411.

APPROVAL, ABSTRACT OF TITLE TO LAND OF ROBERT A. AND OLIVE L. HUTCHINSON, IN THE VILLAGE OF OXFORD, BUTLER COUNTY, OHIO.

COLUMBUS, OHIO, May 17, 1929.

HON. W. P. ROUDEBUSH, *Secretary Board of Trustees, Miami University, Oxford, Ohio.*

DEAR SIR:—You have submitted for my examination and approval a corrected abstract of title, as well as warranty deed and encumbrance estimate No. 2697, relating to the proposed purchase of the south half of the south half of outlot No. 29, as the same is known and designated upon the recorded plat of the village of Oxford, Butler County, Ohio, which tract of land is now owned of record by Robert A. Hutchinson and Olive L. Hutchinson.

An examination of the corrected abstract of title submitted discloses that the exceptions pointed out in Opinion No. 243 of this department, directed to you under date of March 26, 1929, have been cured by the additional information taken from the records in the office of the recorder of Butler County and made a part of said abstract.

As noted in the former opinion of this department above referred to, the original conveyance of outlot No. 29, by the president and trustees of Miami University to Merrikin Bond, under date of September 7, 1810, was, by a ninety-nine year lease, renewable forever. The provisions of said lease in the habendum clause thereof was as follows:

> "Be it known that if the said Merrikin Bond or his representatives shall well and truly pay on the 22nd day of May every year after the date hereof to the treasurer of The Miami University the sum of $1.32, being the amount of interest on the purchase money, at the rate of 6 per centum per annum for the said tract of land, then the said Merrikin Bond or his assigns or representatives shall be entitled to hold the said lot or tract of land for the term of 99 years, and shall also be entitled so often as the lease shall expire to have the same renewed on the same conditions forever."

From said Merrikin Bond the title to the property here in question has come down to the present owners of record by mesne conveyances, which were warranty deeds.

Inasmuch as there does not appear to have been any renewal of said underlying lease in 1909, when the same expired, or that any notice of an intention to renew was given to the president and trustees of Miami University by the then owners and holders of the above described property, a question has arisen as to the nature and extent of the interest of Robert A. Hutchinson and Olive L. Hutchinson in and to this property.

Although, as above noted, it does not appear that any notice of their intention to renew said lease was given by the owners and holders of the property here in question at the time of the expiration of said original lease to Merriken Bond and to his representatives and assigns, it does appear that for a period of nineteen years since the time of the expiration of said lease the annual rental on this property has been paid by the successive record owners of the title and that such payments have been received without question by the president and trustees of Miami University.

In Opinion No. 1652 of this department, addressed to you under date of February 1, 1928, in which this office had under consideration the title of David M. Sheard and Phoebe J. Sheard, to a part of said outlot No. 29, other than that here under consideration, it was held that said David M. Sheard and Phoebe J. Sheard were only

tenants from year to year and that they had no estate in the land then held and occupied by them beyond September 7, 1928, unless the president and trustees of Miami University elected on that date to treat said David M. Sheard and Phoebe J. Sheard as tenants. In said former opinion of my predecessor above referred to it was said:

> "However, information furnished subsequent to the certification of this abstract discloses the facts that this property has been continuously occupied by the assignees of the original lessee to the present date by and with the consent of the lessor; that the ground rent has been paid at the times stipulated since the expiration of the term of the lease; and that the lessor has continuously treated the present claimants as tenants. In fact, the lessor has so far recognized their right to a renewal of the lease, that it has accepted and recorded transfers of title since the expiration of the ninety-nine year lease and has entered into an agreement with the present claimants for the purchase of the property. Under these circumstances, the present claimants would undoubtedly have a claim upon the land, which a court of equity would recognize and will, under the circumstances obtaining at present, constitute a cloud upon your title which would be worth something to remove. The value of that advantage is for the trustees of the university to determine.
>
> Therefore, while I am of the opinion that the abstract does not disclose a good and merchantable title in fee-simple to the property in David M. Sheard and Phoebe J. Sheard, they have such an equitable interest therein that it would support a contract looking to the purchase of that interest."

I am unable to agree with the conclusion reached by my predecessor upon the facts here presented.

The original lease to Merrikin Bond here in question was, I assume, executed by the president and trustees of Miami University under the provisions of Section 1 of the act of the General Assembly passed February 6, 1810, 8 O. L. 94, which, among other things, authorized the trustees of said university to sell town lots and outlots at public auction and to execute to the purchasers thereof leases for the term of ninety-nine years, renewable forever, at an annual rental of six per centum on the amount of the purchase money and, as above noted, said lease provided that said Merrikin Bond, or his assigns and representatives, should be entitled to hold said outlot No. 29 for the term of ninety-nine years "and shall also be entitled, so often as the lease shall expire, to have the same renewed on the same conditions forever."

Touching the question here presented, it is to be noted that while the authorities are substantially in accord upon the rule that where the tenant has the privilege of an extension no notice is necessary and the election of the tenant to take the extended term is exercised by simply holding over, the authorities are in conflict on the question as to whether a notice must be given by the tenant prior to the expiration of the original lease in order to avail himself of the privilege of a renewal of the lease, under the provisions therein providing for such renewal.

