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1. MIAMI UNIVERSITY—SPECIFIC AUTHORITY TO BUY LAND IN OXFORD AND OXFORD TOWNSHIP—HOLDERS OF UNIVERSITY LEASES — UNIVERSITY MAY SUBDIVIDE PROPERTY AND SELL LOTS IN SUBDIVISION TO INDIVIDUALS.
2. UNIVERSITY HAS SPECIFIC AUTHORITY TO BUY AND SELL PERPETUAL ESTATES IN LANDS IN OXFORD TOWNSHIP, BUTLER COUNTY.
3. NINETY-NINE YEAR LEASE—AGREEMENT IN DEED TO EFFECT THAT LEASEHOLD ESTATES AND FEE SIMPLE SHALL NEVER MERGE HAS NO FORCE OR EFFECT AS TO TITLE—STATUS OF TITLE TO SUCH LANDS DETERMINED SOLELY BY STATE LEGISLATURE.

## SYLLABUS:

1. Miami University has specific authority to buy land in Oxford and Oxford Township from holders of Miami University leases and subdivide such property and sell lots in the subdivision to individuals desiring to purchase the same.

2. Miami University has specific authority to buy and sell perpetual estates in lands in Oxford Township, Butler County, Ohio.

3. An agreement set forth in the deed of a ninety-nine year lease to Miami University, to the effect that the leasehold estate and the fee simple under no circumstances shall ever merge, has no force or effect as to the title inasmuch as the status of title to the lands in question is determined solely by the legislature of the State.

Columbus, Ohio, November 10, 1949

Hon. W. P. Roudebush, Secretary, Board of Trustees  
Miami University, Oxford, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“Our Board of Trustees has recently purchased a tract of land which it is proposed to subdivide and sell under contract to purchase to members of the faculty and employees of Miami University. In order to reply to questions which have been raised by attorneys who are examining titles for prospective lessees or purchasers we would appreciate the opinion of your office as to the following questions:

1. Does Miami University have authority to buy land in Oxford and Oxford Township from holders of Miami University Leases, subdivide this property and sell lots in the subdivision to individuals desiring to purchase the same?

2. May not Miami University, like any other Ohio corporation, buy and sell perpetual leasehold estates in lands in Oxford Township, Butler County, Ohio?

3. When Miami University does buy land from holders of the ninety-nine year lease above referred to, and both the university and the owner of the leasehold agree in their conveyance that the leasehold estate and fee simple estate does not merge is there a merger by virtue of this conveyance or are they separate and apart made so as by contract between the parties?

Should further information with regard to this request be desired, kindly advise."

In answering your question I deem it advisable to review briefly some of the pertinent steps taken in legislation both by the Congress of the United States and the legislature of Ohio relative to the lands in question.

An Act of the Congress of the United States was approved March 3, 1803. The fourth and fifth sections of such act read as follows:

"Section 4. That one complete township, in the state of Ohio, and district of Cincinnati, or so much of any one complete, township, within the same, as may then remain unsold, together with as many adjoining sections as shall have been sold in the said township, so as to make in the whole thirty-six sections, to be located under the direction of the legislature of the said state, on or before the first day of October next, with the register of the land office of Cincinnati, be, and the same is hereby, vested in the legislature of the state of Ohio, for the purpose of establishing an academy, in lieu of the township already granted for the same purpose, by virtue of the act, entitled 'An act authorizing the grant and conveyance of certain lands to John Cleves Symmes and his associates:' Provided, however, That the same shall revert to the United States, if, within five years after the passing of this act, a township shall have been secured for the said purpose, within the boundary of the patent, granted by virtue of the above mentioned act, to John Cleves Symmes and his associates."

