


1966

Recent Cases

Follow this and additional works at: <http://scholarship.richmond.edu/lawreview>

 Part of the [Civil Law Commons](#), [Civil Procedure Commons](#), [Contracts Commons](#), [Criminal Law Commons](#), [Criminal Procedure Commons](#), [Family Law Commons](#), and the [Property Law and Real Estate Commons](#)

Recommended Citation

Recent Cases, 2 U. Rich. L. Rev. 253 (1966).

Available at: <http://scholarship.richmond.edu/lawreview/vol2/iss4/6>

This Article is brought to you for free and open access by UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized administrator of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

RECENT CASES

HABEAS CORPUS: *A further expansion of the Great Writ*

The general rule governing prematurity in a petition for a writ of habeas corpus has been well settled for many years. "If a person has received several prison sentences, habeas corpus is, broadly speaking, only available to attack the one that he is presently serving." SOKOL, *Handbook of Federal Habeas Corpus* §6 (1965). This stems from the office of the writ of habeas corpus, which is to secure a release from an illegal restraint. The United States Supreme Court settled the prematurity question as to future prison sentences in the case of *McNally v. Hill*, 293 U. S. 131, 55 S. Ct. 24, 79 L. Ed. 238 (1934) where the court ruled that "a sentence which the prisoner has not yet begun to serve cannot be the cause of restraint." The cases following this decision are readily available and are far too numerous to mention. Virginia has consistently followed the same doctrine of prematurity as laid down in *McNally*.

Recently several decisions have challenged the doctrine of prematurity. Since the courts have expanded the scope of habeas corpus in many other areas, this writer believes these cases to be the forerunners of a further expansion of the writ of habeas corpus. Perhaps the most significant of these prematurity cases is *Martin v. Virginia*, 349 F. 2d 781 (4th Cir. 1965). Martin was convicted of second degree murder in 1960 and sentenced to fifteen years imprisonment. Subsequently he was convicted of escape and grand larceny and sentenced to five and three years respectively. Martin admitted the validity of his murder conviction, but challenged the later escape and larceny convictions on the grounds that they were constitutionally defective. Martin further contended that he would have been eligible for parole in 1963

on the murder conviction, but that because of the escape and larceny convictions his eligibility for parole would be deferred until 1966. The Hustings Court Part One of the City of Richmond denied Martin's petition for a writ of habeas corpus on the ground that Martin was serving the murder sentence and that habeas corpus is available only to attack a sentence presently being served, not one commencing in the future. The Supreme Court of Appeals of Virginia denied the petition for a writ of error.

Martin, his state remedies exhausted, then went into the federal District Court. He filed a "Motion for Declaratory Judgment," claiming a violation of the Due Process Clause of the Fourteenth Amendment. The District Court denied relief on the ground that a declaratory judgment is not a substitute for habeas corpus. The prisoner then appealed this finding to the United States Court of Appeals for the Fourth Circuit.

Justice Sobeloff, writing the opinion of the Fourth Circuit, conceded that if *McNally* stood alone the Court would be bound by that decision. He went on to say, however, that based on the more recent decisions of *Jones v. Cunningham*, 371 U. S. 236, 83 S. Ct. 373, 9 L. Ed. 2d 837 (1963) and *Fay v. Noia*, 372 U. S. 391, 83 S. Ct. 822, 9 L. Ed. 2d 837 (1963) and on the expanding scope of the writ of habeas corpus,

. . . there is reasonable ground for thinking that were the Supreme Court faced with the issue today, it might well reconsider *McNally* and hold that a denial of eligibility for parole is a restraint of liberty no less substantial than the technical restraint of parole. (349 F. 2d at 783).

The Court went on to hold that "in keeping with the spirit of these developments," since Martin's convictions for escape and larceny were a bar to his eligibility for parole, he was in custody within the meaning of the

federal statute even though he technically had not yet begun to serve those sentences. The Court also made it clear that this principle is not "limited to one such as *Martin* who is able to state a strong case for parole consideration."

Aside from this main point in *Martin*, it is also interesting to note that the Circuit Court treated the "Motion for Declaratory Judgment" as a petition for a writ of habeas corpus.

The same question of prematurity that was raised by *Martin* has been raised several times outside of Virginia in the relatively short period since *Martin*. Two of these subsequent cases, both arising in Pennsylvania, are particularly worthy of note. The first of these cases, *Commonwealth v. Myers*, 213 A. 2d 613 (Pa. 1965), was a decision of the Supreme Court of Pennsylvania. The petitioner was serving a valid robbery sentence of ten to twenty years when he was convicted of an unrelated murder and sentenced to life imprisonment, that sentence to commence at the termination of the robbery sentence. The petitioner admitted the validity of the robbery conviction, but in 1959 he attacked the murder conviction by way of a petition for a writ of habeas corpus. This petition was dismissed, and the dismissal was affirmed by the Supreme Court of Pennsylvania. *Commonwealth ex rel. Stevens v. Myers*, 398 Pa. 23, 156 A. 2d 527 (1959). *Cert. denied*, 363 U. S. 816, 80 S. Ct. 1254, 4 L. Ed. 2d 1156 (1960). In 1963 the prisoner again sought a writ of habeas corpus. When an appeal from a denial of that writ was heard in 1965, the Pennsylvania Supreme Court did a complete about-face and granted the writ. Citing *Martin*, the Pennsylvania court discusses and rejects the historical basis of the prematurity concept in a petition for a writ of habeas corpus and goes on to state,

Confident of our power to mold the Great Writ to exigencies of the times, and mindful of present necessities, we conclude that the prematurity concept should be modified in circumstances such as those present here and that the writ of habeas corpus may be sought in postconviction attacks on the validity of a final judgment of conviction even though the petitioner has not yet begun to serve the sentence imposed. (213 A. 2d at 624).

Less than one month after *Myers*, the same issue of prematurity came before the United States District Court for the Western District of Pennsylvania in the case of *United States v. Maroney*, 246 F. Supp. 607 (W. D. Pa. 1965). The facts surrounding this petition for a writ of habeas corpus were similar to *Martin* and to *Myers*. The federal District Court relied upon *McNally*, however, and held that habeas corpus is not available if the vacating of the invalid sentence will only make the petitioner eligible for parole on a valid sentence, because even if the issue were decided in the prisoner's favor, it would not result in his immediate release from custody. It is interesting to note that the District Court mentioned neither *Martin* nor *Myers*.

