Defendants' only other argument is that they are not liable because the dangerous condition complained of was obvious. The court feels that whether the particular ice patch in question was obvious is a question for the jury and thus summary judgment would be inappropriate.

CONCLUSION

Since the Pennsylvania Supreme Court in *Milie*, did not require proof of icy ridges or elevations for a plaintiff to recover in a slip-and-fall suit, the lack of ice ridges or elevations in the instant case does not defeat the plaintiffs' claim. Summary judgment for the defendants, based on the plaintiffs' inability to assert that they slipped and fell on an icy ridge or elevation, is therefore inappropriate.

The question of whether the ice patch plaintiff Steven Alexander slipped and fell on was an obvious risk is one for the jury, and thus summary judgment on that question would be inappropriate.

ORDER OF COURT

February 12, 1992, defendants' motions for summary judgment are denied.

court reads *Milie*, the plaintiffs at trial must show that the ice patch in question was known or discoverable by the defendants and, at the same time, not known or obvious to the plainiff. *See Berman v. Radnor Rolls, Inc.*, 374 Pa.Super. 118, 133, 542 A.2d 525, 532 (1988).

CHARLES AND WIFE VS. REEDER AND WIFE, C.P. Fulton County Branch, No. 162 of 1990 C.

Landlocked Property - Easment by Necessity
Easement by Prescription - Tacking of Adverse Use

1. An easement by necessity required both that a tract is completely landlocked and no other means of access exists and at some point in time the plainitff's and defendant's property was commonly owned.
2. Use is continuous where property is used for recreational purposes, six or eight times a year for only a few hours at a time.
3. To tack adverse uses when creating a prescriptive easement, there is no requirement that a predecessor in title actually convey the easement to a successor.
4. Unlike adverse possession claims to fee simple title, easements ran with the dominant estate and require no deed or writing to support them.

Stanley J. Kerlin, Esq., Attorney for the Plaintiffs
Ira Weinstock, Esq., Attorney for the Defendants

OPINION AND ORDER

WALKER, J., March 28, 1991:

This action arose out of a dispute between two adjacent landowners concerning the existence of a right-of-way from the plaintiffs' landlocked property across the defendants' land to a public road. This court has considered all of the evidence and finds that plaintiffs do not possess a right-of-way by necessity. However, plaintiffs have obtained a prescriptive easement and may continue to use the roadway for access to their land.

Joseph M. Charles and Helen D. Charles ("plaintiffs") are the owners of a 35-acre tract of land located in Dublin Township, Fulton County. The land has no access to a public highway and is surrounded by neighboring properties. The plaintiffs purchased the land in October, 1969 from Penn Seventy, Inc., which had acquired the tract from Lester Detwiler in April, 1969. Mr. Detwiler and his family had resided in a farmhouse on the property since purchasing it from the Chester C. Truax family in 1954. The Truaxes had acquired the property by deed from

Joseph Hafer in 1947.

Ethel M. Reeder and Kenneth M. Reeder ("defendants") are the owners of two adjacent tracts of land over which a private roadway leading to the plaintiffs' property exists. The roadway extends from State Route 655 and includes a portion of the defendants' driveway. The roadway extends from the driveway to an old Southern Pennsylvania Railroad right-of-way, which leads to the plaintiffs' land. Defendant Ethel Reeder purchased the railroad right-of-way from the Pennsylvania Turnpike Commission in June, 1964. The Turnpike Commission acquired the right-of-way from the Railroad in 1938.

Plaintiffs filed a complaint in equity on June 12, 1990, requesting a prelimanary injunction enjoining the defendants from blocking the roadway. A hearing was held on June 19, 1990, and this court entered an order on August 9, 1990 granting the preliminary injunction and ordering the defendants to refrain from interfering with the plaintiffs' use of the right-of-way pending final resolution of the matter. The defendants filed an answer, new matter and counterclaim for trespass and nuisance on July 10, 1990.

