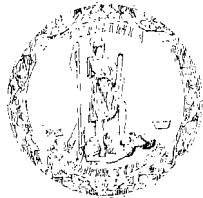


No. 2

ADVANCE SHEETS
OF
CASES DECIDED
IN THE
SUPREME COURT
OF VIRGINIA



Vol. 271

Pages 258-433

ATTACHMENT B: ADVANCE SHEET

FRONT COVER (a.)

271
Va.

Adv.
2

Pages
258
to
433

ATTACHMENT B: Advance Sheets

SPINE (b.)

ADVANCE SHEETS
OF
CASES DECIDED
IN THE
SUPREME COURT
OF VIRGINIA



Vol. 271

Pages 258-433

COMMONWEALTH OF VIRGINIA
SUPREME COURT OF VIRGINIA
RICHMOND

ATTACHMENT B: ADVANCE SHEETS

TITLE PAGE (c.)

JUSTICES
OF THE
SUPREME COURT OF VIRGINIA

DURING THE TIME OF THESE REPORTS

LEROY ROUNTREE HASSELL, SR., *Chief Justice*
ELIZABETH BIRMINGHAM LACY
BARBARA MILANO KEENAN
LAWRENCE LARKINS KOONTZ, JR.
CYNTHIA DINAH FANNON KINSER
DONALD WAYNE LEMONS
GEORGE STEVEN AGEE

SENIOR JUSTICES
HARRY LEE CARRICO
ASBURY CHRISTIAN COMPTON
ROSCOE BOLAR STEPHENSON, JR.
CHARLES STEVENS RUSSELL

ATTORNEY GENERAL
JUDITH WILLIAMS JAGDMANN¹
ROBERT FRANCIS McDONNELL²

REPORTER OF DECISIONS
KENT SINCLAIR

CLERK
PATRICIA LEAS HARRINGTON

EXECUTIVE SECRETARY
KARL ROBERT HADE

NOTE

These cases are in substantially the same form as that in which they will appear in the bound volume. They are, however, subject to correction of typographical errors and are not final in that petitions for rehearing may be filed in any case. If a rehearing is granted, that fact will be indicated by a reporter's note in the bound volume.

ATTACHMENT B: ADVANCE SHEETS

INFORMATION SHEET / (d.)
LISTING OF JUSTICES

¹ Term ended 1/14/06

² Sworn in 1/14/06

SUMMARY OF DECISIONS IN THIS ISSUE

Berry v. F&S Financial Marketing, Inc. 329

In an action to collect upon a debt contract used to finance the purchase of a motor vehicle, the trial court did not err in granting plaintiff's request for a nonsuit made prior to the defendant's lodging of a motion to dismiss for failure to satisfy the one-year service of process requirement set forth in Rule 3:3(c) and Code § 8.01-275.1. The judgment granting the nonsuit is affirmed.

Berry v. Tribble 289

In a will contest, the circuit court erred in confirming a jury verdict that a handwritten phrase and notation, made on the face of a typewritten draft of a will containing many other handwritten entries, constituted a valid holographic will. The document, viewed as a whole, was neither wholly in the decedent's handwriting nor duly attested by two competent witnesses. That part of the decree holding that the proffered document was the decedent's last will is reversed; that part holding that a prior attested will was valid is affirmed, and the court's apportionment of the fees of a guardian ad litem is affirmed. Final judgment is entered admitting the prior will to probate.

Board of Sup. of Culpeper v. Greengael, L.L.C. 266

In suits brought by a developer against a local governing body and others arising from denial of a subdivision plat application and subsequent rezoning of its property, the trial court correctly sustained demurrers and dismissed several of the developer's claims, but erred in overturning such denial and in invalidating the rezoning. Issues concerning the developer's failure to comply with the applicable subdivision ordinance, its claim to vested development rights, alleged "piecemeal downzoning," the validity of the subdivision ordinance, alleged willful misconduct by the local governing body and alleged violation of the developer's due process rights are addressed. The trial court's judgment is affirmed in part and reversed in part and final judgment is entered in favor of the local governing body.

ATTACHMENT B: ADVANCE SHEETS

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SUMMARY of Decisions(e.)