Should the concept of prematurity be abandoned? Several good arguments in favor of abandonment of the rule in *McNally* can be offered. Any delay in the hearing of the habeas corpus petition is harmful, but if years elapse while the prisoner is serving his valid sentence, death, loss of evidence, and fading memories would tend to make the habeas corpus hearing anything but the comprehensive inquiry that it was intended to be. If the petitioner is successful and a new trial is granted, the passage of time places a great burden upon both the defendant and the Commonwealth. Key witnesses die and disappear. Evidence is lost or inaccessible, and memories fade after many years. These unavoidable difficul-

ties could all be surmounted by a speedy hearing and, if necessary, a retrial.

Several other decisions and state statutes, in addition to *Martin* and *Myers*, seem to reject the prematurity concept. In *re Chapman*, 43 Cal. 2d 385, 273 P. 2d 817 (1954). Ore. Rev. Stat. §§ 138, 510, 138.560, 138.570 (1963). *Simon v. Director of Patuxent Institution*, 235 Md. 626, 201 A. 2d 371 (1964). See also: *Commonwealth v. Rundle*, 213 A. 2d 635 (Pa. 1965). Aside from these recent deviations, the concept of prematurity seems firmly entrenched, and the Virginia state courts have shown no signs of variance from the rule stemming from the 1934 decision in *McNally*. There is reason to speculate that the United States Supreme Court will reverse itself, however, when next faced with the prematurity issue, when one considers the rapid expansion of the scope of habeas corpus in other areas and the recent multiplication of habeas corpus petitions now before the courts.

F. BRUCE BACH

REAL PROPERTY: *Riparian rights*

Are riparian rights severable from riparian land? The case of *Thurston v. City of Portsmouth*, 205 Va. 909, 140 S. E. 2d 678 (1965), presented to the Virginia Supreme Court of Appeals the issue of whether riparian rights can be severed from the land by a means other than condemnation.

In *Thurston* the appellant's grantor expressly reserved the riparian rights in a conveyance of riparian lands. The City of Portsmouth obtained a conveyance of these same riparian rights, and by using sand and earth began constructing a highway outside the appellant's low water mark, his statutory boundary. Thurston sought injunctive relief relying on the theory that riparian rights are easements appurtenant and not ease-

ments in gross and, therefore, could not be conveyed separately from the riparian land. In affirming a decision for the City, the Supreme Court of Appeals held that the case was controlled by the prior decisions of *Waverly Water Front and Improvement Co. v. White*, 97 Va. 176, 33 S. E. 534 (1899), *Peek v. Hampton*, 115 Va. 855, 80 S. E. 593 (1914), *Ficklen v. Fredericksburg Power Co.*, 133 Va. 571, 112 S. E. 775 (1923) and particularly *Hite v. Town of Luray*, 175 Va. 218, 8 S. E. 2d 369 (1940).

Except for *Taylor v. Commonwealth*, 102 Va. 759, 47 S. E. 875 (1904), the Virginia cases and most authorities agree that riparian rights are more than easements, but beyond this point there is no agreement as to their exact nature. They are more than easements, but it does not necessarily follow that they are separately alienable. Tiffany criticizes the view taken by the Virginia Court and finds the theory of the separate alienability "not easily comprehensible" since riparian rights are dependent upon the proximity of the land to the water for their very existence. 3 TIFFANY, *Real Property* §736 (3d ed. 1939). Most of the cases in support of this principle of severability are either eminent domain cases, where the result is justified by public necessity, or cases concerning the conveyance of only the right to *make use* of the water. 6-A *American Law of Property* 28.55 (Casner ed. 1954).

Waverly, which was concerned with the same land under consideration in *Thurston*, held that a deed which seemed to grant land only to the *high* water mark was too ambiguous to overcome the presumption of an intent to convey all of the land to the *low* water mark. The Court held, however, that it would be possible to grant only down to the high water mark and thus to retain riparian rights in the grantor. This case differs from *Thurston*, however, since there would be no severance

of riparian rights from the riparian land because the grantor would retain title to the shore below the high water mark. VA. CODE ANN. §62-2 (1950).

Peek was cited for holding that a riparian right is "not a mere easement to pass over the water or a privilege to use the surface, but (is) property in the soil under the water." This seems to defeat the plaintiff's narrow point of appeal in that it holds a riparian right to be more than an easement. However, the case concerned trespass to riparian rights as a result of the construction of a bridge and is in no way authority for a separate conveyance.

Fricklen said that water or a water right could be separated from the water bed. The court held that water power, or the right to use the energy resulting from water's fall, could be partitioned between co-owners of riparian land. The case involved a purchase of a right to water power by a non-riparian owner, but did not pass upon that point. The case is confusing as to the rights of various mill owners to the water. It treats the rights as contract rights part of the time. At other times the court treats them as a conveyance of the water itself or as a right appurtenant to the riparian land. Compounding the confusion is the fact that the water involved flowed through canals. The common law rule was that water in a flowing stream was like a wild animal and one could gain title only by taking possession. 3 TIFFANY, *Real Property* §721 (3d ed. 1939). The assumption of the court seemed to be that the owner of the dam involved had the paramount right to sell the water or the rights in the water that poured into the canal as a result of his dam. If this is true, then riparian rights were not even involved in *Fricklen*.

Hite is cited in 56 Am. Jur. *Waters* §253 (1947) in support of the proposition that a riparian owner may sever riparian rights. However, it is cited in 93 C. J. S.

Waters §253 (1956) in support of the more conservative statement that "a right to the use of water of a stream may be sold and transferred separate and apart from the land to which it is appurtenant."

In *Hite*, a grantor of land gave to the grantee the right to use water from a spring for a mill. The grantor reserved to himself the right of ordinary use and the right to as much water as would run through a two and one half inch pipe. In subsequent litigation over the rights of the parties, it was held that more than a mere easement was conveyed and except for that which the grantor reserved, the grantee was given a property right in the water.

Thurston said that the conveyance in *Hite* was from a riparian owner to a non-riparian owner. However, the facts seem to indicate that the grantee was downstream from the grantor. The cases make a distinction between transfer of a riparian right to another riparian owner and such a transfer to a non-riparian owner. The Virginia view is that the use of water by a non-riparian owner would be an unreasonable use *per se* as against other riparian owners. See 5 POWELL, *Real Property* §719 (1962). *Town of Purcellville v. Potts*, 179 Va. 514, 19 S. E. 2d 700 (1942). 1 MINOR, *Real Property* §55 (Ribble ed. 1928).