A trial was held on December 10, 1990, and this court has carefully considered all of the evidence. The plaintiff makes two separate and distinct arguments. This court rejects the plainitffs' argument that an easement by necessity exists, but finds that a prescriptive easement does exist.

I. EASEMENT BY NECESSITY.

The plaintiffs first argue that they have an easement across the defendants' property because their tract is landlocked and no other reasonable means of access exists. Plaintiffs misstate the law with regard to easements by implication, ie., easements by necessity.

This court agrees that plaintiffs' tract is completely landlocked and that no other means of access exist. Although the defendants suggested at least three alternate routes, the court rejects them all. The suggested routes would require the plaintiffs to, first, obtain permission from other adjacent landowners to cross their

property and, second, construct roadways that would make the Burma Road look like a suburban driveway. The court finds it ridiculous that defendants would suggest the routes. All of the suggested routes were either deep, canyon-like ravines filled with boulders or steep, impassible, forest-like hillsides. No other route exists to the plaintiffs' land.

However, necessity is not the only requirement for an easement by implication. There must also be some evidence that, at some point in time, both the plaintiffs' and defendants' properties were commonly owned and that the owner subdivided the parcels, thus creating the landlocked tract. In such a case, an easement by necessity would be created over the grantor's property allowing the owner of the landlocked tract access to a public road. *See e.g., Burns Mfg. Co., Inc. v. Boehm,* 467 Pa. 307, 356 A.2d 763 (1976); Solstis v. Miller, 444 Pa. 357, 282 A.2d 369 (1971); and Restatement of Property, Section 474 (1944).

There is little doubt that, at some time, both the plaintiffs' and defendants' lands were commonly owned. However, plaintiffs have failed to offer any evidence or even an averment of common ownership. Without evidence of common ownership, there can be no easement by necessity. If plaintiffs do have an easement which they can continue to use, it must be prescriptive.

II. EASEMENT BY PRESCRIPTION.

An easement by prescription, as opposed to an easement by necessity, may be created without evidence of common ownership. An easement by prescription is much akin to claiming fee title by adverse possession and rewards those who have used an easement in the requisite manner with continued use. As our Supreme Court has stated:

> The difference between easements by necessity and by prescription is, of course, the manner of their creation. An easement by necessity may be created when, after severance from adjoining property, a piece of land is without access to a public highway . . . An easement by prescription, on the other hand, is created by adverse, open, continuous, notorious and uninterrupted use of land for the prescriptive period -- in Pennsylvania, twenty-one years.

Bodman v. Bodman, 456 Pa. 412, 414, 321 A.2d 910, 912 (1974) (citations omitted). *See also, Boyd v. Teeple,* 460 Pa. 91, 94, 331A.2d 433, 434 (1975).

The plaintiffs have proven each and every element necessary and may continue to use the roadway. We will discuss each element and the evidence separately.

ADVERSE USE.

In *Loudenslager v. Mostellar,* 453 Pa. 115, 307 A.2d 286 (1973), the Supreme Court held that, "[W]here one uses an easement whenever he sees fit, without asking leave, and without objection, it is adverse, and an uninterruped adverse enjoyment for twenty-one years is a title which cannot be afterwards disputed." *Id.,* 453 Pa. at 117, 307 A.2d at 287.

In the instant case, there is no question that plaintiffs and their predecessors in title used the roadway whenever they so desired and, according to both the plaintiffs and Mr. Detwiler, never asked the defendants' permission to do so. Although there is no evidence of precisely when or how the adverse use began, the Truaxes used the roadway as early as 1947.

Adverse use,

> "without evidence to explain how it began, is presumed to have been in pursuance of a full and unqualified grant. The owner of the land has the burden of proving that the use of the easement was under some license, indulgence, or special contract inconsistent with a claim of right by the other party." *Id.,* quoting *Garrett v. Jackson,* 20 Pa. 331 (1853).

