trunk of the elm tree grows on plaintiff's property . . .' The law, according to the latest holdings, is determined by the exact location of the trunk of the tree at the point it emerges from the ground.'"

The fact that the bark of tree 9 touches the line is insufficient to create a tenancy in common as to that tree. Trees 1 through 5 and 9 through 13 are the sole property of the defendants. They may therefore do with them as they see fit.

DECREE

NOW, this 30th day of January, 1990, the preliminary injunction entered January 19, 1990 is continued in effect as to trees 6, 7 and 8, and the defendants shall refrain from cutting down and removing them or from cutting any branches of said trees overhanging the real estate of the plaintiffs.

The preliminary injunction of January 19, 1990 is dissolved as to trees 1 through 5 and 9 through 13. This dissolution of the injunction as to these trees shall not be construed to grant, lease or license to the defendants to enter upon the real estate of the plaintiffs.

BARNETT AND WIFE VS. APPLEBY AND HUSBAND, C.P. Fulton County Branch, Equity No. 240 of 1985 - C

Prescriptive Easement - Continuous Use - Abandonment - Parol Agreement - Laches

1. Continuous use of a right of way is proved by a settled course of conduct indicating plaintiff viewed his use as an excercise of a property right.

2. A parol agreement to abandon an easement is unenforceable as contrary to the Statute of Frauds.

3. A parol agreement to abandon an easement is enforceable when the agreement has been so for executed that it is inequitable to rescind the agreement.

4. A 14-year delay in exercising plaintiffs' rights in an easement is an inexcusable delay such as to bring into effect the equitable doctrine of laches.

Gary D. Wilt, Esq., Attorney for Plaintiffs
Thomas J. Williams, Esq., Attorney for Defendants

ADJUDICATION AND DECREE NISI

KAYE, J., April 16, 1990:

ADJUDICATION

1. PROCEDURAL BACKGROUND

On September 23, 1985, Gerald and Betty Barnett ("the plaintiffs") filed an action in equity against Verna and Clarence Appleby ("the defendants") seeking injunctive relief which would prevent the defendants from interfering with the plaintiffs' use of an alleged right-of-way which runs along the southern border of the defendants' real property.

The defendants filed their answer to the complaint on October 17, 1985. On November 27, 1985, the plaintiffs filed preliminary objections to the new matter in the nature of a motion to strike based on the Dead Man's Statute, and a motion for a more specific pleading. On May 6, 1986, the Court ordered the defendants to file an amended answer, but denied the motion to strike.

The defendants filed their amended answer on May 15, 1986. On May 28, 1986, the plaintiffs filed a reply to the new matter, and on July 15, 1986, the deposition of the plaintiffs was taken.

The trial in this case began on August 6, 1987. The trial was recessed prior to the completion that day so that a view of the area in dispute could be taken by the Court. The matter returned to Court on May 24, 1988 for the purpose of concluding the trial testimony. However, it having appeared that the parties had arrived at a settlement, they were given a period of sixty (60) days to conclude the matter.

After several delays, the parties were unable to effecutate the settlement so the matter was rescheduled for the purpose of

concluding testimony. On December 11, 1989, the Court heard the final testimony, and the case is in a posture for decision.

II. FACTUAL BACKGROUND:

Plaintiffs Gerald Barnett ("Gerald") and Betty Barnett ("Betty") are husband and wife and reside in Columbia, Pennsylvania. The plaintiffs are the owners of a five (5) acre tract of real property in Fulton County, Pennsylvania which does not adjoin any public road.

Defendants Verna Appleby ("Verna") and Clarence Appleby ("Clarence") are husband and wife and reside in Fulton County, Pennsylvania on a tract of property which is located near the plaintiffs' Fulton County property. The Barnett property and the Appleby property are not adjoining. However, the private road in issue, hereinafter referred to as "the old right-of-way", extends from the Barnett property and runs along the eastern and southern borders of the Appleby property. The owners of the Barnett property obtained access to a public road, LR 29028, by way of two (2) private right-of-ways. The old right-of-way was used by the Barnetts and their immediate predecessors in title from 1936 to 1971 on a regular basis. The new right-of-way has been used by the Barnetts and adjoining landowners from 1971 until the present.

