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: April 2, 1981.

DILLMAN First and final account, statement of proposed distribution and notice to the creditors of Paul R. Dillman, executor of the estate of Roscoe H. Dillman, late of Quincy Township, Franklin County, Pennsylvania, deceased.

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LEGAL NOTICES, cont.

GLENN E. SHADLE
Clerk of Orphans' Court of
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(3-6-81, 3-13-81, 3-20-81, 3-27-81)

rectify the situation. The proper solution entailed seeing more of Y and caring more about him, not dropping out of the picture entirely. Father had the power to develop a non-upsetting relationship with his son; indeed, it was his parental duty to do so. The task might not have been easy but he was bound to work at it. "Parental rights may not be preserved by complete indifference to the daily needs of a child or by merely waiting for some more suitable financial circumstance or convenient time for the performance of parental duties and responsibilities (while others adequately provide the child with [his] immediate and continuing physical and emotional needs)." *Smith Adoption Case*, 412 Pa. 501, 505, 194 A.2d 919 (1963). We conclude that father did not utilize the resources at his command to establish and preserve a relationship with Y. By conduct continuing for a period of at least six months, it is clear that father has refused or failed to perform his parental duties.

We are mindful of the seriousness of terminating a parent's rights to his child, but termination is proper is some situations and we believe this to be one of them. The Legislature has recently expanded the grounds for termination proceedings give primary consideration to the needs and welfare of the child. See Act of 1980, October 15, P.L. , No. , 23 Pa. C.S.A. Sec. 2511(A), (B). Although this new Adoption Act will not take effect until January 1, 1981, we note these policies expressed therein which seem to facilitate termination.

Having concluded that father by conduct continuing for a period of at least six months has refused or failed to perform parental duties, we terminate his parental rights over Y. The child shall remain in the custody of the petitioners.

ORDER OF COURT

December 15, 1980, the rights of father in his son Y are terminated.

ROMALA INVESTMENT CORP. v. JOINER, C.P. Franklin County Branch, Docket Volume 7, Page 157, In Equity

Equity - Watercourses - Easement by Implication - Laches - Standing to Sue

1. The owner of higher land owns the dominent tenement and has a right

to have rains and snows run from his land onto lower land which is the servient tenement.

2. The owner of lower land must receive those waters which flow naturally from the higher land.

3. The owner of the dominent tenement may improve his lands by throwing increased waters upon the servient tenement through the use of natural and customary channels.

4. An easement does not exist in a stone fence which slowed the flow of water onto the servient tenement where there is not adequate evidence of the intention of the original owner to create a benefit — burden relationship between the dominant and servient tenements.

5. Unreasonable diversion of water in a concentrated form which directly injures adjoining property will not be permitted.

6. Where an injury is one of an ongoing nature and defendants have not acted to change their position because of the delay, laches is not an available defense.

7. Where plaintiff to a suit has entered into a land sale contract covering the real estate which is a subject of the suit, plaintiff cannot seek an injunction for an "invastion" of the rights of the equitable owners.

Wayne F. Shade, Esq., Counsel for Plaintiff

William F. Martson, Esq., Counsel for Defendants

OPINION AND DECREE NISI

KELLER, J., December 19, 1980:

This action in equity was commenced by the filing of a complaint on April 19, 1978, and service of the same upon the defendants on April 22, 1978. As a result of preliminary objections and arguments thereon, a first and then a second amended complaint were filed. The defendants' answer to the second amended complaint was filed March 27, 1979. The plaintiffs' reply to defendants' new matter was filed April 16, 1979. As a result of various continuances requested by the parties and their counsel, and the changes in counsel, the matter did not come to trial until August 26, 1980, and was concluded on August 28, 1980. The matter is now ripe for disposition.

The primary issue in this case is whether the conduct of the defendants in the removal of a stone fence row claimed by the plaintiff to be an easement for its benefit for the purpose of

diverting the flow of water away from its land, and the extension and shaling of a lane all on the defendants' land constitute the collection and diversion of surface runoff waters onto the lands of the plaintiff causing flooding and property damage. The plaintiff seeks an injunction to compel the defendants to reconstruct the stone fence row; to be enjoined from altering and increasing the discharge of surface water by their lane, and to compensate the plaintiff for monetary damages sustained.

The second issue is whether the plaintiff's failure to act constitutes laches and a full defense to the plaintiff's suit for relief.

FINDINGS OF FACT

1. The plaintiff, Romala Investment Corp., merged into Romala Corporation. By stipulation of counsel it was agreed that identification of the plaintiff would not be changed in the pleadings. At all times relevant the mailing address of the plaintiff was Box 351, Waynesboro, Penna. 17268.

2. The defendants are Eldon L. Joiner and Jeanette R. Joiner, his wife, who reside at 118 Sunnyside Avenue, Waynesboro, Penna. 17268.