In *Hite*, the judge concluded by saying, "both the rights and privileges are considered by me to be appurtenant to and running as covenants with the lands granted and retained respectively." This concluding reference seems to diminish the value of *Hite* as authority for even a conveyance of a property right. This case, as well as many others seem to use indiscriminately terms such as water rights, water privileges, the sale of water itself, contract rights, and easements, thereby compounding the confusion. Annot. 89 A. L. R. 1187 (1934).

While it may have been clear, prior to *Thurston*, that riparian rights are not easements, there seems to have been no clear authority either for the proposition that one riparian owner could voluntarily convey all of his riparian rights or for the proposition that they could be retained by his grantor. *Thurston*, in what could become a leading decision, has ended any uncertainty that might have existed by holding that a complete severance is possible.

E. OLEN CULLER

CIVIL PROCEDURE: *Misjoinder of actions*

Misjoinder of action was a good defensive plea in Virginia before 1950, but should it be today? *The Rules of Court of the Supreme Court of Appeals of Virginia*, provide that "an action shall be commenced by filing in the clerk's office a motion for judgment" Rule 3:2.

It would appear that the framers of these rules felt that the important result to be gained from making the motion for judgment the sole method of pleading a claim was that the other party be acquainted with the factual basis for the claim against him, not to make it the opening parry in a game of technicalities. Rule 3:8 allows a defendant to counterclaim any cause of action at law for a money judgment in personam that he has against the plaintiff, "whether it is in tort or contract." In light of this move toward simplicity it is indeed unfortunate that the case of *Daniels v. Truck Corp.*, 205 Va. 579, 139 S. E. 2d 31 (1964), was decided the way it was. In this case Daniels had purchased a Mack truck from Truck and Equipment Corporation on a conditional sales contract. Included in the contract was an express warranty for ninety days and a further clause allowing the seller to repossess in the event of a default in monthly payments by the purchaser. Daniels did default in payment,

and Truck Corporation repossessed the truck by breaking the cab window and driving the truck away without the aid of an ignition key. Daniels thereupon instituted a suit against Truck and Equipment Corporation and Mack Trucks, Inc., defendants, basing his suit on breach of warranties of performance and repair and on wrongful repossession of the vehicle. Plaintiff's motion was demurred to on the grounds, among other things, that there was a misjoinder of causes of action. The demurrer was sustained, and plaintiff was forced to proceed with the claim of breach of warranty and to institute a separate suit for the tortious wrongful repossession of the vehicle. The jury returned a small verdict for the plaintiff, but, upon motion of the defendants, the court set aside the verdict as being contrary to the law and evidence. Plaintiff appealed to the Supreme Court of Appeals and was granted a writ of error.

This note is concerned with the sustaining of the defendant's demurrer by the trial court on the grounds of misjoinder of causes of action. The Court affirmed the lower court's ruling, and Justice Snead at page 584 of the opinion said that the plaintiff had "joined two unrelated causes of action which involved more than one right and different kinds of proof, likely to result in confusion at the trial." He further said that the common law general rule would apply, *i.e.* these actions, by their very nature, could not be joined.

Plaintiff relied upon *duPont Co. v. Universal Moulded Prod.*, 191 Va. 525, 62 S. E. 2d 233 (1950), to sustain his position. In that case the plaintiff had purchased paints and varnishes from duPont to use in finishing its wood products. When these products ruined the goods and caused the Moulded Company to lose business, the company sued duPont for negligence in production and breach of warranty. The Virginia court held that there was no misjoinder of actions, for "the demands of the

plaintiff are of the same nature and closely related. Each arose out of the same general cause of action, in a continuous course of dealing with reference to one subject, and one judgment may be given." If this is the guideline that is to be used, then there should have been no misjoinder in *Daniels*.

At page 9 of the brief of counsel for the appellant, Daniels, the argument is made that the breach of warranty and the right to repossess the vehicle are found in the same conditional sale agreement. For that reason it was error to sustain the demurrer, as defendants breached the warranty in the contract and repossessed the vehicle under a right claimed to be in the contract. There was a controversy over the wording and import of pertinent clauses in the contract, but this is not important to this note. The interpretation and liabilities of these clauses would have been for the jury to decide. It is difficult to see a great conflict between the present case and *duPont*. Furthermore, it would seem that the guideline, in *duPont*, if it is a guideline, was not followed properly in *Daniels*.

However, there is another, and more far-reaching, aspect to this case that needs to be explored. Why should the Virginia court have to continually resort to the evasive term "related causes" to defeat a claim of misjoinder? Is it not reasonable to argue that if the *Rules of Court* under 3:8 allow the court to use its discretion in ordering a separate trial for any cause of action asserted in a counterclaim, they are broad enough to allow this same discretion to a trial judge confronted with a tort claim and a contract claim in a motion for judgment?

In appellant's reply brief at page 6, he says, regarding Rule 3:2:

This rule was effective October 1, 1951, and the

question is raised as to whether former decisions holding that tort and contract actions cannot be joined are effective today, especially in cases where both actions grew out of a written contract, as distinguished from an oral contract.

Many states in the United States, including West Virginia, have adopted the Federal Rules of Civil Procedure. Rule 8 of the Federal Rules has been repeatedly interpreted to allow the joining of tort and contract actions. *Card v. Elmer C. Breur, Inc.*, 42 F. Supp. 701 (N. D. Ohio 1941). It is interesting to note that the function of the complaint under the Federal Rules is closely akin to that of our own motion for judgment.

The function of a complaint under these rules is to afford fair notice to (an) adversary of the nature and basis of the claim asserted and a general indication of the type of litigation involved. *Shapiro v. Royal Indem. Co.*, 100 F. Supp. 801 (W. D. Pa. 1951).

It would appear that the Virginia court has allowed cases decided before 1950 to affect its decisions in this area of misjoinder. Is this a disadvantage to the plaintiff? This question was asked by the defendant in *Daniels*, and the plaintiff—appellant answered in his reply brief:

The mere fact that plaintiff has to file two separate actions at law means that justice will be administered piecemeal rather than in one single action.

