

John Cooke was 40 when he was appointed Solicitor-General. The son of a poor-to-do Leicestershire farmer, he had earned his first footnote in legal history in 1646, when he and John Bradshawe persuaded the House of Lords in *Lilburne's case* to establish the right to silence. At the end of the civil war, he decided it was time to make poverty history and wrote passionate and prescient pleas for social justice and redistribution of wealth. He was the visionary who first proposed a national health service, abolition of imprisonment for debt, and probation for those who stole to feed their starving families.

He was also first to give serious attention to legal ethics and law reform. In his most significant work, *The Vindication of Profession of Law* (1646) he argued for fusion of law and equity, the establishment of a land registry, abolition of courtroom Latin, and restrictions on the death penalty.

He argued that lawyers' fees should be on a scale set by parliament (with lawyer MPs disqualified from voting) and that barristers should be required to devote 10% of their practice to *pro bono* work for the poor. For this reason he was disliked by the leaders of the Bar. But in January 1649, these were the very men who fled from the Inns of Court, to avoid any professional engagement in the business of bringing the King to justice.

"They put it upon me"

At the beginning of the month the purged House of Commons established a High Court of Justice. Bradshawe, by now a judge, was to preside, and Cooke was instructed to prosecute, "to the end that no chief officer may hereafter presume traitorously or maliciously to imagine or continue the enslaving or destroying of the English nation, and expect impunity for so doing".

The use of the word "impunity" to describe the freedom that tyrants should never have to live happily ever after their tyranny enters history in Cooke's brief. His pupils tearfully begged him to reject it, but



ENGLAND'S BRAVEST BARRISTER?

The "cab-rank rule" was first and most memorably asserted by John Cooke of Gray's Inn when tried for treason at the Old Bailey in 1660. His crime had been to accept history's most fateful brief, containing instructions from parliament to prosecute Charles I, writes Geoffrey Robertson QC

he answered "I cannot avoid it. You see, they put it upon me."

Rex is lex

Cooke's task was to mount the first war crimes trial of a Head of State. There was no doubt that Charles bore command responsibility for two civil wars which had claimed the lives of one in ten adult males in England, and he was busy fomenting a third. But Charles was still

sovereign and judges had always said that the King, as the source of law, could do no wrong. *Rex is Lex* is how they had put it in the ship-money case. The royalist "top silk" Orlando Bridgeman had advised that Magna Carta required men to be tried by their peers: since the King had no peer, he could never be put on trial.

These were turbulent times, when England was under threat of immi-



Robertson: Cooke — first war crimes trial lawyer?

nent invasion from the royalist army in Ireland: the King's fleet was under sail, and allied with the Dutch. "Pride's purge" of parliament in December 1648 had been the army's way of declaring a state of national emergency and it would have been lawful to court-martial Charles as the enemy commander and to shoot him - on the principle that "a man who is dead renews no war". It was astonishing that the Commons opted instead for a public trial which would provide Charles with a political platform as well as an opportunity to contest his guilt of what today would be described as war crimes and crimes against humanity. Cooke called some 30 eyewitnesses to prove the King's command responsibility for directing the unlawful plunder of towns and the torture of prisoners of war.

His trial was shamelessly rigged: the jury was vetted so that it comprised only hard-line royalists, and the judges held secret meetings with the prosecutors to ensure his conviction.

A refusal to plead

By the standards of the time, especially by comparison with the vicious rhetoric used by Edward Coke at the trial of Sir Walter Raleigh, Cooke's conduct of the prosecution was restrained and professional. After three hearings at which the King declined to recognise the court, the Solicitor General invited the judges to apply the common law rule that a refusal to plead was a confession of guilt. He did not ask for the death sentence and had not believed when he first accepted the brief that this would be the outcome of the trial, although he later said that the King's lack of remorse at the casualties on both sides during the civil wars, and his determination to start another rather than share power with parliament, persuaded him that there was no alternative.

John Cooke was appointed by Cromwell to serve as a judge in Ireland, where he became renowned

for insisting that poor litigants had legal representation. The great lawyers, meanwhile, returned to London as MPs and judges once the King had been executed. In 1656, two of them, Thomas Twisden and William Whyndham, argued in *Conny's case* that a customs tax was contrary to Magna Carta. This made Cromwell so angry that he had them locked in the Tower for a weekend, whereupon they immediately abandoned their client and apologised profusely for accepting his brief. Drivers of the newfangled Hackney carriages accepted any passenger who could pay six pence per mile, but barristers were not yet prepared to follow their example.