3. The plaintiff purchased a certain 81.6 acre tract of real estate lying and being situate in Washington Township, Franklin County, Penna., and located along L.R. 28025 by deed of David and Jane Boone dated August 28, 1968, and recorded in Franklin County Deed Book Vol. 630, Page 549.

4. The defendants purchased a tract of 45.863 acres lying and being situate in Washington Township, Franklin County, Penna., and located along L. R. 28025 by deed of David and Jane Boone dated January 19, 1967, and recorded in Franklin County Deed Book Vol. 612, Page 28.

5. David and Jane Boone were the predecessors in title to the lands purchased by the plaintiff and the defendants.

6. Legislative Route 28025 proceeds in a northeasterly direction from the Borough of Waynesboro past the lands of the plaintiff and the defendants to a point near the easternmost boundary of the parties' lands and then curves to travel in an easterly direction. All of the defendants' real estate is located on the northerly side of the legislative route. The plaintiff owned real estate adjoining the defendants on the West located on the northerly side of the legislative route, and also on the

southerly side of the legislative route.

7. At the point in the legislative route where it goes from a northeasterly direction to an easterly direction there is a culvert extending from the northerly side of the road to the southerly side of the road, a distance of approximately 35 feet. The culvert was installed by the Department of Highways.

8. In approximately August 1968 the plaintiff's lands were for the first time to the knowledge of the officers of plaintiff flooded by surface waters from the lands of the defendants.

9. The President of the plaintiff notified the defendants of the surface water flooding at the time of the August 1968 incident, and the defendants agreed to look into the situation.

10. The lands of the defendants are unimproved with any structure.

11. The lands of the plaintiff are improved with a large colonial-style home, garage, barn and silo. The improvements to the plaintiff's lands are located on the southerly side of the legislative route near the East branch of the Little Antietam Creek.

12. The plaintiff had remodeled the original home which was built about 1836.

13. The plaintiff suffered additional flooding incidents subsequent to August 1968. In March 1970 or 1971 the defendant, Eldon Joiner, and the President of the plaintiff inspected the flooded areas from the defendant's jeep, and the defendant stated he would correct the situation.

14. The plaintiff took or had pictures taken showing flooding conditions occurring during or after rains. On February 12, 1971, September 25, 1975, February 2, 1976, October 10, 1976, March 27, 1977, April 24, 1977, January 27, 1978, March 14, 1978, January 24, 1979, and July 16, 1979.

15. The photographs were admitted in evidence as exhibits showing the flooding conditions at the time of the rains, and for periods of time up to 96 hours after the rain stopped. It is evident that the plaintiff suffered severe flooding of its land, its horse training ring, the driveway and lawn around the house.

16. Six or seven times during the years that the plaintiff owned the real estate the basement of the house was inundated during periods of excessive rand and/or flooding. On one occasion the water was approximately 40 inches deep in the basement.

17. The photograhic exhibits above referred to show that surface water and also cornstalks flowed from the lands of the defendant across the legislative route, and onto the lands of the plaintiff.

18. Over the years and subsequent to the plaintiff's purchase of the real estate it sold all of its real estate on the northerly side of the legislative route. A large tract adjoining the defendants on the West was purchased by Ronald E. Wagaman and improved with a large rancher style house located on the side of a hill, a driveway and parking area extending from the legislative route up the hill to the house. Mr. Wagaman installed a fence on the boundary line between his lands and that of the defendants.

19. The defendants leveled and put shale on the lane immediately West of the Wagamans' boundary fence. The lane had been used for some time by the defendants as a means of access to their higher land. Due to use of the lane by trucks and tractors it was impossible to reasonably use the lane with ordinary vehicles, and when the ground was wet anything but four-wheel drive vehicles bogged down.

20. The plaintiff's photographic exhibits showed surface water running down the lane in a southerly direction to the legislative route before and after it was shaled, and also showed similar surface water running down the Wagaman driveway in a North to South direction to the legislative route. The exhibits also show substantial quantities of surface water running in a southeasterly direction along the northerly side of the legislative route, and crossing over to the southerly side of the highway at about the point of entry to the plaintiff's lane which extends South from the legislative route to the barn and the home. Other exhibits show water on the southerly side of the legislative route also entering upon the plaintiff's land after flowing off of the defendants' land. Photographic exhibits also show water flowing South of the legislative route in the plaintiff's lane leading to the barn and home.

21. From a time prior to 1945 until 1968 there was a lane that extended from the North side of the highway at the curve to the East in a northwesterly direction across the field now owned by the plaintiff. This lane was used to herd cattle to the

upper fields. In addition to the lane and on the northerly side of the lane there was a stone fence or pile of stones that extended from a tree approximately 75 feet northwest of the point of the curve on the North side in a northwesterly direction approximately 225 feet toward the only other large tree in the field — about one-half the distance between the two trees.

22. The stone fence was created by the farmers who cultivated the fields collecting stones that were exposed and placing them along the lane. The stones were not only placed in the area, but also removed from time to time by the owners and those who farmed the fields when there was a use for them.