The defendants have not offered any evidence that the Truaxes, Detwilers or plaintiffs used the land only with their permission, so the presumption that it started with the intent to adversely use the land exists. *See e.g., Keefer v. Jones,* 467 Pa. 544, 551, 359 A.2d 735, 739 (1976). The use of the roadway by all of the landlocked tract's owners to gain access to their property was, therefore, adverse.

OPEN USE.

There is also no question that the use was open. The defendants' homes are only a few yards from the entrance to the

driveway used by all the three owners of the landlocked tract since the 1940's and defendants admit that they knew that the roadway was being used to gain access to the land. The use was never concealed and defendants have always known that the roadway was being used.

CONTINUOUS USE.

The plaintiffs have also continuously used the roadway. Although plaintiffs use the property only for recreational purposes and visit the land only six to eight times a year, staying on the land a matter of a few hours before returning to Maryland, they have continuously possessed the access.

". . [I]t is well-setteled that 'day-to-day use [is not] required to satisfy the continuity element essential to the creation of prescriptive rights.'" *Minteer v. Wolfe,* 300 Pa. Super. 234, 243, 446 A.2d 316, 321 (1982), quoting *Ashead v. Sprung,* 248 Pa. Super. 253, 375 A.2d 83 (1977). Here, the fact that the plaintiff used the roadway only six to eight times a year is irrelevant. The plaintiff continued a settled course of conduct in which he viewed the use of the roadway as a property right.

The plaintiffs' predecessors in title also continuously used the roadway. Mr. Detwiler, who owned the property from 1954 to 1969, testified that he and his family used a portion of the defendants' driveway and the old railroad right-of-way every day for fifteen years. The Detwiler family never asked the defendants for any permission to use the roadway or had any discussion with the defendants concerning its use.

Mr. Detwiler was also a friend of the Truax family, which owned the property from 1947 to 1954. He had visited the property on several occasions and hunted the land with Mr. Truax. According to both Detwiler and the defendants, the Truaxes also used the driveway and right-of-way to gain access to their land.

Merrill Kerlin, a director of Penn Seventy, Inc., testified that he visited the property twice during the summer of 1969, before the corporation sold the land to the plaintiffs. He used the contested roadway to travel to the land on each occasion.

Succession of adverse use may be maintained by "tacking" the possession of the Truaxes, Detwilers and plaintiffs to establish the 21-year prescriptive period if there is "privity" between the occupants. "Privity" means only that there is a succession of relationships to the same thing, ie., all of the landlocked tract's owners adversely possessed the roadway to gain access to their property. *Stark v. Lardin,* 133 Pa. Super. 96, 100, 1 A.2d 784, 786 (1938).

To tack adverse uses when creating a prescriptive easement, there is no requirement that a predecessor in title actually convey the easement to a successor. Unlike adverse possession claims of fee title to land, easements are appurtenances of the dominant estate and require no deed or writing to support them. *Predwitch v. Chrobak,* 186 Pa. Super. 601, 602, 142 A.2d 388, 389 (1958).

Here, the evidence showed that the Truaxes began to adversely possess the roadway in 1947 and the Detwilers continued that possession until April, 1969, a period of 22 years. The plaintiffs subsequently continued the adverse possession through 1989, when the gate was installed and plaintiffs could no longer gain access to their land by vehicle over the roadway.

The Truaxes, Detwilers and plaintiffs continuously possessed the roadway from 1947 to 1989, a period of 42 years and well in excess of the required 21 years.

It is well-settled that

> "the doctrine of *nullum tempus* ["time does not run against the king"] has long been followed in Pennsylvania . . . [and that] a claim of adverse possession does not lie against Commonwealth property." *Com., Dep't of Transp. v. J. W. Bishop & Co.,* 497 Pa. 58, 62, 439 A.2d 101, 103 (1981).

Accordingly, the plaintiff cannot have claimed adverse possession against the Turnpike Commission while it owned the property. However, the Commission sold the property to the defendants in 1964 and the adverse use was not interruped until 1989; see discussion below. Therefore, even if this court tacks only the Detwilers' adverse use from 1964 until 1969, Penn Seventy's adverse use in 1969, and the plaintiffs' adverse use from 1969 until 1989, an easement by prescription is created; the roadway was continuously and adversely possesd for 25 years.