It is hoped that the Virginia court will remove one of the last vestiges of the formalized common law pleadings and abolish the defense of misjoinder of causes of action. If the trial judge were given discretionary powers to order a separate trial if he felt it would be more ex-

pedient and would promote justice for all parties, the historical reasons for, and the development of, the motion for judgment would be satisfied. Virginia's motion for judgment would then be free from competing with common law pleadings.

ARCHER L. YEATTS, III

CRIMINAL PROCEDURE: *Pre-trial discovery in Virginia*

In the recent case of *Westry v. Commonwealth*, 206 Va. 508, 144 S. E. 2d 427 (1965), the Virginia Supreme Court reaffirmed its position on pre-trial discovery in a criminal prosecution. Westry was convicted of the murder of Robert Edward Harmon, the conviction being based on the testimony of his companion, Herbert Lee Capps, on whom Westry blamed the murder. Westry appealed on the grounds that the court refused to make available to the defendant all statements made by the defendant and by Capps, and a list of the Commonwealth's witnesses and their reports as to events and activities in connection with the case. He also claimed error in the court's failure to take discovery depositions of two police officers, and to provide a bill of particulars stating whether the defendant was to be tried as perpetrator or as an aider and abettor. The court refused all but the bill of particulars.

The court dismissed the complaint as to the depositions by quoting from *Setliff v. Commonwealth*, 162 Va. 805, 173 S. E. 517 (1934):

While depositions have been used in chancery proceedings since early times, their use as evidence in criminal cases . . . was unknown to the common law. That right . . . can, therefore, be conferred only by statute . . . (162 Va. at 811).

As to the refusal to furnish the list of witnesses and their reports, the court, citing *Abdell v. Commonwealth*, 173 Va. 458, 2 S. E. 2d 293 (1939), merely held that this was not harmful to the defendant, therefore not error. While the statements of the court are law in Virginia, as well as in most of the jurisdictions in this country, the court, here, failed to do so much as take notice of the current trend in the United States to grant pre-trial discovery to the accused in a criminal case.

Virginia grants no discovery to the accused either by statute or by judicial decision. Before *Westry* the only references to pre-trial discovery to be found in the cases are those in *Setliff* and *Abdell*. In *Abdell* the court said:

As a general rule the accused is not, as a matter of right, entitled to have evidence which is in possession of the prosecution for inspection before trial. 14 Am. Jur. *Criminal Law* §210 (1938). This in our opinion is the proper rule. A different rule would tend to subject the attorney for the Commonwealth to a great deal of annoyance, and to the probable destruction or loss of material evidence Such a rule as is urged by the accused would, in our opinion, subvert the whole system of criminal law. (173 Va. at 472).

Many state courts have abandoned this old rule in the last ten years. This modern trend is the subject of this note. The rule of the Virginia court, as well as the theory, dates back over a century and a half to the case of *Rex v. Holland*, 100 Eng. Rep. 1248 (1792). This was a prosecution for corruption of an officer and is the first case in which a defendant asked for even limited discovery. In refusing discovery of materials not even put in evidence, the court said: "There is no principle or precedent to warrant it. Nor was such a motion as the present ever made, and if we were to grant it, *it would*

subvert the whole system of criminal law." (emphasis added). Thus, we see that not only is the Virginia rule extremely old, but also the theory, and even the language are the same. But, what is even more surprising is that, while the Virginia court has never announced any exception to this rule, the English court had done so as early as 1837 in *Rex v. Harrie*, 172 Eng. Rep. 1165 (1837), and in *Rex v. Story*, 3 Cox Crim. Cases 221 (1848). The latter was a prosecution for homicide by poison. Discovery was allowed of the contents of the stomach of the victim so that justice might be served. 10 Prac. Law 65 (June 1964).

Until recently, this rule prevailed in the United States with only a few insignificant exceptions, as is shown by the case of *People ex rel Lemon v. Supreme Court of New York*, 245 N. Y. 24, 156 N. E. 84 (1927). This was a murder case in which the trial court ordered the prosecution to turn over to the defendant pretrial statements, affidavits, letters, memoranda, and confessions of an accomplice, as well as other information. The Supreme Court of New York reversed this order at the request of the prosecution.

The rationale for refusal of discovery was expounded by Judge Learned Hand in *United States v. Garrison*, 291 Fed. 646 (1923):

Under our rules of criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the mind of any of the twelve. Why in addition he should have the whole evidence against him to pick over at his leisure, and make his defense fairly or foully, I have never been able to see. (291 Fed. at 649).

In *State v. Tune*, 13 N. J. 203, 98 A. 2d 881 (1953), the trial court granted defendant discovery of his own statements, but not of statements of other witnesses. In reversing the order for even the limited discovery, Chief Justice Vanderbilt brought up another major objection to discovery.

Discovery will not lead to honest fact finding, but . . . to perjury and the suppression of evidence. The criminal who is aware of the whole case against him will often procure perjured testimony in order to set up a false defense Another result of full discovery would be that the criminal defendant who is informed of the names of all of the state's witnesses may take steps to bribe or frighten them into giving perjured testimony or into absenting themselves so that they are unable to testify. (98 A. 2d at 844).

As to the objection that the prosecution is at an advantage, Professor Monrad G. Paulson states:

Indeed, there are many reasons why a defendant in a criminal case is in greater need of pre-trial disclosure than a civil defendant. The accused is often without means, represented by assigned counsel or a public defender. He may be barred from fact-gathering efforts by the simple fact that he is in custody. The police are usually the first at the scene of the crime and, therefore, come into possession of most of the physical evidence. The state is well equipped with scientific detection apparatus and trained investigators. In short, most criminal defendants are brought to litigate with an adversary who has more fact gathering resources. From this it is obvious that the advantage is in the favor of the prosecution, not the defendant. Quoted in 1 *AM. CRIM. L.Q.* 3 (1962).

The argument that the defendant will procure perjured testimony presupposes guilt and the use of any means to prevent conviction. This is contrary to our basic concept of justice. In civil cases, experience has shown that his argument is erroneous. DATZ, *Discovery in Criminal Cases*, 16 U. FLA. L. REV. 163 (1963). In Washington, after five years of criminal discovery, in a survey of forty trial judges as to whether discovery resulted in "perjury or other substantial harm" at the time of the trial, one replied it did so often, four occasionally, eight rarely, and twenty-seven said never. Thus, even in practice, we see little problem. Comment in 39 WASH. L. REV. 853 (1964).