23. The stone fence row was from 2 to 3 feet high at its highest point at its northwest end, and tapered down to ground level as it proceeded in a southeasterly direction toward the tree, and it was 12 to 14 feet wide.

24. The lane used to drive cattle through was fenced on both sides and was sunken from use with the bank on the downhill or southerly side of that lane. The lane was wide enough to accommodate a truck.

25. At a time prior to 1968 the fence on each side of the lane was removed.

26. When the defendants purchased their real estate the stone fence row, and the remnants of the lane between the two trees was overgrown with briars and weeds.

27. The defendant, Eldon L. Joiner, decided to remove the stone fence row and grown-up area for aesthetic reasons and to make the field totally usable for farming purposes. He arranged with Frank Miller, Jr. for its removal and Mr. Miller and his employee, Mr. Gsell, on either December 2 or 3, 1968 cleared out and leveled what had been the stone fence row, the lane and the grown-up section. The work took one day and 20 or 30 loads of rock and stone were removed and dumped in another area owned by the defendant.

28. At the suggestion of Merle Eigenbrode, Washington Township Supervisor who visited the site as the removal project was being completed, Mr. Joiner had Mr. Miller dig a swale (ditch) extending to the end of the culvert on the northerly side of the highway.

29. During the years from 1945 to 1967 all of the land of the parties' predecessor in title lying North of the legislative

route had been farmed, first using strip farming with the strips running parallel to the legislative route and thereafter in corn with the corn rows running parallel to the road. The fields were planted in this manner to eliminate or retard soil erosion and surface water runoff from the higher land on the North side of the legislative route to the highway and across it.

30. The defendants rent their real estate to a farmer who plants it in corn. The corn rows are plowed and cultivated perpendicular to the highway so that the rows extend directly downhill toward the legislative route.

31. The stone fence row and the lane would have served as a partial deterrent to the downhill flow of surface water, and over the years it was observed that water would flow around both ends of the row and lane and through it, but would slow it down as it proceeded downhill toward the legislative route.

32. The predecessors in title lived in the home owned by the plaintiff from April 1, 1945 until August 1, 1968, and farmed the entire property. When the ground was saturated and a flash flood occurred they experienced water in the basement of the home to a depth of 26 inches, and water standing in the lawn area which would include the present training ring of the plaintiff, driveway and garage. They used gas and later electric sump pumps to remove the water from the basement. Water stood in the front yard to a depth of 9 inches and their children used part of the lawn area as a swimming pool.

33. Approximately May 1957 the then owners of the farm met with the Department of Highway engineers to discuss the surface water problem and flooding problems they were having. The Department of Highway Engineers with the permission of the owners dug a swale 8 to 10 feet wide and approximately 2 feet deep, extending from the culvert on the South side of the highway in a crescent shape to the East across the lands purchased by the plaintiff and lying to the East of the home, and ultimately emptying into the East Branch of the Antietam Creek.

34. From the time the swale was installed until the sale of the real estate to the parties the predecessors had no serious water problems, though in the event of a big flash flood water still came on their land.

35. A swale needs to be maintained and the parties' predecessor farmed the field in which the swale was located plowing a "G" furrow with the swale and harrowing and disking it in the same manner to keep it open and correct any erosion

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which occurred.

36. The former owner of the property who farmed it testified that the swale which was established would not have been obvious to a person not knowing what he was looking for, and could have been filled-in by simply farming it in the wrong direction, i.e., plowing, harrowing and disking across the swale instead of with it.

37. The President of the plaintiff testified that he was not aware of the existence of the swale; had never seen it and had never caused anything to be done to it.

38. The swale is no longer in existence and at the point on the South side of the legislative route where the culvert formerly conveyed water into the swale there now is a 44 inch high bank of earth which would prevent any water from entering the field where the swale was formerly located.

39. Agents or employees of the plaintiff did perform certain farming activities in the field where the swale had been installed.

40. The President and a stockholder of the plaintiff testified that their predecessors in title had told them prior to the plaintiff's purchase of the real estate that they never had a problem with water in their basement. The predecessors in title testified that they had never discussed the question of water in their basement with any representative of the plaintiff prior to the sale.

41. The real estate of the parties is located in a drainage basin plaintiff's witness testified to consist of 264 acres, and defendants' witness testified to consist of 358 acres. The lands of the plaintiff are located in the lowest area of the drainage basin. Studies of soil content in Franklin County made between 1955 and 1970 to a depth of either 42 inches or bedrock establish that all of the lands of the defendants other than that immediately adjacebt to the legislative route on the North side are Nolin soil, and the soil immediately adjacent to the legislative route on the North side, and all of the plaintiff's land South of the legislative route here relevant is Pope soil. Nolin soil is found in limestone areas from the runoff from higher areas and is an alluvial soil. Pope soil is flood plain soil which has been deposited as a result of past flooding.