The old right-of-way extended from the Barnett property running in a southerly direction. It initially ran along the eastern border of what is now the property of Alma Thomas and continued southward passing along the eastern border of the Appleby property. As the right-of-way reached the southeastern corner of the Appleby property, the right-of-way made a sharp turn and continued in a northwesterly direction along the southern border of the Appleby property and the northern border of a second tract of land owned by Alma Thomas. This section of the old right-of-way (hereinafter referred to as "the west leg") continued along the southern border of the Appleby property until joining public road, LR 29028.

The new right-of-way begins at the same point and initially follows the same pathway as the old right-of-way running along the eastern borders of the Thomas and Appleby properties. However, as the right-of-way reaches the southeast corner of the Appleby property, it continues to run in a southerly direction along the

eastern border of the second tract of land owned by Alma Thomas rather than making a sharp turn to the northeast. This section of the new right-of-way (hereinafter referred to as "the southern leg") continues southward until joining public road, LR 29028. The Gladfelter Pulpwood Company owns the real property which abuts the new right-of-way on the side opposite to the Appleby and Thomas properties.

The Barnett property was originally rented to Gerald Barnett's father, Clarence Barnett, in 1936. Gerald moved to the property with his parents in 1936. Clarence Barnett purchased the property in 1939. Gerald continued to live on the property with his parents until 1950 when he moved away after his marriage to Betty. In 1964, Gerald and Betty Barnett purchased the property from Gerald's parents, Clarence and Iva Barnett. They use the property mainly on weekends.

The Appleby property was previously owned by Bruce and Sarah Cutshall, Verna Appleby's parents. The Applebys lived in a mobile home on her parents' property from 1964 until sometime after 1980. In 1980, after the death of Bruce Cutshall, a section of the Cutshall property was subdivided, and Sarah Cutshall conveyed a tract of the subdivided property to her daughter, Verna Appleby, by deed. The Applebys subsequently sold their mobile home and built a house in which they currently reside on the property.

The 1980 deed purported to reserve "an earth road 50 feet in width crossing above tract and parallel to eastern boundary of the tract for the use of those entitled to use the same." However, in 1982, a second deed was executed with the stated purpose of reducing the width of the right-of-way or easement from fifty (50) feet to sixteen (16) feet, which appeared to reflect the actual width of the roadway.

A survey which is dated October 3, 1980 (Defendants' Exhibit 1) shows the right-of-way as extending from the property owned by the Barnetts and running south in a straight line to LR29028 which is the path of the new right-of-way. There is no representation of the west leg of the old right-of-way in either of the deeds or in the survey.

Gerald Barnett testified that the old right-of-way was used to

thence south 65 and ¼ degrees west 5.1 perches to a post; thence north 20 and ¼ degrees west 6.6 perches to a post; thence north 65 and ¾ degrees east 5.1 perches to the place of beginning. CONTAINING 33.3 perches, neat measure.

Tract No.3:

Another parcel or tract of land adjoining the above-described Tract No. 2, BEGINNING at a stake; thence south 25 degrees east 2.5 perches; thence south 67 and ½ degrees west 5.2 perches; thence north 25 degrees west 2.5 perches; thence North 65 and ½ degrees east 5.2 perches to the place of beginning. CONTAINING 12 perches, neat measure.

Gregory L. Kiersz
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of Counsel:
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239 East Main Street
Waynesboro, PA 17268

8/31/90

LEGAL NOTICES, cont.

gain access to the Barnett property from 1936 to 1971. Prior to 1971, the new right-of-way was visible, but it was seldom used by anyone and never used by the plaintiffs. The west leg of the old right-of-way consisted of a cut through the southern border of the Appleby property. The roadway itself was several feet lower than the adjacent property resulting in three (3) to four (4) foot banks on either side of the right-of-way. When snow fell during the winter months, the west leg sometimes would fill in with snow drifts up to the level of the adjacent property and would be impassable for a period of time.