"Section 5. That the attorney general for the time being, be directed and authorized to locate and accept, from the said John Cleves Symmes and his associates, any one complete township within the boundaries of the said patent, so as to assure the same

for the purpose of establishing an academy, in conformity to the provisions of the said patent, and, in case of non-compliance, to take, or direct to be taken, such measures as will compel an execution of the trust: Provided, however, that John Cleves Symmes and his associates shall be released from the said trust, and the said township shall vest in them, or any of them, in fee simple upon payment, into the treasury of the United States, of fifteen thousand three hundred and sixty dollars, with interest, from the date of the above mentioned patent to the day of such payment." (1 Chase's Statutes of Ohio, p. 72)

It appears that the township referred to in Section 5 above was never located under the provisions of such section, but was located under the provisions of an act passed by the legislature of Ohio April 14, 1803 (1 O. L. 66), which act is entitled "An Act to Provide for the Locating a College Township in the District of Cincinnati." The first section of said act reads as follows:

"Be it enacted by the general assembly of the state of Ohio, That one complete township in the district of Cincinnati, or so much of any one complete township within the same as may remain unsold together with as many adjoining sections as shall have been sold in the said township, so as to make in the whole thirty-six sections, shall be located and entered in due form with the register of the United States' land-office at Cincinnati, on or before the first day of October next, for the use and support of an academy, in lieu of the college township heretofore granted in trust to John C. Symmes and his associates, by the United States, and in pursuance of and agreeably to an act of congress, entitled, 'An act in addition to and in modification of the propositions contained in the act, entitled, 'An act to enable the people of the eastern division of the territory north-west of the river Ohio, to form a constitution and state government, and for the admission of such state into the union, on an equal footing with the original states and for other purposes.'"

The acts of Congress referred to in Section 1 of Ohio Laws (1 O. L. 66) quoted above, is the act of Congress from which the fourth and fifth sections are quoted, supra. And in addition to Section 1 as above quoted the General Assembly of Ohio in the same act appointed three commissioners, to wit: Jeremiah Morrow, Jacob White and William Ludlow, to locate thirty-six sections of land for the use and support of an academy, and such commissioners had the following entry made on the records of the Department of the Interior, General Land Office, being identified as No. 205:

“Land Office at Cincinnati.  
1st September, 1803.

William Ludlow & Jacob White, Agreeably to an Act of Congress passed on the 3rd day of March, 1803, and in conformity to a Law of the State of Ohio, passed on the 15th day of April, 1804, have entered with the Register of the Land Office the following Sections of land, to-wit: Sections Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, E $\frac{1}{2}$ 11, 12, 13, E $\frac{1}{2}$ 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, E $\frac{1}{2}$ 24, 26, 28, 29, 30, 31, 32, 33, 34, 35, 36, in Township No. 5 of Range No. 1; Sections 30 and 31 in Township No. 5 of Range No. 2, and the West half of Section No. 6 in Township No. 4 of Range No. 2, lying east of a meridian drawn from the mouth of the Great Miami River, which contains by the returns of the Surveyor General twenty-three thousand three hundred and twenty-one acres and sixty-eight hundredths of an acre.

for I. Ludlow, Register.  
Charles Killgore.”

The General Assembly of the State of Ohio passed an Act on February 17, 1809, published in 7 Ohio Laws, 184, wherein they established Miami University, and Section 10 of such Act reads as follows :

“Whereas the congress of the United States, by their act of the third of March, one thousand eight hundred and three, did vest in the legislature of the state of Ohio, one complete township in the state of Ohio, and district of Cincinnati, or so much of any one complete township within the same, as there remained unsold, together with as many adjoining sections as should have been sold in the said township, so as to make in the whole, thirty-six sections, to be located under the direction of the legislature of the state of Ohio, on or before the first day of October, then next, with the register of the land-office at Cincinnati, for the purpose of establishing an academy in lieu of the township then granted for the same purpose, by virtue of the act, entitled ‘An act, authorizing the grant and conveyance of certain lands to John Cleves Symmes, and his associates.’

And whereas the said lands have been located and surveyed for the purpose aforesaid; Therefore, be it further enacted, That the said lands so as aforesaid be, and the same are hereby vested in the said corporation, which by this act is created, and their successors forever, for the sole use, benefit and support of the said University, to be holden by the said corporation, in their corporate capacity, *with full power and authority to divide, subdivide and expose the same to sale in tracts of (not less than eighty,) nor more than one hundred and sixty acres, and for the term of ninety-nine years, renewable forever,* (subject to a valu-

ation every fifteen years, always considering the land in an unimproved state, for the purpose of valuation,) and provided that the land shall be offered at auction for not less than two dollars per acre, and the tenants or lessees shall pay six per cent. per annum on the amount of their purchase, during the continuance of their leases; and the said tenants or lessees shall enjoy and exercise all the rights and privileges which they would be entitled to enjoy, did they hold the said lands in fee simple, any law to the contrary notwithstanding; Provided, That the trustees shall have power to reserve one mile square, for the purpose of laying out a town, which they may lay out, and lease in lots of such size, as they or a majority of them shall think proper."

