	Valuation.
The Barney & Smith Car Co., Dayton, Ohio, lease of the berme bank of the Miami and Erie canal and Mad River feeder canal for a distance of 3,525 feet	$3,000 00
C. A. Rager, Groveport, Ohio, lease of a small tract of the abandoned Ohio canal property in Groveport, Ohio, for garage purposes	1,000 00
The state highway department of Ohio, lease of a portion of the abandoned Hocking canal property in Logan, Ohio, for a garage, yard and storage purposes	600 00
Mrs. Alice Baker, Napoleon, Ohio, for a small tract of M. & E. canal property in Napoleon, Ohio, for a residence and orchard purpose	200 00

I have carefully examined said leases, find them correct in form and legal. and am therefore returning the same with my approval endorsed thereon.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1925.

APPROVAL, FINAL RESOLUTIONS FOR ROAD IMPROVEMENTS IN DARKE COUNTY, OHIO.

COLUMBUS, OHIO, March 18, 1921.

HON. LEON C. HERRICK, *State Highway Commissioner, Columbus, Ohio.*

1926.

ROADS AND HIGHWAYS—WHEN TRACT OF LAND NOT ACTUALLY ABUTTING ROADWAY IS NOT ASSESSABLE FOR ROAD IMPROVEMENT.

A tract of land not actually abutting a roadway improved under virtue of sections 3298-1 *G. C. et seq., but being connected with such roadway by a private driveway or easement about* 400 *feet long, running across lands belonging to another than the owner of the tract first mentioned, is not abutting land subject to assessment as such for the improvement of the roadway.*

COLUMBUS, OHIO, March 19, 1921.

HON. A. S. BEACH, *Prosecuting Attorney, Mansfield, Ohio.*

DEAR SIR:—Consideration has been given your several letters submitted in connection with your request for an opinion of this department in a situation which may be stated as follows:

The township trustees of a certain township in your county are proceeding to make an assessment for the improvement of a highway under the provisions of

sections 3298-1 et seq. You say that the assessment is to be made in accordance with an apportionment of cost under authority of section 3298-13. That section authorizes an assessment

> "against the real estate abutting upon said improvement, or against the real estate situated within one-half mile on either side thereof, or against the real estate situated within one mile of either side thereof, according to the benefits accruing to such real estate,"

and while your letter does not state in so many words that the assessment is to be against abutting lands only, the necessary inference is that such is the case—in other words, that it is not intended to follow the plan of a one-half mile zone or a one mile zone as allowed by the statute. A certain farm of eighty acres is so situated with reference to the road to be improved as that the eighty acre tract itself does not touch the road, but is connected therewith by a strip of land perhaps thirty feet wide, running from the road a distance of about 400 feet to the southwest corner of the eighty acres, passing through lands (which will be assessed) lying immediately south of the eighty acre tract and owned by a person other than the owner of the eighty acres. Said strip has been used as a driveway or private right of way appurtenant to the eighty acre tract for more than thirty years. It is fenced on each side as it passes through other lands than the eighty acre tract; but there are no gates at either end of the driveway. Said driveway is not entered for taxation in the name of the owner of the eighty acre tract, but in the name of the owner of the lands through which it passes.

The point at issue is whether the owner of said eighty acre tract is subject to assessment for the road improvement in question.

Of course, it is plain that the eighty acres is not subject to assessment unless it may be treated either in law or in fact as abutting on the road in question. There are provisions in the highway laws to the effect that certain situations shall not be considered as taking lands out of the category of abutting lands, the particular statute on that subject in the series 3298-1 et seq. G. C., being section 3298-14, which reads as follows:

> "When property is separated from an improvement by a canal, street or interurban railway, steam railway or in any similar manner, such property shall be regarded for the purpose of assessment under the township road improvement laws as property abutting upon said improvement and both the land owned or occupied by such street, interurban or steam railway and the land lying back thereof shall be assessed on account of said improvement in the manner provided by law."

The answer to your question would seem to be found in a determination of the fact whether the driveway is owned in fee by the owner of the eighty acre tract, or is merely an easement appurtenant to such eighty acres. If the driveway is owned in fee, then said eighty acres would seem to be abutting lands for assessment purposes, leaving the question of amount of assessment to be determined not only by reference to the fact of the eighty acres being abutting land, but also by reference to the fact that the assessment cannot exceed benefits. On the other hand, if the driveway is only an easement, the conclusion is plain that the eighty acres does not abut upon the highway for assessment purposes.

The general rule as to the nature of a title acquired by adverse possession is stated in 2 Corpus Juris, at page 251, as follows:

> "While it is true that in one state at least there are special statutes under

which possession for the statutory period bars the remedy merely, in the United States and Canada the doctrine is almost universal that possession for the statutory period not only bars the remedy of the holder of the paper title, but also extinguishes his title and vests title in fee in the adverse occupant."