CASES REPORTED

	PAGE
Barnett v. Kite	65
Berry v. F&S Financial Marketing, Inc.....	329
Berry v. Tribble	289
Blue Ridge Service Corp. v. Saxon Shoes.....	206
Board of Sup. of Culpeper v. Greengael, L.L.C.	266
Board of Sup. of Fairfax Cty. v. BZA of Fairfax	336
Boundary Association, Inc. <i>and</i> White	50
Bowie v. Murphy	126
Boynton v. Kilgore	220
Britt Construction v. Magazzino Clean, LLC.....	58
BZA of Fairfax <i>and</i> Board of Sup. of Fairfax Cty.....	336
Cangiano v. LSH Building Co.....	171
Cary <i>and</i> Commonwealth	87
Commonwealth <i>and</i> Foster.....	235
Commonwealth <i>and</i> Juniper	362
Commonwealth <i>and</i> Overbey	231
Commonwealth v. Cary.....	87
Commonwealth v. Neely.....	1
Cornett <i>and</i> Sexton.....	251
Cox v. Geary.....	141
Daly Seven, Inc. <i>and</i> Taboada.....	313
Director, Va. Ctr. for Behav. Rehab. <i>and</i> Jenkins	4
Dresser, Inc. <i>and</i> Hubbard	117
First Union National Bank <i>and</i> Johnston	239
Foster v. Commonwealth	235
F&S Financial Marketing, Inc. <i>and</i> Berry	329
Geary <i>and</i> Cox	141
Government Micro Resources, Inc. v. Jackson	29
Greengael, L.L.C. <i>and</i> Board of Sup. of Culpeper	266
Harris v. Kreutzer	188
Horan, In re.....	258
Hubbard v. Dresser, Inc.....	117
Interactive Return Service <i>and</i> Virginia Tech.....	304
Jackson <i>and</i> Government Micro Resources, Inc.....	29
Jenkins v. Director, Va. Ctr. for Behav. Rehab.	4
Johnston v. First Union National Bank.....	239
Juniper v. Commonwealth	362
Kilgore <i>and</i> Boynton.....	220
Kite <i>and</i> Barnett.....	65
Kreutzer <i>and</i> Harris	188
Lyren v. Ohr	155

ATTACHMENT B: ADVANCE SHEETS
 CASES REPORTED (f.)

Cases Reported, 271 Va.

LSH Building Co. and Cangiano	171
Magazine Clean, LLC and Britt Construction	58
Murphy and Bowie	126
Neely and Commonwealth	1
Ohr and Lyren	155
Overbey v. Commonwealth	231
Plunkett v. Plunkett.....	162
PMA Capital Insurance Co. v. US Airways	352
QSP, Inc. and Ulloa	72
Saxton Shoes and Blue Ridge Service Corp.....	206
Schmidt v. Wachovia Bank.....	20
Sexton v. Cornett.....	251
Taboada v. Daly Seven, Inc.	313
Trible and Berry.....	289
Ulloa v. QSP, Inc.....	72
US Airways and PMA Capital Insurance Co.....	352
Virginia Tech. v. Interactive Return Service.....	304
Wachovia Bank and Schmidt	20
White v. Boundary Association, Inc.	50

CONSTITUTIONS AND STATUTES CITED
IN OPINIONS

CONSTITUTION OF THE UNITED STATES

	PAGE
Amendment I	133,140
Amendment VI	387,395
Amendment VIII.....	421,422
Amendment XIV.....	395,407

UNITED STATES STATUTES

42 U.S.C. § 1983	286
14 C.F.R. §§ 330.1-330.45	359

CONSTITUTION OF VIRGINIA

1971, Art. I, § 8	395
1971, Art. I, § 16	133
1971, Art. III, § 1	263
1971, Art. V, § 15	226
1971, Art. VI, § 1	258