(Emphasis and parentheses added.)

The first portion of such Section 10, which is in parenthesis was amended and supplemented by Section 1 of an act of March 22, 1837, authorizing leases in tracts containing less than eighty acres. See 35 Ohio Laws, Local, 303, Section 1, which reads as follows:

"Be it enacted by the General Assembly of the State of Ohio, *That the trustees of the Miami University, shall have power, if they or a majority of them should deem it advisable, to grant leases of such lands belonging to the said Miami University as may remain undisposed of at the date of this act; as well as of such lands, tracts, lots, or parcels of land, as may hereafter revert to, or otherwise come to the lawful possession of said University, by the non-payment of rents accruing thereon; or by forfeiture, purchase or devise, in tracts of such size below eighty acres, as the said trustees or a majority of them, may deem most conducive to the interest of said institution.*" (Emphasis added.)

That part of Section 10 which refers to valuation every fifteen years was repealed by Section 5 of an Act passed February 6, 1810 (8 O. L. 94).

The Act establishing Miami University, passed February 17, 1809 (7 O. L. 184), and from which Section 10 is heretofore set forth, also contains Section 9, which reads in part as follows:

"\* \* \* *and the said corporation shall be capable of having and holding in fee simple, or any less estate, by gift, grant, devise or otherwise, any lands or other estate, real or personal.*"

The above section was amended by an Act of March 7, 1842 (40 O. L. Local, 123). However, said amendment did not change or affect the provision for authority to purchase real estate, as above set forth, and the first branch of your first question, which is "Does Miami University have

authority to buy land in Oxford and Oxford Township from holders of Miami University Leases", is clearly answered in the affirmative.

Section 1 of the Act of March 22, 1837, *supra*, also clearly indicates that any lands coming into the possession of said University by the non-payment of rents accruing thereon or by forfeiture, purchase or devise, can be sold by the trustees of the University if they, or a majority of them, should deem it advisable, in tracts of such size below eighty acres. Not limiting the minimum size of such tracts, we can only interpret such authority as permitting the trustees to subdivide as often as they deem it advisable and sell such smaller tracts.

Section 1 of an Act passed March 28, 1862 (59 O. L. 125) amended Section 3 of the Act of March 22, 1837 (35 O. L. Local, 303) to read as follows :

"That in all cases where the original tracts or lots heretofore leased, or which may hereafter be leased by the trustees of said university, have been or shall be subdivided by the lessees or his assignees, and are now, or may be held by two or more occupants, whether lessees or assignees, or both, said occupants, by application to the proper officer, whose duty it is to keep the books or records of said lands, may have their lots or subdivisions so held by them, entered separately on the books of said corporation, upon such terms and conditions as to rent and otherwise, as may be agreed upon between them and the trustees of said university ; and thereafter the amount of rent so fixed upon each sub-division, shall be levied in the name of the owner or occupant thereof, and shall be collected in the same manner, and each sub-division shall be subject to the same liens and restrictions that are now imposed by law on entire lots or tracts of land, the leases for which had been granted in conformity with the provisions of 'an act to establish the Miami University,' passed February 17, 1809: Provided, that no such entry or transfer shall be made except upon application of all the parties concerned in such sub-division ; and, provided, further, that the expense of such entry and transfer shall first be paid by the persons making application for the same : and, provided, further, that the trustees in making such sub-divisions shall not be bound to apportion among them the original rent, but may increase the same, and shall in no case agree to a rent of less than one dollar per annum for any sub-division."

Even without the specific and clear provision of Section 1 of the Act of March 22, 1837, *supra*, giving to the trustees power and authority to sell in tracts smaller than eighty acres, such amended Section 3 immediately above set forth could certainly be interpreted to give such au-

thority to the trustees by implication, for certainly if the University can approve of tracts being subdivided by lessees or their assignees and a record of such subdivision being placed on the University books, we could not advance a strong argument that if and when the University repurchased such leases it could not itself do what those holding from it are authorized to do.

Therefore, I am clearly of the opinion that the second branch of your first question is also answered in the affirmative.