In 35 Corpus Juris, at pp. 1019 and 1020, it is said:

> "It has been uniformly held that formal notice of election is not necessary under a lease giving an option for an extension in the absence of a provision in the lease or of some special statute requiring notice. On the other hand, there is much authority to the effect that, under an agreement by the lessor to renew at the expiration of the term, the implication is that it is to be done at the request of the tenant or upon notice by him that he desires a renewal. But this view has by no means been universally accepted. Many decisions place options to renew and options to extend on the same basis so far as

notice is concerned, and hold that formal notice is no more necessary in one case than in the other."

Among the many decisions cited by this authority in favor of the rule that it is not necessary for the tenant to give to the lessor formal notice of the tenant's intention to renew the lease, is the case of *Gross* vs. *Clauss,* 6 O. App. 140, decided by the Court of Appeals of the First District, wherein it is held:

"A lease for a term with a privilege or option in the tenant of a renewal or extension for a further term, upon the same terms and conditions, is a present demise as to the renewal to begin at a future time, and under such covenant no new lease need be required, but any indication on the part of the tenant of his intention to avail himself of his privilege operates to extend to him the right of the additional term."

Among other cases in support of this rule the following may be found: *Hooper* vs. *Sterling-Cox Shoe Company,* 118 Me. 404; *DeLashman* vs. *Berry,* 20 Mich. 292; *Quade* vs. *Fitzloff,* 93 Minn. 115; *Raulett* vs. *Cook,* 44 N. H. 512; *Hurley-Tobin Co.* vs. *White,* 84 N. J. Equity, 60. As above noted, authorities may be found supporting the contrary rule on this question. Even if, however, it could be said that as against the lessor the tenant is required to give to the lessor notice of his intention to renew said lease as provided for in said lease, or by implication of law, such provision or rule is clearly one for the benefit of the lessor, and the lessor can waive the same either expressly or by conduct clearly evidencing his intention to waive the requirements of such notice.

In 35 Corpus Juris, at page 1020, it is said:

"The provisions of a lease requiring notice from the lessee of an election or intention to renew or extend the term are for the benefit of the lessor and therefore the notice itself, or any other matter going to the sufficiency thereof, may be waived. A written notice may be waived by parol, and a waiver of notice may be express or by inference from the conduct of the parties."

In the case here presented, it appears that after the original lease to Merrikin Bond expired, the tenants then in possession of, and those following them in the chain of title to, the premises here in question, regularly paid the ground rents provided for in said lease, which payments during a period of nineteen years last past have been received by the president and trustees of Miami University without question. In this situation I have no hesitation in holding that if, as against said lessor, to wit, the president and trustees of the Miami University as a body corporate, notice was required to be given by the tenants in possession on the expiration of said leases, the requirements of said notice have been waived by said lessor and that the present tenants, Robert A. Hutchinson and Olive L. Hutchinson, have all the rights under said lease that they would have had if said lease, upon its expiration, had been formally renewed.

I am of the opinion, therefore, that said Robert A. Hutchinson and Olive L. Hutchinson have a good and indefeasible title in perpetuity in the premises here in question, free and clear of all encumbrances except the taxes for the year 1928, apparently amounting to $58.20, and the undetermined taxes for the year 1929, which are a lien on said premises.

The warranty deed for the premises here in question to the president and trustees of the Miami University has been properly signed, executed and acknowledged by said Robert A. Hutchinson and Olive L. Hutchinson and is in form sufficient to

convey to the president and trustees of the Miami University, as a corporation, all the right, title and interest in perpetuity owned and held by said grantors to the property in question, free and clear of all encumbrances whatsoever, except all taxes and assessments due and payable December 20, 1928, and thereafter.

Encumbrance estimate No. 2697, submitted with the above files, has been properly executed and shows there are sufficient balances in a proper appropriation account to pay the purchase price of said property.

I am herewith returning to you said corrected abstract of title, warranty deed and encumbrance estimate.

Respectfully,
GILBERT BETTMAN,
Attorney General.

412.

APPROVAL, BONDS OF EAST CANTON SPECIAL SCHOOL DISTRICT, STARK COUNTY, OHIO—$50,000.00.

COLUMBUS, OHIO, May 17, 1929.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

413.

LEASE—CANAL PROPERTY—SUPERINTENDENT OF PUBLIC WORKS MAY NOT TERMINATE—SPECIFIC CASE.

SYLLABUS:

Where, pursuant to the terms of a lease of canal property for hydraulic purposes, executed by the Superintendent of Public Works, the lessee therein notifies the Superintendent of Public Works of its intention to terminate said lease effective November 1, 1929, the Superintendent of Public Works has no authority, prior to the termination of said lease at the time fixed by said notice, to release said lessee from the obligation and duty imposed upon it by said lease, to maintain said canal property and to keep the same in repair.

COLUMBUS, OHIO, May 18, 1929.

HON. RICHARD T. WISDA, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge the receipt of your recent communication with which was inclosed a copy of a water lease executed by you as Superintendent of Public Works to The Southern Ohio Public Service Company, and in which communication you request my opinion as to your authority to release said company from some of the obligations imposed upon it by the terms of said lease.

From your communication and an examination of the lease here in question, it appears that on May 3, 1927, you executed to The Southern Ohio Public Service Company a lease by the provisions of which, and in consideration of the annual rentals