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.

The same is not true where the statement is made to a fellow prisoner. The *Davenport* rule does not cover such statements. Moreover the alleged statements to Randy Pennabaker were made after Harmon was arraigned. These were not suppressed.

Though there was nothing in the complaint filed by the police specifically mentioning it, the District Attorney prepared an information in which he was charged with two counts of conspiracy. These were filed October 25, 1978, when Harmon was arraigned on the charges growing out of this incident and on which he had had a preliminary hearing. Counsel for Harmon contend that since he had no preliminary hearing on the conspiracy charges specifically, these counts must be quashed.

Pa.R.Crim.P. 225(b) lists the requirements of a valid, sufficient information, including one that the information contain "a plain and concise statement of the essential elements of the offense alleged in the complaint." Pa.R.Crim.P. 225(b)(5). We find that conspiracy is cognate to the offenses alleged in the complaint (criminal homicide, aggravated assault, theft and robbery) and therefore the application to quash informations was denied.

Harmon's attorneys argue that "cognate offense" means a "lesser included offense" and since conspiracy is not a lesser included offense of those contained in the complaint, these counts must be quashed. Webster's Third New International Dictionary defines cognate as "related, akin or similar, especially in having the same or common or similar nature, elements, qualities, or origin..." The Philadelphia Common Pleas Court used this definition in ruling that nine additional offenses were cognate with five offenses contained in the complaints. In *Commonwealth v. Schwartz*, 56 D&C 2d 147 (1972), when the defendant came before the Common Pleas Judge as a committing magistrate, after the testimony at the preliminary hearing was heard, the judge added nine offenses to the five charged. In reviewing this the court concluded that the nine additional charges "satisfied the standard of being 'cognate' with those for which [the defendant] was arrested, that is, they were related to, or had common elements or a common origin with the first set of charges, or sprang from the same alleged facts as portrayed by the testimony." 52 D&C 2d at 157. See also *Commonwealth v. Danner*, 79 Pa. Super 556 (1922) (Any crime arising out of the same transaction can be laid in the indictment... The offenses charged were of a cognate nature and were a part of the same affair).

The conspiracy counts arose out of the same transaction,

criminal act, episode or occurrence as the other charges and Harmon admits this. (See Paragraph 21, Omnibus Pretrial Motion). Therefore the conspiracy charges are cognate and the informations were properly filed by the District Attorney.

A *Campana* argument was raised by Harmon. In that case it was held that a prosecutor is required to bring, in a single proceeding, all known charges against the defendant arising from a "single criminal episode." *Commonwealth v. Campana*, 452 Pa. 233, 304 A.2d 432 (1973). However, *Campana* was a double jeopardy case dealing with the issue of successive prosecutions. Here all charges were brougnt against Harmon in one proceeding and *Campana* does not apply.

The evidence the court heard supported the conclusion of the District Justice of the Peace that there was a prima facie case and therefore the petition for a writ of habeas corpus is denied.

This opinion is filed in support of our order dated February 6, 1979.

ROCKWELL v. SPIELMAN, ET AL., C.P. Franklin County Branch. No. 65 Aug. Term, 1976

Habeas Corpus - Child Custody - Contest between Parents inter se and with Third Parties - Best Interests of Child Rule - Prima Facie Right Rule as Against Third Parties - Present Fitness of Parent Rule - Burden of Proof

1. The Court's concern in custody cases is with the child's physical, intellectual, moral and spiritual well-being.

2. The sole issue to be decided in a custody proceeding is the best interests and welfare of the child.

3. In a custody dispute between parents, the Court must consider the fitness of each parent in determining the best interest and permanent welfare of the child, and each parent has an equal burden of proof.

4. In a custody dispute between a parent and a third party, the parent is said to have a "primary right" to custody, althougn such right is not absolute.

5. The third party must present convincing reasons related to the child's best interests, and the burden of proof in this regard is a difficult one.

6. The Court will award custody on present conditions, the issue being the parent's present fitness, not the nature or extent of her past misconduct.