42. Mr. John Akers, a District Conservationist with the Soil Conservation Service of the United States Department of Agriculture, showed on defendants' Exhibit 21, an aerial photo-

graph made in 1970, the location and soil content of the parties' lands and marked thereon an "intermittent stream" flow representing the run off of surface waters after a heavy rain or a heavy run off which extends in a southerly direction across the lands of the defendants, the legislative route and the lands of the plaintiff near the improvements on the plaintiff's land as it proceeds to the East Branch of the Antietam Creek.

43. Plaintiff's witness, Edward Birely, recalled the installation of the swale and its operation.

44. The 10 to 12 year period immediately preceding the purchase of the real estate by the plaintiff was a dry period when irrigation was necessary.

45. According to the U. S. Department of Commerce record of climatological observations for South Mountain, Penna., 14.74 inches of rain fell in September 1975, 1.67 inches in February 1976, 11.07 inches in October 1976, 6.29 inches in March 1977, 4.24 inches April 1977, 8.79 inches in January 1978, 3.42 inches in March 1978, 9.23 inches January 1979

46. Contrary to the testimony of the plaintiff and his witnesses, it was not unusual in the years preceding 1968 for surface water to run downhill from the lands to the North of the legislative route, across the legislative route and onto the lands now owned by the plaintiff.

47. On a view of the parties' real estate it was observed:

(a) In the cornfield of defendants' North of the legislative route there are wash areas and weed growth areas indicating drainage downhill with the corn rows toward the legislative route and the lands of plaintiff.

(b) The shale lane does not appear to be above ground level.

(c) The shale lane was extended uphill in a northerly direction, and drainage ditches and culverts have been installed running from West to East across or under the shale lane into heavy undergrowth of locust trees, green briar and honeysuckle. There is no evidence at the point where the undergrowth meets the defendants' corn field of any wash coming from the road culverts and drainage ditch.

(d) There is no evidence of the shale lane being washed out.

(e) The shale lane is the only means of access available to the defendants from the legislative route to their higher land to

the North.

(f) The plaintiff's photographic exhibits indicate, as does the testimony, that little water now passes through the culvert under the legislative route and the entrance to the culvert on the North side is slightly higher than the exit on the South side.

48. The President of the plaintiff testified that the fair rental value of the home had been diminished by $300.00 per annum due to the water in the basement for a period of 12 years. On cross-examination he testified that this claim of the plaintiff for compensation was predicated upon its contention that there should be no water in the basement, and it resulted directly from the defendant's removal of the stone fence row.

49. The President of the plaintiff testified to various expenses the plaintiff had incurred in its efforts to remove water from the basement; make necessary repairs resulting from the basement flooding; making repairs to the eroded driveway; and installing ditches to divert the water from the basement. His testimony was predicated upon information set forth in plaintiff's Exhibit 78, which was withdrawn by counsel for the plaintiff and is not in evidence.

50. The plaintiff on or about November 12, 1976 initiated an action in eminent domain against the Pennsylvania Department of Transporation No. 207, November Term 1976, petitioning for the appointment of viewers and alleging inter alia:

"The defendant, as the direct result of its maintenance of L.R. 28025 as the said route adjoins the property of the plaintiff, has since 1972 and to the present, discharged water from L. R. 28025 in a southerly direction, onto the property of the plaintiff, in such a way as to flood the driveway, lawn and buildings upon the premises."

The petition was dismissed.

51. On April 19, 1980 the plaintiff entered into an agreement of sale with Mrs. Walter Y. Grove for a tract of real estate upon which the swale installed by the Department of Highways had been located for the sum of $25,000.00. Initially the President of the plaintiff testified that the agreement of sale referred to the case at bar and reserved to itself the right to create a drainage easement from the legislative route to Antietam Creek. However, the witness corrected his testimony and testified that the section of the agreement of sale pertaining

to this litigation and to the drainage easement had been stricken out by him on behalf of the plaintiff and by the purchaser, and was not applicable.

52. The land upon which the swale formerly was located is not presently available to either of the parties for use for drainage purposes.

53. On August 29, 1979 the plaintiff entered into an agreement of sale with Richard P. and Joyce S. Murphy for the sale of that tract of real estate upon which the improvements heretofore referred to are located for the sum of $140,000.00. The agreement of sale specifically provides:

> "Buyer is aware that, during periods of heavy rain, surface water, from the lands of Eldon L. Joiner and Jeanette R. Joiner, abutting to the North of the real property which is the subject of this agreement, is discharged upon the said real property which is the subject of this agreement. Buyer enters into this agreement notwithstanding this surface drainage problem. Although it is agreed that seller has no duty to resolve this surface drainage problem at any time, seller will continue to utilize its best efforts to see to the elimination of said surface drainage problem;"

54. At the time of trial of this matter the plaintiff apparently holds legal title but not equitable title to a small portion of the real estate originally purchased in 1968.

