of law, Equity was not the forum in which to adjudicate their claim that the school board had not complied with the regulations of the Department of Education (*Conrad, et al.*, supra, 3 Fr. Co. Leg. J. at 105).

The entire matter may be academic, however, because whether the case is decided by virtue of our granting the non-suit or sustaining the demurrer, the result is the same.

ORDER OF COURT

NOW, August 24, 1979, the motion to remove the compulsory non-suit is denied and the order of the court dated June 6, 1979 granting the non-suit and sustaining the demurrer is affirmed. All costs to be paid by the plaintiff.

PRICE, ET UX. v. GLASS, ET UX., C.P. Franklin County Branch, E.D. Vol. 7, Page 150, E.D. Vol. 7, Page 180

Equity - Injunction - Right-of-Way - Easement by Prescription

1. Easements by prescription may be acquired by adverse user for twenty-one years.

2. An easement by prescription cannot be acquired if the use is permissive regardless of how long it is continued.

David C. Cleaver, Esq., Attorney for Parties, Price

David W. Rahauser, Esq., Attorney for Parties, Glass

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
DISCUSSION AND DECREE NISI

EPPINGER, P.J., August 20, 1979:

There are two cases here, one filed by John E. Price and Beryl Jean Price, husband and wife, against John W. Glass and Bertha M. Glass, husband and wife, to enjoin the Glasses from using a right-of-way. The other is a suit by the Glasses against the Prices to enjoin them from obstructing their access to the right-of-way. The cases were tried together, and from the evidence taken the Court makes the following

FINDINGS OF FACT

1. The Glasses own a property which fronts on U. S. Route 11 in Greene Township, Franklin County, Pennsylvania.

2. South of the Glasses' property is a 20 foot right-of-way that leads to lands owned by the Prices.

3. This right-of-way was originally laid out by Bruce O. McCleary and others to provide access to the eight-acre tract now owned by the Prices which they acquired from McCleary.

4. When the right-of-way was laid out it was the intention of McCleary to hold the same for access to the eight-acre tract.

5. Between 1955 and 1978 the Glasses used the right of way as an exit from their own driveway, for parking their car and for other purposes.

6. On several occasions Mrs. Glass asked McCleary whether they could buy the right-of-way. McCleary refused to sell it, saying it was intended for use as an access to the eight-acre tract but that there was no need for the Glasses to buy the right-of-way because they could use it as long as he owned it.

7. The use made by the Glasses continued while McCleary was the owner but terminated September 16, 1978, when the Prices excluded the Glasses from using it.

CONCLUSIONS OF LAW

1. The use the Glasses made of the right-of-way was by permission of Bruce O. McCleary, one of the record owners of the right-of-way.

2. The Glasses did not acquire an easement by prescription.

3. The use made by the Glasses of the right-of-way, had it been adverse, would have ripened into an easement by prescription.

4. The prayer of the Glasses' complaint must be denied and that of the Prices' granted.

DISCUSSION

Easements by prescription may be acquired by adverse user for twenty-one years. Generally, the same elements necessary for acquisition of title by adverse possession must be present for the acquisition of an easement by prescription. Thus, the user must be continuous, visible, notorious and hostile for the statutory period. The legal theory behind easements by prescription is that such continuous, open, visible,

notorious, hostile and adverse user of an easement for twenty-one years or more gives rise to a presumption that at some time in the remote past an express grant of such easement had been made. See Ladner on Conveyancing in Pennsylvania (3d ed.), Sect. 6:13.

Since the user must be continuous, notorious and adverse, an easement by prescription cannot be acquired if the use is permissive regardless of how long it is continued. A permissive use is not adverse. See, e.g., *Deeb v. Ferris*, 127 Pa. Super 489, 193 A. 75 (1937); *Kline v. Rothenberger*, 49 Berks 152 (1957).

Having concluded that the Glasses used the subject right-of-way by permission of one of its record owners and, therefore, that no easement by prescription was acquired, we enter the following

DECREE NISI

August 20, 1979, the prayer of the Complaint filed by John E. and Beryl Jean Price is granted and John W. Glass and Bertha M. Glass are enjoined from blocking or obstructing the private drive referred to in these proceedings, from using it and from interfering with plaintiffs' use and enjoyment of it. The prayer of the Complaint filed by John W. and Bertha M. Glass is denied.

This decree nisi shall become final if no exceptions are filed within ten (10) days from the date hereof.

The costs of the proceedings shall be paid by John W. and Bertha M. Glass.

COMMONWEALTH v. HARMON, C.P. Cr. D. Franklin County Branch, No. 375 of 1978

Omnibus Pre-Trial Motion - Motion to Suppress - Cognate Offenses

1. Statements made to a police officer will be suppressed if the accused is not arraigned within six (6) hours of his arrest.

2. An arrest is accomplished by any act which indicates an intention to take a person into custody, and to subject him to the actual will and control of the person making the arrest.

3. Conspiracy is cognate to the offenses charged and may be included in an information even if it was not specifically alleged in the information at the time of the preliminary hearing.

District Attorney's Office, Franklin County, Attorneys for the Commonwealth

David W. Rahauser, Jr., Esq. and *Frederic G. Antoun, Jr., Esq.*, Attorneys for the Defendant

OPINION AND ORDER

EPPINGER, P.J., February 9, 1979:

James E. Harmon is charged with murder in the first and second degree, aggravated assault, robbery, theft and conspiracy. He filed an onmibus pretrial motion to suppress statements to sever his trial from that of co-defendant Charles E. Sleighter, Jr., to quash the indictment (sic) and also filed a petition for a writ of habeas corpus challenging the finding of the District Justice of the Peace that a prima facie case existed as to robbery and theft.

The motion to sever become moot before Harmon's trial because Sleighter entered a plea of guilty to murder generally and pending disposition of that matter, he was not to be tried on the other charges.

We granted motions to suppress statements made to the Chambersburg Police. In *Commonwealth v. Davenport*, the Pennsylvania Supreme Court adopted a per se exclusionary rule that if the accused was not arraigned within six hours of his arrest, statements obtained after arrest but before arraignment were not admissible at the trial. 471 Pa. 278, 286, 370 A.2d 301, 306 (1977). This was based on the court's conclusion that it was desirable to set an inflexible standard of six hours.

In light of *Davenport*, the important question is when Harmon was arrested. Harmon was in custody, in handcuffs, at the scene at 2:45 the morning of this incident. He was read his rights at approximately 3:00 a.m., was formally arrested sometime between 3:15 and 3:30 a.m., An arrest may be accomplished by "any act that indicates an intention to take [a person] into custody and that subjects him to the actual will and control of the person making the arrest." *Commonwealth v. Bosurgi*, 411 Pa. 56, 58, 190 A.2d 304.311 (1963). We conclude that Harmon was arrested when he was first in custody and handcuffed at approximately 2:45 a.m. But even if we found that he was not arrested until he was detained on suspicion of a felony and read his rights at 3:00 a.m., since he was not arraigned until approximately 9:15 a.m. (at the earliest), and because more than 6 hours elapsed between arrest and arraignment, the statement made to the police officers during their investigation had to be suppressed.