In 1971, either Bruce Cutschall or members of his family at least partially obstructed the west leg of the old right-of-way. Glen Barnett, Gerald Barnett's brother, unsuccessfully attempted to remove an obstruction from the west leg of the roadway. When he was unable to remove the obstruction, Glen Barnett threw an object through a window of the defendants' residence. As a result, criminal charges were filed against Glen Barnett.

On September 30, 1971, Gerald Barnett caused a letter to be sent from District Justice Don Knepper addressed to Bruce Cutshall. The letter advised Mr. Cutshall to open that portion of the right-of-way which had been closed or else face legal action. Soon after Bruce Cutshall received the letter from District Justice Knepper, Mr. Cutshall and Gerald Barnett met at a site along the right-of-way.

According to Gerald Barnett's testimony and version of the meeting, the meeting occurred when Gerald took a road grader to the right-of-way with the intention of opening the west leg himself. Bruce Cutshall arrived at the site and approached Gerald Barnett. Gerald informed Bruce Cutshall that he was going to open the west leg of the right-of-way with the grader. At that point, Bruce Cutshall told Gerald that he was planning to open the southern leg of the new right-of-way so that landowners could gain access to LR 29028 instead of reopening the west leg. At that time, Bruce Cutshall also owned the tract now belonging to Alma Thomas.

In response, Gerald Barnett testified that he told Bruce Cutshall to do what he wanted to do with the south leg, but that Gerald intended to continue to use the west leg of the right-of-way. According to Gerald's version of the event, Bruce Cutshall responded by saying that he would discuss the matter with his family.

Gerald Barnett testified that only he and Bruce Cutshall were present at the meeting.

Apparently, improvements were made to the south leg of the new right-of-way, and the west leg of the old right-of-way was not reopened after this meeting in 1971. Gerald did not take any further action to open the west leg until 1985 when the instant action was filed. When asked why he had not taken futher steps to reopen the west leg of the old right-of-way after his meeting with Bruce Cutshall in 1971, Gerald Barnett stated that Bruce Cutshall became ill, and eventually he died. We note that Bruce Cutshall's death occurred sometime in 1979.

Clarence Appleby's version of the 1971 meeting was inconsistent with Gerald Barnett's version in some respects. According to Clarence Appleby, the 1971 meeting was attended by himself, Bruce Cutshall, Gerald Barnett, Richard Bishop, Sr., and Paul Thomas. Richard Bishop, Sr. and Paul Thomas also owned land adjacent to the right-of-way. Clarence Appleby testified that during the meeting, most of the conversation took place between Bruce Cutshall and Gerald Barnett. Although Clarence was unable to hear the entire conversation, Bruce Cutshall and Gerald Barnett agreed that Bruce would remove some of the trees on the new right-of-way and widen its entrance so that it could be used as the access to the public road instead of using the old right-of-way.

Clarence Appleby testified that since the 1971 meeting, the west leg of the old right-of-way has not been travelled by automobile traffic. Around 1972, the entrance to the new right-of-way was improved by the Pennsylvania Department of Transportation. ("PennDOT"). Some of the dirt which was removed from the new right-of-way during the process of improvement was deposited onto the northern side of the old right-of-way. Over the years, the west leg of the old right-of-way was filled in so that it is currently level with the adjacent property, and the three (3) to four (4) foot banks are no longer visible, i.e. it is visually indistinguishable from the area on either side. Clarence Appleby testified that shrubbery has been planted in that area, and that he and his wife have built their new home relatively close to the site of the west leg of the old right-of-way.

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Additionally, Richard Bishop, Sr. testified about the 1971

meeting which took place at a site along the right-of-way. However, he was unable to recall the purpose of calling the meeting. Mr. Bishop remembered that in addition to himself, Gerald Barnett, Bruce Cutshall, Paul Thomas and Clarence Appleby attended the meeting. He recalled that Gerald Barnett and Bruce Cutshall had a discussion which took place at some distance from where he was located. Because Mr. Bishop did not participate in the conversation, he does not know exactly what they discussed. However, he did know that the west leg of the old right-of-way was not used after that meeting. The plaintiffs and other landowners exclusively used the new right-of-way to reach their properties after 1971 apparently without incident until 1985.

