their public trust unless such an exigency exists, or to the fact that any other practice would contravene the principle that law enforcement should be local, I do not know. However, I do not find, as a matter of fact, that any such limitation exists upon the power which article IX, section 4, confers upon the governor. The constitution charges the chief executive with the responsibility of executing the laws and expressly empowers him to call out the militia in order to execute them. This, I believe, confides in him full discretionary power to determine when he shall summon the militia in order to execute the law and renders him responsible only to the electorate for indiscretion in resorting to this extraordinary power when the same ends may be attained without it. In 40 Corpus Juris 691, under a paragraph entitled "Who May Call Out the Militia," it is stated:

> "The right to call out the militia in times of public disorder or danger, or when there is imminent danger thereof, or *to aid the civil authorities in the enforcement of law,* is generally vested in the governor, and he may act even without a request from local civil officers in the place where the disturbance exists. The power of the governor in this respect extends to calling out either the organized or the unorganized militia. *The decision of the governor that the condition exists which demands the exercise of his authority is conclusive and is not subject to review by the courts.*"
>
> (italics the writer's)

This conclusion is not contrary to the opinion rendered in 1914 by a former Attorney General (1914 O. A. G. 1140—Opinion No. 1118), bearing on the right, under section 5316, General Code, to use the Ohio national guard to preserve order and do general police duty at county fairs. The then existing section 5316, which has since been repealed, but which was analagous to the present section 5270, General Code, supra, provided:

> "Where there is a tumult, riot, mob or body of men acting together with intent to commit a felony, or to do or offer violence to person or property, or by force and violence to break or resist the laws of the state, or there is reasonable apprehension thereof, the commander-in-chief, the sheriff of the county, the mayor of a municipal corporation therein, or a judge of any court of the state or United States, may issue a call to the commanding officer of any regiment, battalion, company, troop or battery, to order his command or part thereof, describing it, to be and appear, at a time and place therein specified, to act in aid of the civil authority."

It will be noted that said section 5316 is practically identical to present section 5270 with the exception that the latter does not empower "the sheriff of the county, the mayor of a municipal corporation therein, or a judge of any court of the state or United States" to summon the militia, as did the former section. The question at hand in the 1914 opinion, related to the right of local officials to call out the militia merely on their own say, the writer of the opinion stating: (p. 1143)

> "My understanding, * * * is that the real question at issue is, primarily, the constitutionality of section 5316 of the General Code, permitting certain civil officers to call upon the national guard under circumstances of tumult, riot, etc. The correlative question relates to the nature of the circumstances which must exist as a condition precedent to the exercise of the authority conferred in section 5316, in the event that section is given credence as a valid and constitutional legislative enactment."

The opinion concluded: (p. 1145)

> "In brief, therefore, section 5316 is a valid enactment which confers certain powers upon the enumerated officers, but when read in connection with the corresponding provisions of law, and of the constitution, must be construed as conferring these powers, subject to the power of direction and control by the commander-in-chief.
>
> The concrete case presented by you, to wit, the calling out of troops for service during fair week, does not, as presented, show sufficient facts to warrant a decisive answer to your question. As a necessary foundation for the exercise of the authority conferred by section 5316, there must be a tumult, riot, mob or body of men acting together with intent to commit a felony, or to do or offer violence to person or property, or by force or violence to break or resist the laws of the state, or there must be reasonable apprehension of such state of circumstances. In the first instance, the question of the existence of such situations rests in the discretion of the officers in question, subject to the superior discretion, at all times, of the commander-in-chief. The exercise of such discretion is limited, only, by the rule that it must not be unreasonably or arbitrarily employed. Circumstances may exist, I assume, where the holding of a county fair might justify a reasonable apprehension of the conditions referred to. Whether or not such is the case rests with the officers in question, subject to the control of the courts, only, on clear, manifest and flagrant evidence of abuse of discretion."

Said opinion made no attempt to deal with the question of the governor's power, under article IX, section 4, to call forth the militia on his own responsibility alone—which is the question now.

In view of the above authorities and in specific answer to the inquiry propounded, I am of the opinion that whether the militia shall be summoned in order to execute the laws in connection with the National Air Races at Cleveland is within the discretion of the governor.

Respectfully,

GILBERT BETTMAN,
Attorney General.