55. The flooding and damage resulting from the flooding suffered by the plaintiff is a direct and proximate result of:

> (a) The location of the flooded real estate at the lowest point of a large drainage basin in a flood plain.
>
> (b) An unusual amount of precipitation in the years following the purchase of the real estate by the plaintiff and the defendants.
>
> (c) The inadvertent closing of the swale and the entrance to the swale on the lands of the plaintiff.
>
> (d) The farming of the defendants' land with the corn rows perpendicular to the highway.
>
> (e) The sale by plaintiff of real estate to Ronald E. Wagaman and its development which contributed to run off of surface water onto the legislative route and the lands of the plaintiff.

> (f) The removal of the stone fence row and cattle lane adjacent to it at most minimally contributed to the quantity and force of the surface water proceeding by gravity across the lands of the defendants, the legislative route and onto the lands of the plaintiff.
>
> (g) The shaling of the lane at the western boundary of defendants' land by the defendants was necessary to their use of their land and contributed only minimally to the quantity or force of surface water proceeding by gravity across their lands, the legislative route and onto the lands of plaintiff.

56. As a result of the sale of the real estate upon which the swale was installed the defendants are precluded from using that drainage system as a means of delivering all or any part of water collected from their lands into the East Branch of the Antietam Creek.

57. The testimony of Gary L. Young, plaintiff's expert witness, was considered together with his recommendation that the defendants be required to install a swale on their lands diverting the surface water to the culvert entrance on the North side of the legislative route. This would not resolve the flooding problems of the plaintiff, for there is no swale or drainage system available at the outlet of the culvert to channel waters to the creek due to plaintiff's agreement to sell the real estate upon which the former swale existed to Mrs. Grove. If Mr. Young's recommendation were carried out either the defendants would be in the position of being required to collect and divert water onto the lands of another or the water would proceed along the South side of the legislative route in a southwesterly direction and still enter upon the lands of the plaintiff.

58. According to the testimony of Mr. Brindle, the expert witness for the defendants, the culvert installed by the Highway Department is at the wrong location and has been a "major sore spot" for the 17 years of his experience. In addition, in his judgment a much larger culvert would be required to adequately accommodate surface run off water from the defendants' lands and the drainage basin in a "10 year storm."

59. Mr. Brindle also testified that the period from 1955 to 1968 was a drought period when the ground water table was lower and the water fall peaks in storms were also lower. Therefore, it did not surprise him that the swale in stalled on the plaintiff's land in 1957 operated so successfully.

60. Mr. Brindle also testified that the culvert would be more effectively used if the entrance area were cleared out and

LEGAL NOTICES, cont.

NOTICE is hereby given that Articles of Incorporation have been filed with the Commonwealth of Pennsylvania, Department of State at Harrisburg, Pennsylvania, on March 18, 1981, for the purpose of obtaining a Certificate of Incorporation.

The name of the proposed corporation organized under the Commonwealth of Pennsylvania Business Corporation Law, approved May 5, 1933, P. L. 364, as amended, is SANDY'S WARM SPRING SELF SERVE, INC.

The purpose or purposes for which the corporation has been organized are:

"The Corporation shall have unlimited power to engage in and to do any lawful act concerning any and all lawful business for which corporations may be organized under the Business Corporation Law. The Corporation is to be organized under the provisions of the Business Corporation Law approved the 5th day of May, 1933, P.L. 364, as amended."

Joel R. Zullinger, Attorney
Davis and Zullinger
Suite 410
Chambersburg Trust Company Building
Chambersburg, Pennsylvania 17201

(3-27-81)

NOTICE is hereby given that Articles of Incorporation have been filed wtih the Commonwealth of Pennsylvania, Department of State at Harrisburg, Pennsylvania, on March 13, 1981, for the purpose of obtaining a Certificate of Incorporation.

The name of the proposed corporation organized under the Commonwealth of Pennsylvania Business Corporation Law, approved May 5, 1933, P.L. 364, as amended, is MARTIN'S SERVICENTER, INC.

The purpose or purposes for which the corporation has been organized are:

"The Corporation shall have unlimited power to engage in and to do any lawful act concerning any and all lawful business for which corporations may be organized under the Business Corporation Law. The Corporation is to be organized under the provisions of the Business Corporation Law approved the 5th day of May, 1933, P.L. 364, as amended."

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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: April 2, 1981.

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ORRIS First and final account, statement of proposed distribution and notice to the creditors of Hazel L. Gilbert, administratrix of the estate of Raymond D. Orris, a/k/a Ray D. Orris, late of Antrim Township, Franklin County, Pennsylvania, deceased.

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ROSS First and final account, statement of proposed distribution and notice to the creditors of Winifred J. Ross, executrix of the last will and testament of Charles A. Ross, late of the Borough of Chambersburg, Franklin County, Pennsylvania, deceased.

SANDERS First and final account, statement of proposed distribution and notice to the creditors of Robert P. Shoemaker, executor of the estate of Alice D. Sanders, late of the Borough of Waynesboro, Franklin County, Pennsylvania, deceased.