The argument in favor of discovery is best summed up as follows:

Of course discovery procedures are based on the theory that a law suit is a search for truth, and not a game of chance. The basic premise in any criminal case is the ascertainment of facts so that justice will be served. A criminal prosecution is not a game of chess. Thus the argument that an accused should not be granted discovery because it will give him a better chance to win is contrary to the very goal of a criminal prosecution, to-wit, the ascertainment of facts so justice will be served. Garber, *The Growth of Criminal Discovery* 1 AM. CRIM. L. Q. 3 (1962).

An ever increasing number of state courts have recognized the importance of discovery in criminal cases. Within the past several years at least seven states have permitted discovery for the first time, and several others have indicated that in appropriate situations it would be proper. *Id.* at 6.

The general rule is still that there is no broad right of discovery in a criminal case, but this is qualified by allowing it where the ends of justice require it, where it

would otherwise be impossible to afford the defendant the defense to which he is entitled. 23 C. J. S. *Criminal Law* §955 (1) (1961). In every state which allows discovery, except California, it is within the discretion of the court, and may be allowed by the inherent power of the court. The burden of showing necessity, however, is on the moving party.

Some states allow discovery by statute, but these statutes are usually so strictly construed that discovery is almost non-existent. But many states have developed completely by judicial decision that which the Virginia court expressly refused to do in *Setliff*. Vermont has done so by adding statutory provision to liberal judicial precedent. State rules go from strict discretion, as in New Jersey, to "neutral discretion" (not favoring either party) in Washington State. Only California makes it a matter of right, and it has been held reversible error to refuse discovery in many cases, even where evidence is wanted for impeachment purposes only. *People v. Riser*, 47 Cal. 2d 266, 305 P. 2d 1 (1956). In one state, Louisiana, refusal to grant discovery of defendant's confession in a murder trial has been held to be a violation of due process.

The things which are discoverable vary from state to state. Louisiana allows only the confession of the accused, and only if it will be used at the trial. Most states, and the Federal Rules of Criminal Procedure, allow discovery of documents (especially where the document in question is the basis of the charge) and other tangible things such as exhibits. Washington allows discovery of the names of witnesses, *State v. Mesaror*, 62 Wash. 2d 579, 384 P. 2d 372 (1963), as well as statements made by the defendant, autopsy reports, and clothing and effects of the victim.

Thus, we see that while there is little uniformity among the states, there is a strong trend towards al-

lowing discovery. Due to modern police methods, there is no balance favoring the accused as has long been claimed by the opponents of criminal discovery. This writer feels that the time is ripe for Virginia to abandon the archaic rule and to follow the modern trend. And, as the legislature has not acted in this direction, the court should have in *Westry*, either granted the defendant's request or at least laid the groundwork for future decisions, with a statement to the effect that although discovery was refused here, it would have been granted under proper circumstances. This was the time to break away from the ancient theory, and this writer hopes that the same mistake will not be made again.

ROBERT PUSTILNIK

CONTRACTS: *Arbitration clauses*

Is an arbitration clause in a contract between the State and a road contractor, which makes the State Highway Commissioner the arbiter and his decision *final and binding* in all questions of law and fact, valid in Virginia? The Virginia Supreme Court has upheld just such a clause in the case of *Main v. Department of Highways*, 206 Va. 143, 142 S. E. 2d 524 (1965). The purpose of this note is to criticize this decision and to point out possible problem areas if this case is followed.

The facts of the case are as follows: The Highway Department and Main Construction Co. entered into a contract for the construction and improvement of a portion of Virginia's interstate highway system. The parties had agreed to use certain grading materials "of a minimum CBR value of 12." Later the Highway Department notified Main that the materials were not of suitable quality and could no longer be used by Main on the construction job.

The Highway Department directed Main to secure a better grade of material and to use it in place of the material upon which they had previously agreed. Main complied with these directions and performed all conditions of the contract on their part. The extra work thus required cost the contractor \$509,468.97 over and above the original contract price of the project. Main Construction Company attempted to recover for this work from the Highway Department, and this recovery was denied.

This decision, so far as arbitration clauses are concerned, could lead to undesirable results.

The contracts in road construction agreements with the State of Virginia are lengthy, always incorporating a separate volume known as *The Virginia Department of Highways Road and Bridge Specifications* (1954). The arbitration clause in question is found in Section 105:13 of this incorporated volume. It reads:

To prevent all disputes and litigations, the Commissioner shall decide all questions, difficulties and disputes, of whatever nature, which may arise relative to the interpretation of the plans, construction, prosecution and fulfillment, of the contract, and as to the character, quality, amount, and value of any work done and materials furnished, under or by reason of the contract, and his estimates and decisions upon all claims, questions, and disputes shall be final and conclusive upon the parties thereto.

The Court held in *Main*,

That this provision was valid and binding on the parties, in the absence of any allegation that the Commissioner was guilty of fraud, bad faith, or had exceeded his authority. (206 Va. at 150).

The Highway Department is in a vastly superior bargaining position. They can and do demand that each

contract entered into between themselves and road contractors contain the arbitration clause in question. The Highway Department often argues in defense of this clause that the tax-paying public has a vital interest in all state contracts. Even so, I feel that the inclusion of this clause in these contracts is grossly unfair to the contractor.

To put this arbitration clause in its proper perspective, a look at what it is not, might be helpful. This is not a pure arbitration clause like those found in some labor agreements where a professional arbiter is used to settle labor disputes. In those agreements, the parties agree that the arbiter's decision is binding, final and not reviewable. This type of arbitration is specifically authorized by some type of legislative expression. (*e.g.* Railway Labor Act).

Nor is this an agreement for an arbiter to decide all questions of fact. These are very common in construction agreements and are upheld in almost all jurisdictions. To quote from a case relied upon in *Main*:

There are many decisions to the effect that where parties to a building or construction contract designate a person who is authorized to determine questions relating to its execution and stipulate that his decision shall be binding and conclusive, both parties are bound by his determination of those matters which he is authorized by the contract to determine, except in case of such gross mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment. *State Highway Department v. MacDougald Construction Co.*, 189 Ga. 490, 6 S. E. 2d 570, 573 (1939).

This same case points out:

That decisions by the United States Supreme

Court and the courts of at least 26 states subscribe to this doctrine of almost universal acceptance. (6 S. E. 2d at 573).