In support of this text several Ohio cases are cited, as follows:

McNeely vs. Langan, 22 O. S. 32;
Yetzer vs. Thoman, 17 O. S. 130;
Thompson vs. Green, 4 O. S. 216;
Paine vs. Skinner, 8 Ohio, 159.

It is believed, however, that this general rule must not be understood as operating to vest in a person claiming by adverse possession a greater estate than is consistent with the nature of the use he makes and the possession he holds of the lands claimed.

In Ohio, the doctrine of acquiring an easement by adverse possession is closely akin to that of acquiring the fee by adverse possession.

A case in point is that of Pavey vs. Vance, 56 O. S. 162, whereof the second paragraph of the syllabus reads:

"When one who is the owner of a tract of land uses a way over the land of another for the convenience of egress and regress to his land, without let or hindrance and without obstruction for the period of twenty-one years, he thereby, in the absence of anything to the contrary acquires a right by prescription to its use as an incident to his land; and the right will pass by a conveyance or descent of the land."

The rule thus stated would seem to apply perfectly in determining the nature of the right of the owner of the eighty acres in the driveway. Your statement shows that the driveway for taxation purposes appears in the name of the owner of the land through which it passes; and while the matter of taxation alone need not be given great weight, it is important to note also that the fencing has been done only on the sides of the driveway, and not at either end. In short, the whole tenor of your statement is to the effect that the use of the strip in question by the owner of the eighty acres has been for the limited purpose only of a private driveway, thus affording an easement appurtenant to the eighty acres, with the fee in the owner of the lands through which the driveway passes.

In addition to the case of Pavey vs. Vance, *supra,* the following cases discuss the subject of prescriptive easements:

Tootle vs. Clifton, 22 O. S. 247;
R. R. Co. vs. Zinn, 18 O. S. 417;
McCleery vs. Alton, 19 Ohio Cir. Dec. (29 C. C. R.) 97;
Schaeffer vs. Clauda, 15 Ohio Cir. Dec. (25 C. C. R.) 249;
Bates vs. Sherwood, 14 Ohio Cir. Dec. (24 C. C. R.) 146.

The conclusion of this department therefore is that the owner of the eighty acres is not subject to assessment for the improvement of the highway in question.

A comparatively recent decision by the supreme court of Ohio has some bearing on your question, namely, that of Commissioners vs. Bolin, 99 O. S. 117. The views of the supreme court are stated in a short per curiam opinion, from which the following paragraphs are taken:

"The questions of consequence are, first, as to the assessments on real estate on the north side of said Newark and Zanesville road, and, second, as to the assessments upon the south side of said Newark and Zanesville road. Exemption is claimed for certain property on the north side of said road by reason of the fact that immediately abutting said road on the north, for a considerable distance, is a certain electric railway. The evidence, however, discloses that said railway has only a right of way, while the fee thereof is in Bolin.

We hold that as to such lands Bolin is an abutting owner within the contemplation of the statute and subject to the assessment heretofore found; and in so far the judgment of the court of appeals is reversed.

As to the lands upon the south side of said improved road, there is intervening between said Bolin lands and the improved roadway the Ohio canal, occupying a strip of land some fifty or sixty feet in width, paralleling the improved road.

It is urged that the canal lands as to use and occupation are substantially abandoned by the state of Ohio, and that said Bolin is using, occupying and tilling the same, to all intents and purposes, as if his own lands.

It is admitted, however, that the fee in these lands is in the state; and whatever use may be made of them by said Bolin is only by sufferance of the state, the latter having the right to retake full possession at any time and dispose of the same as it may see fit.

In this view of the case, the Bolin lands, so far as they are cut off from the highway by the Ohio canal, are not abutting lands within the contemplation of the statute, and as to this finding of the court of appeals the same is affirmed."

It should be said that section 3298-14 G. C., above quoted, and similar statutes appearing in the state and county highway improvement laws, were probably enacted to obviate such questions as arose in the case last cited. These statutes, however, do not have the effect of classifying the eighty acre tract now in question as abutting lands, because the "separation" referred to in said statutes is a lateral separation, or a separation which owes its existence to the canal, street or railway; whereas, in the case of the eighty acre tract under discussion, the driveway does not "separate" the tract from the road, but furnishes a passage about 400 feet long across farm lands which do separate the eighty acre tract from the road. Section 3298-14 authorizes the assessing of the land occupied by the street or railway "and the land lying back thereof," whereas, in the situation which you describe the eighty acre tract does not lie "back of" the driveway, but at the end of it.

In one of your letters, you mention the following Ohio cases as having been considered by you in connection with the question at hand:

Richards vs. Cincinnati, 31 O. S. 506;
Cohen vs. Cleveland, 43 O. S. 191, 196;
Challen vs. Marvin, 8 C. C. 480.

These cases have been examined by this department and are not believed to be inconsistent with the conclusion above expressed.

Respectfully,
JOHN G. PRICE,
Attorney-General.