UMBRELL First and final account, statement of proposed distribution and notice to the creditors of Jack Umbrell and George Umbrell, executors of the last will and testament of Newton A. Umbrell, late of Metal Township, Franklin County, Pennsylvania, deceased.

GLENN E. SHADLE
Clerk of Orphans' Court of
Franklin County, Pennsylvania

(3-6-81, 3-13-81, 3-20-81, 3-27-81)

had a defined channel to it instead of a "depressed hole." In addition it was his opinion that the farming of defendants' real estate with rows parelleling the legislative route would provide some diversion and detention of surface water run off.

DISCUSSION

Plaintiff's initial burden in the present suit is to show that defendants caused injury to plaintiff's property by the wrongful increase or redirection of water flowing across defendants' land. Determination of the legal character of defendants' actions must be within the context of the parties respective positions as adjoining landowners. Plaintiff and defendants acquired their land from a common grantor. Defendants, in 1967, purchased real estate on the northerly side of legislative route 28025. Plaintiff, in 1968, purchased the remaining real estate on the northerly side of the road and to the west of defendants' land, as well as all the grantors' real estate on the southerly side of the legislative route. Defendants' land is higher in elevation than plaintiff's land south of the road, upon which a colonial style home, garage, barn and silo stand. Defendants' land is unimproved and is used for farming; it is presently rented to a farmer who plants corn on the land. The Pennsylvania Supreme Court in *Kauffman v. Griesemer*, 26 Pa. 407, 413 (1856) discusses the law of watercourses:

> "Almost the whole law of watercourses is founded on the maxim of the common law, *aqua currit et debet currere* [water runs and ought to run]. Because water is descendible by nature, the owner of a dominant or superior heritage has an easement in the servient or inferior tenement for the discharge of all waters which by nature rise in or flow or fall upon the superior."

The owner of higher land, therefore, as the dominant tenement owner, has a right to have the rains and snows run from his land onto the lower, or servient tenement. The lower land owner must receive those waters which flow naturally from the higher land. Although the law refers to the natural flow of surface waters, it does not mean that the dominant tenement owner cannot improve or cultivate his land merely because that would produce some change in the manner of discharging the water. The Court in *Kauffman* states at 413:

> "The law intends not this; it prohibits only the immission into the inferior heritage of the waters which would never have fallen there by the disposition of the places alone. It neither would nor could refuse to the superior proprietor the right to aid and direct the natural flow."

The Court in *Kauffman* cites cases for and reaffirms "the principle that the superior owner may improve his lands by throwing increased waters upon his inferior through the natural and customary channels."

It was established in the present case that plaintiff's land lies in the lowest area of a drainage basin of 264 or 358 acres, and that the soil on plaintiff's land is of a type described as flood plain soil, deposited as a result of past flooding. Plaintiff's predecessors in title testified to severe periodic flooding during their ownership from 1945 to 1968. During this period the stone fence, cattle road and other water-channeling improvements (such as swales and the culvert) were in place and, should have, under plaintiff's theory of the case, prevented such severe flooding. The plaintiff has, therefore, failed to show that the action of defendants in shaling the road or removing the stone fence caused the flooding during its ownership.

The plaintiff attempts to establish its right to an easement in the stone fence which would compel defendants to restore and maintain the fence for the benefit of the land held by plaintiff or its successors in title. Plaintiff contends that the stone fence acquired the character of an easement by implication by its use while the land was held by the common grantors who subsequently severed the real estate. Plaintiff cites *Koons v. McNamee*, 6 Pa. Super. Ct. 445, 488 (1898) as authority wherein the Court explains Pennsylvania law regarding easements by implication:

> "Where an owner of land subjects part of it to an open, visible, permanent and continuous service or easement in favor of another part, and then aliens either, the purchaser takes subject to the burden or the benefit as the case may be."

The courts recognize easements which are readily apparent and obviously intended to be permanent, such as the water supply and drain pipes installed by the common grantor in *Koons*, supra, and the dam and race constructed to supply water to grantor's mill in *Seibert v. Levan*, 8 Pa. 383 (1848). Easements by implication are not to be presumed to exist, however, without adequate evidence of the intention of the grantor to create the benefit-burden relationship. The Pennsylvania Supreme Court in *Phillips v. Phillips*, 48 Pa. 178 (1864) makes this point:

> "It is not to be understood by this doctrine [easement by implication] that any temporary convenience adopted by the owner of property is within it. By all the authorities it is confined to cases of servitudes of a permanent nature, notorious or plainly visible, and from the character of which it may

> be presumed that the owner was desirous of their preservation as servitudes, evidently necessary to the convenient enjoyment of the property to which they belong, and not for the purpose of mere pleasure."