This type of factual arbitration must be carefully distinguished from the court's interpretation of the disputed clause in *Main*. The language clearly shows an intent to have the,

Commissioner decide all *questions, difficulties* and *disputes* of *whatever nature . . .* and his . . . decision shall be *final* and *conclusive* upon the parties thereto. (emphasis added).

To quote once again from *MacDougald*, which was relied upon by the Virginia court in *Main*:

Nor do we fail to note that according to numerous decisions a general agreement to arbitrate all questions which may arise in the executions of a contract both as to liability and loss should be treated as against public policy and void, as an attempt to oust the court of jurisdiction. (6 S. E. 2d at 578).

I would argue therefore that this clause, by its very language, can be interpreted only as an attempt by the Highway Department to oust the court's jurisdiction. The language "to prevent all disputes and litigations" clearly sets out the intent to prevent any court litigation in the future. Virginia has held in a case not mentioned in *Main* that,

It is settled law that the authority of arbitrators where they are required to pass upon the ultimate liability of the parties, may be revoked at anytime before the award is made; and the agreement to arbitrate will be no bar to an action on the original contract, because such a course is supposed to oust

the courts of their jurisdiction. *Big Vein Pocahontas Co. v. Browning*, 137 Va. 34, 45, 120 S. E. 247, 250 (1923).

The Court in *Main* said,

It is not the purpose and effect of the provision to oust the jurisdiction of the courts. Its purpose is to limit the questions which may be litigated to those which have been settled by the Commissioner as the referee. (206 Va. at 151).

From this statement of the court, it seems that when the Commissioner "found that there is nothing due to the plaintiffs on their claim," the plaintiff should have been able to go into a proper court and question the Commissioner's findings. The case seems to produce an opposite result however.

The plaintiff filed his petition in a proper court and the Highway Department demurred, stating that:

The matters complained of are among those upon which the plaintiffs agreed in their contract that the decision of the Highway Commissioner would be final and binding. (206 Va. at 146).

The lower court sustained the demurrer, and the Virginia Supreme Court upheld this holding. I submit that the court held as a matter of law that the plaintiff had no cause of action because he had agreed previously to be bound by the Highway Commissioner's final decision. This seems to be in conflict with the well defined common law rule in *Pocahontas*, and if followed this decision vests unrestricted power in the Highway Commissioner.

Virginia law has been very clear up to now on these types of arbitration agreements. As long as the parties treated these agreements only as conditions precedent to actions in a proper court, they were held valid.

Virginia and almost all other jurisdictions hold that the principle is:

. . . that wherever a *cause of action exists, a right of action in a court of law* is incident thereto, and inseparable therefrom, *even by* the agreement of the parties. So that, if parties enter into an agreement referring a present or future cause of action to the decision of an arbitrator, even though they expressly stipulate that no action shall be brought in the meantime, the agreement will be no bar to such action

It is carefully to be distinguished from another principle with which it is sometimes confounded, and from which it is separated by a line not always easily discernable. That other principle is, *that parties by their contract may lawfully make the decision of arbitrator or of any third person a condition precedent to a right of action upon the contract . . .* (emphasis added). *Condon v. South Side R. R. Co.*, 14 Gratt. (55 Va.) 302, 313 (1858); see also: 5 Am. Jur. 2d *Arbitration & Award* §36 (1962).

These cases clearly hold that any arbitration agreement which acts only as a condition precedent to a cause of action for breach of contract is valid.

Only such agreements as do not undertake to vest power in the arbitrators to determine the question of general liability or as make the award of the arbitration a condition precedent to the maintenance of a subsequent suit in the courts, are held to be valid. *Big Vein Pocahontas Co. v. Browning* (137 Va. at 49).

The Court in *Main* holds:

As applied to the present circumstances, the finding of the referee of the amount due upon the con-

tract is by implication made a condition precedent to a right of action therefor. (206 Va. at 151).

This seems to mean that the court felt that had the Highway Commissioner awarded the plaintiff the full amount of the claim, then the plaintiff could go into a court of law and collect this amount; that since the Department (Highway Commissioner) "refused to pay" the plaintiff was not entitled to go to a proper court and question his decision. This is not in line with what Virginia and other jurisdictions have held "condition precedent" to mean prior to *Main*. I believe the proper interpretation would be that if the plaintiff does not submit to arbitration then he may be out of court, but where the Highway Commissioner acts or as in this case does not act on the claim the "condition precedent" has been met. The plaintiff should then be allowed to attack the ruling of the Commissioner in a court of law.

In contract actions of this nature, the State Highway Commissioner, being the head of the Highway Department, could decide, as in this case, in favor of the Department and reject the claim without the least trace of fraud or bad faith and be well within his authority. By so doing, under this decision, he completely cuts off the plaintiff's constitutionally protected rights to be heard before an impartial tribunal before any binding decree can be passed affecting his right to property. VIRGINIA CONSTITUTION, ARTICLE I, §11; *Commission v. Hampton Roads*, 109 Va. 565, 64 S. E. 1041 (1909).

I agree with *Main* where the arbitration agreement is one binding as to facts only or where the agreement is a condition precedent to a proper court action. If, however, the arbiter's decision is final and binding, it seems that all decisions under the contract should be reviewable by a court of law. The right of appeal for fraud, bad faith or acts by the Commissioner which exceed his

authority is not a sufficient safeguard. Whenever a cause of action exists, a right of action in a court of law should be incident thereto.

DUDLEY EMICK, JR.

(Writer's Note): *After the above note had been sent to the printer, the 1966 session of the Virginia General Assembly took some actions which should be of interest. House Bill No. 484 which passed both the Senate and House amended the Code of Virginia, Title 33, Chapter 8, by adding sections numbered 33-328 through 33-331. Of particular interest is §33-329 which expressly provides that any claim denied by the Highway Commission may be appealed by instituting a civil action for such sum by filing a petition in the Circuit Court of the City of Richmond. It further provides that the hearing will be by the Court without a jury. The statute specifically sets out that the submission of the claim to the Highway Department shall be a condition precedent to bringing an action under this section. (emphasis added).*

It is the opinion of this writer that these enactments will eliminate some of the possible problem areas of the Main decision. It might be of some interest that Main and Company was awarded \$30,000.00 by House Bill No. 790 under the General Assembly Special Relief bill provisions.