Sometime in 1985, Clarence Appleby installed a cable across the entrance to the west leg of the old right-of-way. According to Clarence Appleby, persons unknown to him were using the area and leaving behind beer cans and other debris. Clarence Appleby also posted "No Trespassing" signs along the right-of-way during that period of time because maintenance of the right-of-way was resulting in a widening of the road onto his property.

Soon after the signs were posted, Gerald Barnett requested a meeting with Clarence Appleby in order to discuss the sign posting. A meeting took place at the Appleby residence and, according to Clarence Appleby's testimony, Gerald Barnett stated that posting signs would not prevent Gerald from entering onto the Appleby property. Furthermore, Clarence Appleby alleges that Gerald Barnett asked him to assist in maintaining the new right-of-way which Mr. Appleby refused to do. Mr. Appleby believed that because he did not use the right-of-way himself, he was under no obligation to assist in maintaining it.

Gerald Barnett filed this action to open the old right-of-way in 1985 shortly after this meeting with Clarence Appleby. Gerald Barnett testified that his primary motive for seeking the reopening of the old right-of-way is for safety concerns. According to Mr. Barnett, it is difficult to turn onto LR29028 from the new right-of-way because of limited sight distances. He testified that at least one (1) motor vehicle accident has occurred at that intersection.

Ronald Swope, assistant manager of the Fulton County Maintenance Shed of PennDOT, testified that he has been employed by

PennDOT since 1979. Until approximately 1984, Ronald Swope was the driveway permit officer. In his opinion, a permit would not be issued for a reopening of the west leg of the old right-of-way onto LR 29-28. Furthermore, because a culvert is located about one hundred (100) feet below the entrance of the old right-of-way, a hydraulic study would be required prior to the reopening. Mr. Swope also testified that although the intersection of the new right-of-way and LR 29028 may not be the safest, there is a three hundred (300) foot sight distance in either direction. He testified that the state requires a two hundred and fifty (250) foot sight distance from a position located ten (10) feet back from an intersection. Currently, a school bus stop shed is located adjacent to the new right-of-way according to Mr. Swope.

III. DISCUSSION:

This case presents several issues: 1 [Whether the plaintiffs established the existence of a prescriptive easement in the old right-of-way, and if a prescriptive easement or right-of-way was established, whether the easement or right-of-way was abandoned by the plaintiffs; and 2] Whether the plaintiffs are prevented from asserting any right in the easement by the equitable doctrines of estoppel or laches.

The plaintiffs in this case contend that they have established the existence of a prescriptive easement over the old right-of-way. "It is well settled that a prescriptive easement is created by (1) adverse, (2) open, (3) notorious, (4) continuous and uninterrupted use for a period of 21 years." *Burkett vs. Snyder,* 369 Pa.Super. 519, 522, 535 A.2d 671, 673 (1988) citing *Walley v. Iraca,* 360 Pa.Super. 436, 520 A.2d 886 (1987). The party who seeks to claim a prescriptive easement must establish each element by clear and positive proof. *Burkett id.,* citing *Walley, id.* Continuous use does not necessarily mean constant use.

> "[C]ontinuity is established if the evidence shows a settled course of conduct indicating an attitude of mind on the part of the user or users that the use is the excercise of a property right." *Keefer v. Jones,* 467 Pa. 544, 548, 359 A.2d 735, 737 (1976).

In the case at bar, there is no dispute that the old right-of-way was used to gain access to the Barnett property for a time period which exceeded twenty-one (21) years. However, the defendants maintain

that use of the old right-of-way was sporadic and intermittent which does not rise to the level of "continuous use" required to establish a prescriptive easement. The evidence presented at trial indicated that the old right-of-way was the only road used to reach the Barnett property prior to 1971, and that the road was regularly used.