Shamelessly rigged

Come the Restoration, Justice Cooke was the first regicide to be arrested. His trial was shamelessly rigged: the jury was vetted so that it comprised only hard-line royalists, and the judges (now including Thomas Twisden) held secret meetings with the prosecutors at Sergeant's Inn to ensure his conviction.

At 7am on Saturday 13 October 1660 John Cooke was brought to the bar of the sessions house in Old Bailey. The prosecution proved that he had drafted the indictment of the King and had urged the court to proceed expeditiously to sentence. In a powerful speech in his own defence, Cooke tried to explain that a barrister should not be identified with those who instruct him: "the counsellor is to make the best of his client's cause, then leave it to the court". The prosecution had to prove malice and "that I did nothing maliciously I hope will appear in this - what I then spoke, it was for my fee. I may be called *avaricious* but not *malicious*. I hope the jury will take this into consideration: I had no power to act judicially - I was not magisterial, but ministerial."

In peril of his life, John Cooke was articulating what has now become the bedrock principle of the English bar: the duty of counsel to accept any brief that is offered with an appropriate fee and to make the best argument that he can for his client's

cause, irrespective of the danger to himself or to his reputation.

Centuries later, two better connected lawyers were to dress this argument in finer language and to win the profession's accolade for originating the "cab-rank" rule. Lord Erskine, defending Tom Paine, said "the liberties of England are at an end" if barristers could be permitted to refuse an unpopular brief. All that Erskine lost was his retainer to advise the Prince of Wales. His speech is never quoted in full, because it is an insufferable ego-trip in which he notably fails to defend his client (who had the good sense to flee to France). Lord Brougham, defending Queen Caroline in a case that advanced his own political career, waxed even more portentous:

"An advocate, by the sacred duty which he owes his client, knows in the discharge of that office but one person in the world, that client and none other... he must not regard the alarm, the suffering, the torment, the destruction which he may bring upon any other. He must go on, reckless of the consequences... even if his fated should unhappily be, to involve his country in confusion for his client's protection."

John Cooke was defending himself in the face of hanging judges, a rigged jury and a hate-filled public gallery who interrupted his final speech with a "death hum". The prosecution could not infer malice from his acceptance of the brief, other than by their circular argument that "no man could have a lawful calling to pursue the life of the King and the law implies malice". But they could rely on prejudice: the royal family had counsel, who was permitted to make a second speech for the prosecution. Cooke's defence, that he "acted as counsel for his fee, was "the fee that Judas had, the thirty pieces of silver that made him hang himself. Now, gentlemen of the jury, you must hang this Judas."

Wadham Wyndham, now the prosecution junior, was also allowed a final speech. "The chief argument the prisoner shelters him-

self under is his profession – which gives a blast to all of us of the long robe”. Advising how to prosecute a king was beyond the bounds of any barrister’s duty. “Mr Cooke is as much a traitor as the man in the frock who did the execution”.

The trial judge, the newly promoted royalist Orlando Bridgeman, told the jury that Cooke’s defence was no defence at all because the King was above the law and any attempt to make him accountable must be treason. Shaking his head, he concluded his summing up, “If these be not overt acts of compassing and imagining the death of the King I do not know what are. It must, of course, be left to you - but I think you need not go from your bench”. The jury convicted immediately.

Thrown to the dogs

On 16 October John Cooke was hung, drawn and quartered on a scaffold at Charing Cross. The bar-

rist made a notable final speech: when the sheriff tried to intervene, he replied “I am the first to be hanged for demanding justice, therefore I hope you will not interrupt again”. He was cut down while still conscious: his genitals were slashed and thrown to the dogs and then his bowels were torn out and burnt before his goggling eyes.

After this torture, his heart was cut out, his head cut off and his torso chopped into four parts, to be boiled and set on spikes at Aldgate. Cooke’s head was last seen by the diarist Samuel Pepys, as he looked over Westminster Hall: “There is Cooke’s head set up for a traitor, and Harrison’s on the other side. From here I could see them plainly, as also a very fair prospect about London.”

This is the last recorded sighting of John Cooke, his head mounted above the great gate of the hall where he had once demanded justice on the head of state. These



days, Gray’s Inn makes no mention of Cooke or of Bradshawe, its members who did most to change the course of history. (Its largest portraits are of Charles I, Charles II and Charles III.) But if we are still to venerate the cab-rank rule, we should salute John Cooke, that brave English barrister who actually died for it. ❖

Geoffrey Robertson QC has written the first biography of John Cooke, *The Tyrannicide Brief*, published this month by Chatto & Windus.

31 VOL32 VOL33 VOL34

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