Whether an easement exists, whether the user is apparent, of a permanent nature, and intended by the grantor to continue to benefit or burden the land involves questions of fact. In the present case, the evidence shows that the stone fence was created by the gradual collecting of stones which interfered with cultivation of the fields, and that the farmer who piled the stones into the fence row also removed stones when there was a need for them elsewhere. The effect of the stone fence in slowing or directing the flow of water across defendants' property appears to have developed inadvertently, or, at most, secondarily, to the convenient disposal of field stones. Therefore, the land was not impressed with "peculiar qualities" which are so "palpable and manifest, that a purchaser should take the land burdened or benefited, as the case may be, by the qualities which the previous owner had undoubtedly the right to attach to it." *Seibert v. Levan* at 390.

Plaintiff argues that the erection of the stone fence by predecessors in title at an angle which directed water toward a culvert and natural channel to Little Antietam Creek established the fence row as an easement by implication. Yet, plaintiff cites no authority, nor can this Court find any, which recognizes an easement merely because a structure exists on the land, without further proof that the owner intended to subject the land to a particular use accomplished by creation of the improvement.

The lower ground is bound to receive the surface water which naturally flows, by inclination of the land, from the higher ground. The owner of higher ground has the right to improve his land for cultivation by draining the land even if the flow of water to the lower land is thereby increased. The water may be discharged by its natural channels, even aided by concealed drains, as long as care is taken not to cause unnecessary injury to the owner of the servient tenement. *Meixell v. Morgan*, 149 Pa. 415, 24 A. 216 (1892). Plaintiff seems to argue that once the stone fence was erected, for whatever purpose, and its existence began to channel surface water in a particular direction, the servient tenement owner acquired an easement in the stone fence and a right to have the surface water continue to flow as directed by the fence. The cases cited do not support plaintiff's position.

In *Milotta v. Pfeifer*, 34 Wash. 33 (1951), plaintiff's prop-

erty was injured by the actions of defendant in closing a drainage ditch in existence for 40 years, the placing of a pipe which directed the flow onto plaintiff's land and the construction of other small ditches to direct water onto plaintiff's land. The Court held that plaintiffs had acquired an easement by prescription in the original ditch by nortorious user in excess of 21 years, and that the obstruction of the accustomed flow to the injury of plaintiff was actionable. In *Milotta*, the water flowed by direction of the pipe onto plaintiff's land "in a concentrated manner." The facts of *Milotta* are opposite to the instant case, in that the removal of the stone fence permitted surface water to flow in a diffused and natural manner across defendants' land. Further, unlike *Milotta*, the flow of the water after removal of the stone fence has not been shown to be the direct and proximate cause of injury to plaintiff's property.

In *Margaro v. Metropolitan Edison Co.*, 130 Pa. Super. Ct. 323, 197 A. 550 (1938) defendant was liable for damages sustained to plaintiff's land by defendants' discharge of water collected in a canal on his land onto plaintiff's land through a 24 inch pipe and breaks or wash-outs in the canal banks. The court stated at 323: "The plaintiff could not object to receiving the water which would naturally come on her land from higher ground, but this did not justify the defendant in collecting water that naturally would have flowed elsewhere and discharging it in mass or volume on plaintiff's land by means of a pipe, two feet in diameter, or through non-repair of breaks or washouts in the canal bank."

The court specifically stated that the defendant "is not obliged to maintain a canal," but would be liable for damages caused by the concentrated, unnatural discharge of water onto adjoining land.

Milotta and *Magaro*, therefore, establish that unreasonable diversion of water in a concentrated form which directly injures adjoining property will not be permitted in Pennsylvania. Neither case requires the maintenance of a stone fence which partially redirected or slowed the natural flow of surface water when the removal of that fence allows a natural, diffused flow of water to lower land and it is not apparent that this flow, even if increased, directly caused unnatural flooding of the lower land.

The owner of higher ground may, in improving his land, increase the flow of water onto the lower ground, and, if he proceeds without negligence, any incidental loss to his neighbor is damnum absque injuria. *Reilly v. Stephenson*, 222 Pa. 252, 70 A. 1097 (1908); *Meixell*, supra. Defendants were, therefore, permitted to shale the lane which gave access to their high ground because this was a reasonable and necessary action to improve the land for cultivation and to make their higher ground accessible. In so doing, defendants did not directly interfere with the natural flow of surface waters, did not collect and discharge water onto lower land, and any increased flow was not shown to be the proximate cause of unnatural flooding of the lower land.

It is further evident that over the years the owners of the higher ground made efforts to slow the flow of water and retard erosion of the soil by the planting of corn in rows or strips parallel to the road, and the cutting of ditches and culverts under the shale lane to direct water to heavy undergrowth areas. A swale was cut in the lower land in 1957 and maintained until the sale of the land to plaintiff, which directed water to Little Antietam Creek. Water, therefore, created problems throughout the history of this land. Defendants have not, by unreasonable or negligent actions, caused the most recent flooding of the lower land, as the only water which flows onto plaintiff's land is that which would naturally flow there by reason of the relative elevation of the properties alone.