But, there was testimony that during the winter months snow accumulated on the old right-of-way to the extent that it became impassable at times. Moreover, there was testimony that the old right-of-way was not maintained during the winter months so that driving over it was difficult due to snow, ruts and mud. Therefore, those individuals desiring to reach the plaintiffs' property would park along the public road and walk to the Barnett property during those times.

In *Burkett v. Snyder, supra,* the Superior Court affirmed a lower court's finding of a prescriptive easement. In *Burkett,* the record showed that the appellees who were seeking to establish the prescriptive easement, used a roadway which passed over the appellants' land to gain access to their Christmas tree nursery. The evidence indicated that the appellees used the road several times each year to care for and harvest the trees. The road was used in this manner from 1954 to approximately 1968-70, a period of fourteen to sixteen years. The appellees ceased their Christmas tree operation in approximately 1968-70 after which the road was used for hiking purposes only once or twice a year. The Superior Court held that the trial court's finding of a prescriptive easement was warranted under the facts of that case.

In the case at bar, we believe that sufficient evidence of usage was presented at trial from which to find that the owners of the Barnett property demonstrated a settled course of conduct indicating that they viewed the use of the old right-of-way as an excercise of a property right. We therefore conclude that a prescriptive easement was established along the old right-of-way as a result of the adverse, open, notorious, continuous and uninterrupted use from at least 1936 for a period of time in excess of twenty-one (21) years.

The second question before us is whether the plaintiffs have abandoned the old right-of-way. In order to find an abandonment of an easement, the owners of the easement must demonstrate

through affirmative conduct or physical obstruction their intent to permanently relinquish their rights in the easement. *Iorfida v. Mary Robert Realty Co., Inc.,* 372 Pa.Super. 170, 539 A.2d 383 (1988), *Alloc. den.* 520 Pa. 576, 549 A.2d 136 (1988). *Sabados v. Kinaly,* 258 Pa.Super. 532, 393 A.2d 486 (1978). Standing alone, non-use or the failure to maintain a right-of-way are insufficient to show an intent to abandon the easement. However, non-use does provide some evidence of intent to abandon an easement. *Iorfida, supra.*

The plaintiffs suggest that a parol agreement to abandon an easement is inadequate and unenforceable as being contrary to the Statute of Frauds. It is correct that an unexecuted parol agreement to relinquish an easement is unenforceable under Pennsylvania law. *Erb v. Brown,* 69 Pa. 216 (1871); *Hudson v. Watson,* 5 Pa.Super. 456, 41W.N.C.34 (1897). However, a parol agreement to abandon an easement is enforceable when the agreement has been so far executed that it is inequitable to rescind the agreement. *Hudson v. Watson,* 2 Pa.Super. 422, 39W.N.C.160 (1896).

According to the testimony of Clarence Appleby, a meeting between five (5) residents and landowners took place in the fall of 1971 at a site located along the right-of-way. It was Mr. Appleby's recollection that an agreement was reached between Bruce Cutshall and Gerald Barnett to the effect that trees would be cleared and the new right-of-way would be widened. The landowners and residents would use the new right-of-way and give up their use of the old right-of-way. Mr. Appleby's version of the meeting was bolstered by Richard Bishop, Sr.'s testimony that a meeting did occur between the five (5) individuals named by Mr. Appleby. Further, Mr. Bishop testified that subsequent to this meeting in 1971, the old right-of-way was not used again, and access was gained to their properties solely by way of the new right-of-way.

Gerald Barnett admitted that after the 1971 meeting, the old right-of-way was closed and he began to use the new right-of-way exclusively and continued to do so for the next fourteen (14) years. It was evident from Gerald Barnett's testimony that prior to the meeting in 1971, he had every intention of pursuing the reopening of the old right-of-way. He had consulted with the local district justice in order to legally compel the reopening of the old right-of-way. Gerald testified that on one occasion, he took a road grader to

the old right-of-way with the intent of reopening the right-of-way himself. But after the 1971 meeting, Gerald refrained from taking any further action, legal or otherwise, to reopen the old right-of-way until 1985.