NOTORIOUS USE.

The possession must also be notorious. Here, the defendant testified that he had noticed that both the roadway and railway had been used by all of the owners of the landlocked tract. The use was of a very conspicuous nature and it was common knowledge that the roadway was used to gain access to the property. The roadway was traveled to a family home from 1947 to 1969. It was not used under cover of darkness to gain access to a secret hideaway. It was a family driveway used, until the Detwilers sold the land to Penn Seventy, on a daily basis.

UNINTERRUPTED USE.

The fifth and final element for the creation of a prescriptive easement is that the use of the land be uninterrupted for twenty-one years. This court has already discussed the fact that the Truaxes and Detwilers used the roadway to gain access to their home. The first interruption in 42 years of adverse use was the defendants' installation of a gate at its entrance in 1989.

Defandants argue that they had previously placed obstructions in the roadway. However, none of the obstructions stopped the plaintiff from using the roadway.

> "To be interrupted an obstruction must interrupt the actual use and the obstruction must be accomplished by an intent to cause an interruption in use." *Keefer,* 467 Pa. at 550-551, 359 A.2d at 738.

Here, the use was uninterrupted for 42 years.

All five elements for a prescriptive easement have been met. The plaintiffs and their predecessors in title have adversely possessed the roadway for at least 25 years, in excess of the 21-year prescriptive period.

III. DEFENDANT'S COUNTERCLAIM FOR TRESPASS AND NUISANCE.

As this court finds that plaintiffs were entitled to use the roadway to gain access to their land, the defendants' trespass

action will be dismissed. However, in their nuisance action, the defendants maintain that several dogs kept at the plaintiffs' land have caused substantial damage.

According to the defendants' counterclaim, the dogs' barking keeps them awake and the dogs roam loose, eating the defendants' pony and dog foods. The defendants also claim that the dogs are "abnormally dangerous" and that they are afraid to be outside. At the hearing, defendant Kenneth Reeder estimated that the dogs ate approximately half a pound of dog and cat food on the defendants' property. However, Mr. Reeder also testified that he was not bothered by the dogs' barking and, after accompanying Mr. Reeder to view his suggested alternate routes of access, this court is reasonably certain that he has absolutely no fear about being outdoors near his home.

Ethel Reeder was not in good health at the time of trial and did not testify. She did, however, testify at the preliminary injunction hearing and that testimony has been considered. A review of Mrs. Reeder's testimony reveals that she is very hard of hearing and had great difficulty hearing questions asked of her from only a few feet away. Her house is some distance from the plaintiffs' property and this court does not believe that she is kept awake at night by the plaintiffs' dogs.

CONCLUSION

The five elements required for the creation of a prescriptive easement--adverse, open, continuous, notorious and uniterruped use of land for twenty-one years--have been met. The use of the roadway, comprised of a portion of the defendants' driveway and the old Southern Pennsylvania Railroad right-of-way, for more than 40 years has created an easement. Plaintiffs may continue to use the roadway as access to their landlocked property.

The defendants have not established any claim for trespass, but have established that an amount of pet food has been eaten by the plaintiffs' dogs. They have established no other damages.

ORDER OF COURT

March 28, 1991, judgment is entered in favor of plaintiffs Joseph M. Charles and Helen D. Charles and against defendants Ethel Reeder and Kenneth M. Reeder. Defendants are hereby enjoined from interfering with the rights of plaintiffs, their heirs, successors and assigns in and to the access road leading from Pennsylvania State Route 655 across the defendants' premises to the plaintiffs' property.

Defendants' trespass action is dismissed. In defendants' nuisance action, defendant Kenneth Reeder is awarded $2.50 in damages. Plaintiffs are also ordered to keep any animals boarded on their land secure.