CODE OF VIRGINIA

Code (1950), § 1-217.....	238
Code (1950), § 2.2-103.....	227
Code (1950), § 2.2-103(B)	226
Code (1950), § 2.2-501	226,227,228,229
Code (1950), § 2.2-502	226,228
Code (1950), § 2.2-2900	223,224,226
Code (1950), § 2.2-2902	226
Code (1950), § 2.2-2903	226
Code (1950), § 2.2-2905	224
Code (1950), § 2.2-2905(a)	224,225,226,227,229,230
Code (1950), § 2.2-3202	223,224
Code (1950), § 2.2-3202(A).....	224
Code (1950), § 2.2-3202(A)(i)	223,224,225,227,228,230
Code (1950), § 2.2-4026	347
Code (1950), § 8.01-35.1	152,153,154
Code (1950), § 8.01-35.1(A)(1)	152
Code (1950), § 8.01-38.1	35
Code (1950), § 8.01-193	307
Code (1950), § 8.01-195.11	154
Code (1950), § 8.01-229(E)(3)	334
Code (1950), § 8.01-247.1	38
Code (1950), § 8.01-262	69
Code (1950), § 8.01-262(3)	69,70
Code (1950), § 8.01-275.1	331,332,334
Code (1950), § 8.01-277	157,158,159,160
Code (1950), § 8.01-329	331
Code (1950), § 8.01-358	395,397,400

ATTACHMENT B: ADVANCE SHEETS

TABLE of CONSTITUTIONS
AND STATUTES CITED (g.o.)
IN OPINIONS →

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond, on Thursday, the 19th day of January, 2006.

In re: Robert F. Horan, Jr.,
Commonwealth's Attorney, Petitioner
Record Nos. 060023 and 060024

Upon Petitions for a Writ of Mandamus and a Writ of Prohibition

Proceeding under the Court's original jurisdiction pursuant to Article VI, § 1 of the Constitution of Virginia and Code § 17.1-309, the petitioner, Robert F. Horan, Jr., Commonwealth's Attorney of Fairfax County, seeks the issuance of a writ of mandamus and/or a writ of prohibition directed to the Honorable Leslie M. Alden, Judge of the Circuit Court of Fairfax County. Upon consideration of the petitions and the parties' briefs, a writ of mandamus is issued and the petition for a writ of prohibition is dismissed.

On January 3, 2006, in the capital murder case of *Commonwealth v. Dinh Pham*, Criminal No. K105537, pending in the Circuit Court of Fairfax County, Judge Alden granted Pham's motion to prohibit the death penalty. In a letter opinion incorporated in that order, Judge Alden concluded that the Vienna Convention on Consular Relations and Optional Protocol on Disputes, Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820 (the "Vienna Convention"), confers judicially enforceable individual rights and that the Commonwealth violated those rights with regard to Pham. Judge Alden further concluded that the preclusion of the death penalty was an appropriate remedy for the violation of Pham's rights under the Vienna Convention and thus prohibited the Commonwealth from seeking the death penalty in that criminal proceeding. The Commonwealth's Attorney then filed the petitions for a writ of mandamus and a writ of prohibition.

"Mandamus is an extraordinary remedy employed to compel a public official to perform a purely ministerial duty imposed upon him by law." *Richlands Med. Ass'n v. Commonwealth*, 230 Va. 384, 386, 337 S.E.2d 737, 739 (1985); accord *In re Commonwealth's Attorney for the City of Roanoke*, 265 Va. 313, 317, 576 S.E.2d 458, 461 (2003). "A ministerial act is 'one which a person performs in a given state of facts and prescribed manner in obedience to the man-

date of legal authority without regard to, or the exercise of, his own judgment upon the propriety of the act being done.'" *Richlands Med. Ass'n*, 230 Va. at 386, 337 S.E.2d at 739 (quoting *Dovel v. Bertram*, 184 Va. 19, 22, 34 S.E.2d 369, 370 (1945)). "However, when the act to be performed involves the exercise of judgment or discretion on the part of the court or judge, it becomes a judicial act and mandamus will not lie." *In re Commonwealth's Attorney for the City of Roanoke*, 265 Va. at 318, 567 S.E.2d at 461.

As this Court previously explained:

[Mandamus] may be appropriately used and is often used to compel courts to act where they refuse to act and ought to act, but not to direct and control the judicial discretion to be exercised in the performance of the act to be done; to compel courts to hear and decide where they have jurisdiction, but not to pre-determine the decision to be made; to require them to proceed to judgment, but not to fix and prescribe the judgment to be rendered.