For fourteen (14) years following the 1971 meeting, Gerald only used the new right-of-way for access to his land. His stated reason for the delay in instituting legal action that Bruce Cutshall became ill and died is not persuasive since Mr. Cutshall's death occurred nearly eight (8) years after the 1971 meeting. Gerald Barnett was agressively pursuing a course of action to reopen the old right-of-way prior to the 1971 meeting. After the meeting, Gerald took no further action until the instant action nearly fourteen (14) years later.

It seems more likely that the reason Gerald stopped his campaign to reopen the old right-of-way was that he and Bruce Cutshall reached a compromise agreement whereby Gerald would abandon his right in the old right-of-way and would use the new right-of-way as Clarence Appleby testified. We believe that Gerald Barnett and Bruce Cutshall reached such an agreement.

As we stated previously, in order for such an oral agreement to be enforceable in Pennsylvania, there must be a showing that the oral agreement has been so far executed that it would be inequitable to rescind the agreement. *Hudson v. Watson, supra.* In the case at bar, we believe that such a showing has been made. During the fourteen (14) years subsequent to the agreement, the defendants and/or their predecessors in title cleared the new right-of-way to make it passable by motor vehicle, filled in the old right-of-way thereby incorporating it as part of their yard, and built a new home relatively close to the old right-of-way site. At this point in time, it would be inequitable to rescind the parol agreement.

Although we have found that the plaintiffs in this case have abandoned their easement in the old right-of-way, we believe the facts of this case present a strong basis upon which to find equitable estoppel.

The equitable estoppel doctrine has been applied in a real estate context where a developer was estopped from claiming that an oral promise not to develop a neighboring wooded area made to a home

purchaser was unenforceable. *Haines v. Minnock Construction Co.*, 289 Pa.Super. 209, 433 A.2d 30 (1981). In *Haines*, the Court relied on the Restatement of Property §524 which states:

> An oral promise or representation that certain land will be used in a particular way, though otherwise unenforceable, is enforceable to the extent necessary to protect expenditures made in reasonable reliance upon it.

See also, Gailey v. Wilkinsburg Real Estate Trust, 283 Pa. 381, 129 A.445 (1925).

In the case at bar, we believe that Bruce Cutshall and the Applebys reasonably relied on Gerald Barnett's oral agreement to abandon the old right-of-way and to use the new right-of-way in the future. The defendants reasonably relied on this promise in developing their property over the fourteen (14) years subsequent to the 1971 meeting.

Furthermore, at the time that defendant Verna Appleby acquired ownership to her property in 1980, there was no indication from either an inspection of the site or in any document that an easement still existed over the southern border of her property. The subdivision plan showed only the easement along the eastern border of the property line. The defendants were unaware of the plaintiffs' continued claim to the old right-of-way which, to the best of their knowledge, had been abandoned by the plaintiffs in 1971.

Moreover, at least two courts have held that where an easement is not apparant and does not appear in a grant or in the chain of title the easement holder may not enforce it against a subsequent owner unless that party has actual knowledge that the land was subject to the easement. *VanderWerff v. Consumers Gas Company*, 41 Berks L.J. 17 (1978). *Sharpe v. Scheible*, 162 Pa. 341, 29 A 736 (1894).

We believe additionally that on the facts of this case, the doctrine of laches can be applied. The equitable doctrine of laches arises when the defendants' position or rights are prejudiced by inexcusable delay, and attendant facts and circumstances that it would be inequitable to allow the present claim against him. *Thompson v. Curwensville Water Co.*, 400 Pa. 380, 162 A.2d 198 (1960). Laches

IN THE COURT OF COMMON PLEAS OF THE 39th JUDICIAL DISTRICT OF FRANKLIN COUNTY, PENNSYLVANIA ORPHANS' COURT DIVISION

The following list of Executors, Administrators and Guardian Accounts, Proposed Schedules of Distribution and Notice to Creditors and Reasons Why Distribution cannot be Proposed will be presented to the Court of Common Pleas of Franklin County, Pennsylvania, Orphans' Court Division for CONFIRMATION: October 4, 1990.

Alleman: First and final account, state ment of proposed distribution and notice to the creditors of Chambersburg Trust Company, Executor of the Estate of Rudy A. Alleman, late of St. Thomas Township, Franklin County, Pennsylvania, deceased.