D. E., JR.

DOMESTIC RELATIONS: *A blow to family unity and another step towards abolition of the clean hands doctrine in divorce cases*

The Virginia Legislature in combination with the Virginia Supreme Court of Appeals has recently lessened the effect of the clean hands doctrine in divorce cases, and dealt a blow to the idea of family unity. The

purpose of this note is to explore the present subsection (9) Va. Code Ann. 1950 §20-91 (Cum. Supp. 1964) and the case of *Canavos v. Canavos*, 205 Va. 744, 139 S. E. 2d 825 (1965) in light of this contention.

The defendant in a divorce case in Virginia may re-accuse as a defense any offense committed by the party seeking the divorce and the action will be dismissed, provided such offense itself justifies a decree of divorce of equal or greater magnitude than that sought by the plaintiff. Recrimination is based upon the maxim that a party seeking a divorce must come into equity with clean hands, that is, one spouse may not gain by his own misconduct. But the writer sees a rapid advance toward the abolition of this defense in divorce cases in Virginia, if the legislature and the courts have not already, in effect, reached that point.

At an early date Virginia's merger statutes permitted a divorce *a mensa* to be merged into a divorce *a vinculo*. The absolute decree granted as a result of the merger statute was not considered a continuation of the original *a mensa* suit, but a substitution of the *a vinculo* decree for the *a mensa* decree. This philosophy of a separate action rather than a continuation of the original suit created the possibility of a direct conflict between the merger statute and the doctrine of recrimination.

In *Gray v. Gray*, 181 Va. 262, 24 S. E. 2d 444 (1943), the wife was granted a divorce *a mensa* upon an allegation of desertion. The husband attempted to prove that since that decree the wife had been guilty of adultery, while she requested that the *a mensa* decree be merged into an absolute divorce. The court granted the *a vinculo* divorce, as the charges of adultery were not sustained by her husband. If the husband had been able to sustain his charges of adultery and had he asked for a divorce *a vinculo*, an interesting question would have been presented as to whether or not the wife would have had a

recriminatory defense because of her previous *a mensa* decree. The legislature recognized that the problem could arise and enacted a statute which in substance is the present Va. Code Ann. 1950 §20-117 (Repl. Vol. 1960). The statute states that a divorce *a mensa* is not a bar to either party obtaining a divorce *a vinculo* unless cause for the *a vinculo* divorce existed and was known to the party when applying for the *a mensa* divorce. At this point a decree *a mensa* was not a defense by way of recrimination, and the first step towards lessening the effect of the clean hands doctrine was taken.

A second step was taken when the case of *Haskins v. Haskins*, 188 Va. 525, 50 S. E. 2d 437 (1948) was decided on the underlying public policy upon which the above statute was enacted. The case declared that grounds for an *a mensa* decree would be no bar to an absolute divorce. To have decided otherwise would have been to place the party who had secured the *a mensa* decree in a position less favorable than if he had not taken the matter to court. The defense of recrimination was again limited.

The most recent step towards lessening the effect of the clean hands doctrine in divorce cases was taken in 1960. Prior to 1960 mere separation was not a ground for divorce in this Commonwealth. With the addition of subsection (9) to Va. Code Ann. 1950 §20-91 (Repl. Vol. 1960) and a subsequent amendment to that section, Va. Code Ann. 1950 §20-91 (Repl. Vol. 1960) (Cum. Supp. 1964), the statute read as follows:

A divorce from the bond of matrimony may be decreed:

(9) On the application of either party if and when the husband and wife have lived separately and apart without any cohabitation and without interruption for three years. A plea of *res adjudicata* or of recrimination with respect to any other pro-

vision of this section shall not be a bar to either party obtaining a divorce on this ground.

It was under this statute as it read in 1962 (it now reads two years instead of three) that the Supreme Court of Appeals rendered its decision in *Canavos*. Christos Canavos filed suit for divorce from his wife, Alexandra, on the ground that they had lived separate and apart for three years without interruption. The record showed that the parties had lived separate and apart and without any cohabitation and without interruption since 1938. Alexandra contended that the Chancellor erred in granting her husband a divorce because he was the party at fault in causing the separation and she was without fault. The precise question concerning the construction of this statute had not been presented to this court before.

Alexandra contended that the legislature did not intend to reward the party in a divorce action who caused the wrong by granting a divorce for the wrong committed. She pointed out that the Supreme Court of North Carolina refused to grant the party committing the wrong a divorce under a similar statute in that state. However, the North Carolina statute did not contain the words, "A plea of *res adjudicata* or of recrimination with respect to any other provision of this section shall not be a bar to either party obtaining a divorce on this ground." Such statement expressed the intent of the legislature in no uncertain terms. The Supreme Court of Appeals had no choice but to grant Christos a divorce under this statute.

Except when a divorce is sought on the ground of two years separation, very little harm is done to the doctrine of recrimination as recriminatory defenses are still available. This is subject to the proviso that an *a mensa* decree, or ground for such a decree, is no bar to an absolute divorce. Yet, as long as time is not of the essence, a party seeking a divorce can avoid any recriminatory defense

which might prohibit the divorce action by mere separation and a two year wait. Hence, the defense of recrimination, in essence, has been abolished in divorce actions in Virginia provided time is not important to the party seeking a divorce.

Recrimination should not be a defense to a divorce action. When we speak of the defense of recrimination we admit the fact that the spouse seeking the divorce has grounds for a divorce. If the grounds for divorce are present the marriage no longer exists in fact and should be terminated. An effort should not be made to preserve a non-existent marriage because of the antiquated doctrine of recrimination based upon a time-worn maxim that parties in a divorce action should come into equity with clean hands. Therefore, the writer finds satisfaction in the idea that the legislature and the courts have reached the position outlined and virtually abolished recrimination as a defense.

The writer disagrees with the premise by which the above result was reached. This premise seems to have been that a marriage has ceased to exist after a two-year separation. However, for a divorce to have been granted prior to 1960, actions of a graver nature such as adultery, sodomy, desertion, abandonment or cruelty were required. When one party has been guilty of such acts it is not difficult to see that a marriage no longer exists in fact. But a mere separation is not so grave as these acts, and a party is able to discharge his responsibilities on mere whim, making divorce relatively easy.

It would seem, therefore, that the legislature has dealt a devastating blow to family unity. Great emphasis should be placed upon the continuity of the relationship between husband and wife. The efforts of society should be to preserve that relationship unless it has reached a point where a marriage no longer exists in fact.