I think the above sections also clearly answer your second question in the affirmative in so far as the University clearly has authority to buy and sell perpetual leasehold estates in lands in Oxford Township. I do not deem it necessary to go into the matter as to whether or not the University can buy and sell such perpetual leasehold estates *like any other Ohio corporation*, as set forth in your second question, for the reason that an exhaustive study would be required to determine what authority any other Ohio corporation may have to buy and sell such leasehold estates. And, furthermore, I am unable to comprehend how such a comparison could be of any benefit to the University.

Coming now to your third question, I have in mind the provision of Section 10 of the Act of February 17, 1809, establishing the University and vesting said University with the land granted by the Federal Government for the purpose of an academy, which Section 10 is supplemented by Section 1 of an Act of March 22, 1837, *supra*. I wish to repeat and set forth that part of Section 10 which reads as follows:

“That the said lands so as aforesaid be, and the same are hereby vested in the said corporation, which by this act is created, and their successors forever, for the sole use, benefit and support of the said University, to be holden by the said corporation, in their corporate capacity, with full power and authority to divide, sub-divide and expose the same to sale in tracts of \* \* \* and provided that the land shall be offered at auction for not less than two dollars per acre, and the tenants or lessees shall pay six per cent. per annum on the amount of their purchase, during the continuance of their leases; and the said tenants or lessees shall enjoy and exercise all the rights and privileges which they would be entitled to enjoy, did they hold the said lands in fee simple, any law to the contrary notwithstanding; \* \* \*.”

Judge Hitchcock in the case of *Thomas Armstrong, et al. v. Treasurer of Athens County*, in 10 O. Reps., 235, in discussing a similar provision in the grant of land to Ohio University, with respect to their exemption

from taxation, held in substance that as long as such lands remained vested in the University with the right to collect rent they remained free from taxation by the State. In that case the court had under consideration an Act passed on February 4, 1826, authorizing the Ohio University to divest itself, by sale of any interest in certain lands, which of course took them out of a class of exemption from taxation. No similar act as the one just referred to was ever enacted affecting Miami University lands. All Miami University ever sells or conveys and all it can sell or convey until or unless consent is given by the legislature, is a leasehold estate renewable forever, retaining in itself the right to collect rent forever.

It was anticipated that there would be breaches of the payment of rent and in some instances lands would revert and also that for the best interest of the University leases would be purchased by the University. In such instances the University would not collect rent while such leasehold and the fee were both held by it, however, in theory, or may we say as a legal fiction, the fee and the leasehold never merge. When again leased the fee remains in the University, and this must necessarily remain the situation as long as the lands remain vested in trust in the University. Such status of title does not come about, nor can it be effected by an *agreement* between the grantor and the University in a deed of conveyance of a ninety-nine year lease to the University. I have in mind the agreement to which you refer and of which I have personal knowledge and which reads as follows:

“It is further agreed between the grantor and grantee herein, its successors or assigns, that this instrument of conveyance shall under no circumstances create a merger of the parent or freehold estate already owned by the grantee herein, and the outstanding ninety-nine (99) year perpetual leasehold estate which is hereby conveyed to the grantee, and the grantee shall have full power to resell or dispose of the unexpired term of the ninety-nine (99) year perpetual leasehold interest hereby conveyed to it as it never owned the original or parent estate.”

The land originally was granted to the State for a particular purpose; it was accepted by the State for that purpose and by the State is vested in the University in trust for that purpose, and up to date no legislation has been passed affecting the title status of such land in so far as merging the fee with the leasehold estate. I pointed out before that a restriction against giving of more than a ninety-nine year lease, renewable forever,



means that the University shall retain the right to rental on all applicable land forever.

Therefore, on specific answer to your first question, it is my opinion that Miami University has specific authority to buy land in Oxford and Oxford Township from holders of Miami University leases and subdivide such property and sell lots in the subdivision to individuals desiring to purchase the same.

In answer to your second question, I am of the opinion that Miami University has specific authority to buy and sell perpetual estates in lands in Oxford Township, Butler County, Ohio.

In regard to your third question, I am of the opinion that an agreement set forth in the deed of a ninety-nine year lease to the University, to the effect that the leasehold estate and the fee simple under no circumstances shall ever merge, has no force or effect as to the title inasmuch as the status of title to the lands in question is determined solely by the legislature of the State.

Respectfully,

HERBERT S. DUFFY,  
Attorney General.