Edwards: First and final account, statement of proposed distribution and notice to the creditors of Chambersburg Trust Company, Executor of the Estate of Helen Edwards, late of Quincy Township, Franklin County, Pennsylvania, deceased.

Hockenberry: First and final account, statement of proposed distribution and notice to the creditors of Judy Clayton, Executrix of the Estate of Neva Jane Hockenberry, late of Metal Township, Franklin County, Pennsylvania, deceased.

Lefley: First and final account, statement of proposed distribution and notice to the creditors of Orrstown Bank and Doris Brenize, Executors of the Estate of Velva B. Lefley, late of the Borough of Shippensburg, Franklin County, Pennsylvania, deceased.

Washabaugh: First and final account, statement of proposed distribution and notice to the creditors of Chambersburg Trust Company, Executor of the Estate of Joseph L. Washabaugh, late of Chambersburg, Franklin County, Pennsylvania, deceased.

Wiles: First and final account, statement of proposed distribution and notice to the creditors of Mae E. Wiles and Gregory L. Kiersz, Executors of the Last Will of Robert E. Wiles, Late of the Borough of Waynesboro, Franklin County, Pennsylvania deceased.

Robert J. Woods
Clerk of Orphan's Court
Franklin County, Pennsylvania
9/7, 9/14, 9/21, 9/28/90

SEPTEMBER 12, 1990

NOTICE IS HEREBY GIVEN - Pursuant to the provisions of the Act of Assembly of December 16, 1982, P.L. 1309 and its amendments supplements, there was filed with the Secretary of the Commonwealth of Pennsylvania at Harrisburg, Pennsylvania, on April 4, 1990, an application for registration for the conducting of a business under the fictitious name of PARTY TIME DECOR with its principal place of business at 2 Center Square, Greencastle, Pennsylvania 17225. The name and address of the persons interested in said business are : Geraldine M. Sites, 25 North Main Street, Mercersburg, Pennsylvania 17236 and Kay D. Straley, 14 West Walters Avenue, Greencastle, Pennsylvania 17225.

Party Time Decor
2 Center Square
Greencastle, PA 17225
9/21/90

operates where the circumstances of the case show that lack of due diligence is imposable upon the plaintiff. Laches is a factual question which can be found only on an examination of all factual circumstances of the case generally. *Lehrer v. Montgomery County,* 18 Pa.Super. 493, 119 A.2d 816 (1956). The doctrine of laches was applied against an individual who was claiming an easement in *Aldine Realty Co., v. Manor Real Estate & Trust Co.,* 297 Pa. 583, 148 At 56 (1929).

In the case at bar, Gerald Barnett was actively pursuing the reopening of the old right-of-way prior to the 1971 meeting with Bruce Cutshall. After the meeting where we believe that Gerald Barnett made the oral agreement to abandon the old right-of-way, Gerald stopped his attempts to have the right-of-way reopened. During the subsequent fourteen (14) years, the defendants made improvements on their property in reliance on the plaintiffs' agreement to abandon the old right-of-way and to use the new one. We do not believe that the plaintiffs have established a reasonable explanation for their fourteen (14) year delay in asserting their claim to the old right-of-way. Therefore, the plaintiffs are barred by the doctrine of laches from asserting a claim to the old right-of-way.

DECREE NISI

NOW, April 16, 1990, plaintiffs' action for injunctive relief is DENIED. Costs to be paid by plaintiffs.

The Prothonotary shall notify the attorneys for the parties of the date of filing hereof, pursuant to Pa.R.C.P. No. 1517 (b).

MARTIN VS. WISE, C.P. Franklin County Branch, A.D. 1988-347

Amend Complaint - Punitive Damages - Restatement of Torts 3908

1. A petition to amend should be liberally allowed except where surprise or prejudice to the other party would result.
2. To justify punitive damages a plaintiff must show actual malice - a deliberate intention to commit an injury.
3. Where a claim is obviously based on negligence, a petition to amend resulting in punitive damages will be denied.