In addition to the fact that plaintiff's real estate is located in a flood plain at the low point of a large drainage basin which received water runoff from higher lands, including that of the defendants, the evidence also established as contributing to the flooding suffered by the plaintiff that:

1. In the years following the purchase of the subject real estate by the parties there had been an unusually heavy amount of precipitation.

2. The swale installed on plaintiff's land by the Department of Highways, which had effectively channeled runoff water into the adjacent creek, was closed and its entrance blocked subsequent to plaintiff's acquisition of the property.

3. Water flowed from the property sold by plaintiff to Ronald E. Wagaman onto plaintiff's lands.

4. The defendants' real estate was planted in corn with the rows running perpendicular to the highway instead of parallelling it as had formerly been the practice.

Thus, the plaintiff has failed to sustain its burden of proving that the defendants use of their real estate was the

direct and proximate cause of the flooding problems.

As above noted, in cultivating the upper land in corn rows perpendicular to the road, the defendants are, in fact, cutting artificial channels which direct surface waters across the highway. Reasonable use and cultivation of the land in strips or rows parallel to the road avoids unnecessary and rapid drainage onto lower lands while permitting full agricultural use of the upper land. The Court will, therefore, direct defendants to cease the cultivating of crop rows in such a manner as to unnecessarily increase water flow to the lower land.

The second issue in this case is whether plaintiff's failure to act constitutes laches and a full defense to plaintiff's suit. Laches is a factual question. *Kepler v. Kepler*, 330 Pa. 441, 199 A. 198 (1938). The Pennsylvania appellate courts have repeatedly stated that laches, an affirmative equitable defense "will bar a claim whenever it appears that, under the circumstances of the particular case, plaintiff is chargeable with want of due diligence in failing to institute or prosecute his claim and because of that laxity the assertion of that claim would be unjust." *Fidelity v. Casualty Co. of N. Y. v. Kizis*, 363 Pa. 575, 578, 70 A. 2d 227, 229 (1950). The delay must be prejudicial to the adverse party. *Weil v. Power Building & Loan Assoc., 142 Pa. Super. 257, 17 A. 2d 634 (1941).*

In the instant case, plaintiff maintains that any delay in pursuing legal action against defendants was due to ongoing negotiations for resolution of the flooding problem. The court is convinced that laches is not available to defendants because the injury is one of an ongoing nature, and defendants have not acted to change their position because of the delay.

If the plaintiff had successfully sustained its burden of proof, we have grave doubts that we could have granted the equitable relief sought because, at this point in time, plaintiff has conveyed the property over which the swale once ran and adjoining the creek to Mrs. Walter Grove. It is onto and over her parcel of land that water would be directed to drain by restoration of the stone fence. The Court cannot compel defendants to lessen the natural flow of water onto plaintiff's land by increasing, with artificial means of collection and discharge, the flow of water upon the property of another landowner who is not a party to the suit. Plaintiff could not remedy its problem by directing the flooding water upon another owner, and the Court, likewise, cannot cure plaintiff's problem by creating similar problems for Mrs. GRove. See *Martin v. Riddle*, 26 Pa. 415 (1856).

A further impediment to being granted the equitable remedy of injunction sought in this suit is plaintiff's present standing to sue. In 1979, plaintiff conveyed the remaining property in issue to Richard and Joyce Murphy under an installment sale contract. Such a land sale contract allows the vendor to retain legal title while the purchaser takes equitable title. The vendor is regarded in equity as a trustee of the land for the puchaser, and the purchaser is regarded as trustee of the purchase money for the vendor. *32 P.L.E. Sales of Realty, Sec. 131 (1960).* Equity cannot relieve by injunction unless the plaintiff demonstrates a "clear legal right to the use, occupation or enjoyment of the property or right, the invasion of which is sought to be enjoined." *Williams v. Bridy*, 391 Pa. 1, 136 A. 2d 832 (1957). Plaintiff clearly would have a right to sue for damages occurring prior to conveyance of the land, but cannot seek a mandatory injunction for an "invasion" of the rights of the equitable owners who have the present right to use and enjoyment of the land.

Plaintiff has failed, however, to show that the damages incurred by flooding were proximately caused by the wrongful actions of defendants in removing the stone fence or shaling the road to the upper land. The evidence does show that present cultivation methods are unreasonable in light of the natural, recurring water drainage problems of this area, although these methods have not been proven to be the sole or major cause of the flooding damage.

Therefore, the Court must deny plaintiff's prayer for injunctive relief and compensation for damages due to flooding.

The defendants will be ordered to enjoin from the cultivation of their lands so crop rows extend perpendicularly from Legislative Route 28025 to the higher land.

DECREE NISI

NOW, this 19th day of December, 1980, the Plaintiff's complaint is dismissed.

The Defendants, Eldon L. Joiner and Jeanette R. Joiner, are enjoined from the cultivation of their lands so crop rows extend perpendicularly from Legislative Route 28025 to higher land.

Costs to be paid by Plaintiff.

Exceptions are granted Plaintiff and Defendants.