

## Another Reason to Read Coke

I express my appreciation to Thomas M. Moncure Jr., Esq., for his Book Review appearing in the *Virginia Lawyer*, April 2004, *The Selected Writings of Sir Edward Coke*. Naturally, I immediately telephoned the listed number (1-800-955-8335) and ordered the volumes. Mr. Moncure mentioned *Va. Code* Sec. 1-10, which makes the common law of England the law of Virginia, as one reason why a reading of Coke is so vital to the Virginia lawyer, and I wish to add an additional one.

*Va. Const.*, Art. I, Section 8, states, "He shall not be deprived of life or liberty, except by the law of the land or the judgment of his peers [.]” The latter refers to trial by jury. As to the former, in *Commonwealth v. Byrne*, 20 Gratt. (61 Va.) 165 (1871), our Supreme Court gave us its meaning. Quoting from *Murray's lessee v. Hoboken*, 18 How. U.S.R. 272-286 (1855), wherein the U.S. Supreme Court construed U.S. Const., Amend. V, "No person shall . . . be deprived of life, liberty, or property, without due process of law[.]” President Moncure teaches that in the Second Part of the Institutes Sir Coke set forth various significant British statutes, and then made a Commentary on them.

The Second Part begins with *Magna Carta*, 1215 A.D., and at p. 46, Coke sets forth Ch. 29 thereof,

No Freeman shall be taken or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed, nor will We not pass upon him, nor condemn him, but by lawful judgment of his Peers, or by the Law of the Land. We will sell to no man, we will not deny or defer to any man either Justice or Right.

At p. 50, Coke writes the "Law of the Land" means "without due process of law[.]”

Thus, we learn that these phrases express the same concept, that Mr. George Mason, when he crafted the *Virginia Bill of Rights*, used the original language from Ch. 29, but the founding federal fathers used Coke's interpretation of it. The Court then adopted the following "two-fold" test of what is "due process":

We must examine the constitution itself to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute

law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition, by having been acted on by them after the settlement of this country.

The first part of the test is the so-called "incorporation by reference" doctrine, that the due process clause incorporates by reference the explicit guarantees of the *Bill of Rights*. But under the second part of the test, common law rules of criminal procedure which became "settled," and which were adopted in Virginia (*see, e.g., 4 Va. (2 Va. Cases)*), are of constitutional stature, and cannot be changed even by the legislature. The forgetting of this "two-fold" test by the bench and bar has led to a *de facto* "one step" test, where the judiciary asks simply if the accused was denied an explicit right.

The Virginia bench and bar thus need to read Coke, not merely to know "the law" under Sec. 1-10, except as varied by the legislature, but the "fundamental law" of Virginia, unchangeable by the legislature.

Norman H. Lamson

## Selecting Long-Term Care

The otherwise excellent discussion by Mark Covey and Kathy Johnson on long-term care in the April 2004 issue of *Virginia Lawyer* omits an important point about selecting features of a long-term care policy.

In order to account for the possibility of inflation, the purchaser should consider increasing the daily maximum benefit rather than purchasing inflation protection.

This may be a more cost-effective way of accomplishing the same result because most long-term care plans consist of a pool of money, unlike a typical health or disability insurance policy.

For example, if the cost of nursing home care in the prospective purchaser's com-

munity is currently \$150 per day and we reasonably anticipate that the price may increase to \$200 per day in nine years, then the purchaser should ask the salesperson to compare how much these two options would cost: (1) maximum daily benefit of \$150 per day with 5 percent inflation protection, and (2) maximum daily benefit of \$200 per day with no inflation protection. Compare these two options with the same "pool" or maximum total coverage.

I believe the results show that it is much cheaper to increase the daily maximum now, rather than purchase inflation coverage. If (when the need arises) care costs less than the maximum daily benefit, the "pool" will simply be consumed at a lower rate.

Laura Effel

## We want to hear from you.

Send your letter to the editor\* to:

**E-mail:** [coggin@vsb.org](mailto:coggin@vsb.org)

**fax:** (804) 775-0582

**mail:** Virginia State Bar,

*Virginia Lawyer Magazine*

707 E. Main Street, Suite 1500,

Richmond, VA 23219-2800

\*Letters published in *Virginia Lawyer* may be edited for length and clarity and are subject to guidelines available at [www.vsb.org/publications/valawyer/letters.html](http://www.vsb.org/publications/valawyer/letters.html).