When they enacted the statute upon which *Canavos*

was based, the legislature dealt with two separate problems. The first was the determination of the grounds upon which a divorce should be granted, that is, the tests to determine whether or not a marriage in fact exists. According to this statute the marriage has ceased to exist when the parties have been separated for a relatively short period of time. It is submitted that the legislature failed in its responsibility when it implied that such marriages are beyond the point of preservation. The second problem arises when it is once determined that the relationship is beyond hope. When that point is reached the legislature has wisely decided that, at least in one situation, there is no reason to prohibit the termination of the marriage. In this decision it is correct.

Therefore, while this writer finds no quarrel with the partial abolition of the defense of recrimination, and in fact applauds it, the same cannot be said for the trend towards a relaxation of the grounds for divorce. This is not the direction that the legislature should take on so serious a matter.

ROBERT N. JOHNSON

STATUTE OF LIMITATIONS: *Not tolled on removal from state*

The defendant's removal from the state did not toll the statute of limitations because the plaintiff could have had process served under the non-resident motorist act and, therefore, defendant's removal in no way obstructed the prosecution of plaintiff's claim. *Bergman v. Turpin*, 206 Va. 539, 145 S.E. 2d 135 (1965).

The plaintiff Bergman was injured in an automobile accident with the defendant in Botetourt County on May 30, 1959. At the time of the accident, the defendant was a Virginia resident but became a resident of the District of Columbia on November 1, 1959. The plaintiff

instituted a personal injury action in the Circuit Court of Botetourt County on August 22, 1963, some fifty months after the cause of action arose.

Process was served on the defendant, who was still a resident of the District of Columbia, through service on the Commissioner of the Division of Motor Vehicles, pursuant to the provisions of Va. Code Ann. 1950 §8-67.1 (Repl. Vol. 1957) which provides for service of process in this matter on a non-resident motorist who has been involved in an automobile accident on a public road or highway in Virginia.

The defendant filed a special plea of the statute of limitations on the ground that the plaintiff had not instituted suit within two years after his cause of action had accrued as required by Va. Code Ann. 1950 §8-621 (Repl. Vol. 1957). To this, the plaintiff filed a reply alleging that his action was not barred because of Va. Code Ann. 1950, §8-33 (Repl. Vol. 1957) which provides in part:

When any such right as mentioned in this chapter shall accrue against a person who had before resided in this State, if such person shall, by departing without the same . . . or by any other indirect way or means *obstruct the prosecution of such right*, the time that such obstruction may have continued shall not be computed as any part of the time within which such right might or ought to have been prosecuted. . . . (emphasis added).

The plaintiff contended that he was not precluded by the statute of limitations because the defendant became a non-resident after the cause of action accrued and this "obstructed" the prosecution of the claim within the meaning of 8-33.

Although this case is one of first impression in Virginia, the position taken by the Court is supported by the

majority view in this country. While there appears to be a direct conflict between 8-33 and 8-67.1, any conflict can be resolved by an examination of the purposes of such statutes.

Almost every state has a "tolling statute" similar to 8-33 and also a non-resident motorist statute comparable to 8-67.1. A compilation of authorities on the question here involved is found in 17 A.L.R. 2d 502 (1951) where the position taken by the majority of jurisdictions is summarized:

Where provision is made by statute for substituted service of process upon a state official in cases arising out of motor accidents within the state, the majority of courts have held that such a provision has the effect of nullifying any statute suspending the period of limitations. 17 A.L.R. 2d 502, 516 (1951).

Many cases have considered the apparent conflict between the tolling statute (like 8-33) and a non-resident motorist act (like 8-67.1). The reasoning behind the position taken by a majority of jurisdictions is that to allow a plaintiff to take advantage of a tolling statute when the opportunity for service of process is continuously open through a statute allowing substituted service would permit a plaintiff to defer service indefinitely. Obviously, this could cause great hardship to a defendant and would be inconsistent with the primary purpose of a statute like the Non-Resident Motorist Act, which is designed to give speedy adjudication of the respective rights of the parties.

Therefore, *Bergman* indicates that Virginia is following the majority view in that where a non-resident motorist statute provides for substituted service, removal from the state by a defendant will not toll the statute of limitations as to that defendant.

However, *Bergman* seems to raise another question concerning Virginia's relatively new long arm statute. Va. Code Ann. 1950 §§8-81.1 through 8-81.5 (Cum. Supp. 1964). While the main purpose of the statute is to provide a means of getting non-resident persons and foreign corporations not "doing business" in Virginia before the court *in personam*, the broad language of the statute includes in its coverage "persons . . . whether or not a citizen or domiciliary of this State. . . ." From this wording it appears that both residents as well as non-residents are brought within the terms of the statute.

When these provisions are viewed in light of *Bergman*, it appears that the application of 8-33 will be further limited. This is because the long arm statute provides a means of service upon a resident or former resident who has left the state or is not amenable to service of process by ordinary means. With this method of service available to a plaintiff, it seems that a plaintiff should not be able to rely on 8-33 to toll the statute of limitations.

On the other hand, it may be argued that the primary purpose of the long arm statute is to reach non-residents of Virginia who could not otherwise be reached, and that the phraseology ". . . whether or not a citizen or domiciliary of this State . . ." was intended to provide the broadest possible basis for reaching non-residents and was not intended to include residents within its coverage. This contention may be supported by the varied machinery available for reaching the person and property of residents as well as the terms of 8-33.

This position should not be entitled to great weight because of the very language of the long arm statute. Regardless of the original intent of the legislature, residents as well as non-residents seem to be brought within the terms of the statute. Therefore, the principles laid down in *Bergman* should control when the long arm

statute is available against an individual who was a resident at the time of the wrong, and 8-33 is set up to counter a plea of the statute of limitations by the defendant. This is because of the need for speedy adjudication of a claim and to prevent a plaintiff from sleeping on his rights until a personally advantageous opportunity presents itself.

However, this appears to be the limit to which *Bergman* may be carried in light of earlier decisions interpreting 8-33. These decisions hold that the tolling statute has no application to persons who have never been residents because of the terms of the statute which require that a defendant must have been a "person who had before resided in this State."

While, as yet, there have been no Virginia cases involving the tolling statute and the long arm statute, the principles of *Bergman* which would not allow a suspension of the statute of limitations should permit a similar result to be reached if such a question were raised.

G. ANDREW NEA, JR.