Page v. Clopton, 71 Va. (30 Gratt.) 415, 418 (1878).

The provisions of Code § 18.2-31 specify the offenses that constitute capital murder in Virginia, each one being punishable as a Class 1 felony. The authorized punishment for a Class 1 felony is "death, if the person so convicted was 16 years of age or older at the time of the offense and is not determined to be mentally retarded . . . , or imprisonment for life and . . . a fine of not more than \$100,000." Code § 18.2-10(a); see also Code § 18.2-10(g) (except in cases for which the sentence of death is imposed, a court may impose life imprisonment without a fine). In other words, there are three sentencing options if a defendant is found guilty of capital murder: (1) death; (2) life imprisonment and a fine of not more than \$100,000; or (3) life imprisonment.

In the context of ruling on a pre-trial motion, Judge Alden precluded the Commonwealth's Attorney from seeking the death penalty in the event Pham is found guilty of capital murder. Under Judge Alden's order, only life imprisonment, or life imprisonment and a fine of not more than \$100,000, would be at issue in a penalty phase hearing. Judge Alden's pre-trial order not only eliminated one of the statutorily prescribed sentences that could be imposed if Pham is found guilty of capital murder, but her ruling is also tantamount to a refusal by Judge Alden to conduct a penalty phase hearing at which

Administration of Government*Agency debt collection*

Claim establishment, 304
 Contractual obligations, 304
 "Debtor" defined, 304
 "Funds on deposit" defined, 304
 Mutual debts, 304
 Non-tax refund cases, 304
 Offsetting judgment, 304
 Private judgment creditors, 304
 Satisfaction of judgments, 304
 Setoff Debt Collection Act, 304

State employees

Attorney general's staff, 220
 Augmented estate statute
 exemptions, 251
 Governor's personnel powers, 220
 Severance benefits, 220
 Statutory conflicts, 220
 Statutory exemptions, 220
 Statutory powers, 220
 Vested benefits, 251
 Virginia Personnel Act, 220
 VRS life insurance proceeds, 251
 VRS retirement benefits, 251
 Workforce Transition Act, 220

*Subdivisions, see Real Property**Zoning, see Zoning***Air Transportation Safety and Stabilization Act, 352****Appellate Practice**

Advisory opinions, 87
Assignments of error, 87
Assistance of counsel, see

Constitutional Law

Belated appeals, 4

Demurrers

De novo review, 117, 188, 313
 Facts alleged, 117, 126, 188, 313
 Standard of review, 117, 126, 188, 313
 Sufficiency of allegations, 117, 188, 313

Judicial economy, 4

Preservation of errors

Approbation and reprobation, 171

Failure to argue at trial, 171, 362

Failure to object, 72, 362

Invited errors, 171

Jury instructions, 72, 87

Standards of review

Abuse of discretion, 171, 206

Arbitrary and capricious, 266

Attorneys' fee awards, 72, 171

Contract interpretation, 50, 162, 171, 352

Cross-appeals, 29

Damages, 29

De novo, 29, 117, 162, 171, 220, 304, 352

Defamatory statements, 29

Deference, 72, 162, 336

Demurrers, 117, 126, 188, 313

Evidence, 87, 206

Expert testimony, 206

Fairly debatable, 266

Findings of fact, 266, 336

Issues of law, 162, 220, 304, 336, 352

Jury instructions, 72, 87

Marital agreements, 162

Mixed law and fact questions, 352

Mutual reciprocal wills, 162

Nonconforming use challenges, 336

Piecemeal downzoning claims, 266

Plainly wrong, 266

Statutory interpretation, 220, 304

Subdivision plat appeals, 266

Zoning amendments, 266

Waiver

Change of venue, 362

Failure to renew motions, 362

Failure to request rulings, 362

Fee award challenges, 171

Jurisdictional defects, 336

Attorneys and Judges*Conflicts of interest*

Commonwealth's attorneys, 362

Disqualification, 362

Prior client relationship, 362

Fees and fee recovery

Abuse of discretion, 171

ATTACHMENT B ADVANCE SHEETS

INDEX (i.)