

The origins and development of the Cab Rank Rule for Barristers in England and Wales.

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Abstract.

In England and Wales and some other common law jurisdictions barristers are required to take instructions, sent through the intermediary of a solicitor, in any case provided it is in a field in which they profess to practise (having regard to their experience and seniority), subject to their availability, and payment of a proper professional fee. This is known as the Cab Rank Rule. The origins of this professional rule are traced with certainty to the end of the 18th Century. An attempt is made to locate earlier manifestations of the principles upon which it was built involving examination of cases and other sources in the 17th and 16th Centuries.

Key words: *England, Barristers, Cab Rank Rule, origins.*

Introduction.

This article commences by explaining the meaning and scope of the Cab Rank Rule in England and Wales. Most barristers, if asked about this important aspect of their code of professional behaviour, would trace its origins to the defence of Thomas Paine in 1792 by Thomas Erskine. This landmark case, and subsequent entrenchment of the rule, is considered. Although, unfortunately, there is not an abundance of sources, an attempt is made to explore earlier manifestations of the principles upon which the rule was built. In this regard attention is paid to the trial of John Cooke in 1660, and a number of cases from preceding decades. Further, speeches of Lord Chief Justices of the Court of Common Pleas, made on the ceremonial creation of new serjeants at law in the 16th and early 17th Centuries, are examined. A competing strand in legal professional ethics which elevates individual conscience above other considerations whether to accept cases is identified. Finally a summary of the evidence is presented which contains some tentative conclusions.

The Cab Rank Rule.

Provided he or she can pay for the service, it is long settled, and usually a condition of their licence, that drivers of taxicabs, horse drawn vehicles in earlier times, must carry the first passenger who hails them and asks for a destination. Similarly what became known as the Cab Rank Rule is a distinctive and time honoured aspect of the professional life of barristers in independent practice in

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England and Wales, a relatively small group of lawyers, just over 17,000 in 2020¹. Under this rule self employed barristers are duty bound to take instructions, sent through the intermediary of a solicitor, in any case provided it is in a field in which they profess to practise (having regard to their experience and seniority), subject to their availability, and payment of a proper professional fee. Barristers cannot choose their clients based the nature of the allegations against them or their character or reputation or apparent strengths or weaknesses of their cases. It is at least possible that a barrister might prosecute in a criminal case on Monday, defend in another on Tuesday and act in a civil case either for the defendant or the claimant for the remaining three working days of the week². At the outset it is important to appreciate that the Cab Rank Rule has never governed practising solicitors, by far the largest branch of the legal profession in England and Wales, now numbering nearly 157,000³. Solicitors are much involved in advocacy in lower courts but are entitled to decline cases as long as they do not infringe statutes and professional rules forbidding discrimination on grounds of age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex or sexual orientation.

Justification, exceptions and strength of professional attachment.

The Cab Rank Rule is said to ensure unpopular people and causes are represented by shielding barristers from criticism for taking their cases, thus maintaining access to justice and the rule of law, and to strengthen the quality of advocates through experience of acting for both the prosecution and the defence and for claimants and defendants in civil matters. There are exceptions to its application in England and Wales notably in modern times including , “no win no fee” conditional fee agreements and “public access cases”, where barristers are not briefed by solicitors but approached directly by clients. These and other exceptions are set out in the Bar Standards Board’s current (legally enforceable) Code of Conduct paragraph C30⁴.

¹ Statistics provided by the Bar Standards Board in 2021.

² See David Pannick, *Advocates*, Oxford University Press, 1992, page 138.

³ Solicitors Regulation Authority, November, 2021.

⁴ Paragraph C30 together with paragraphs C21, C29, constitutes “The modern ‘cab rank rule’ for England and Wales, obliging a barrister to accept any case appropriate to their experience, seniority and/or field of practice, irrespective of the identity of the client, the nature of the case, and regardless of any belief or opinion which the barrister may have formed as to the character, reputation, cause, conduct, guilt or innocence of the client.

In keeping with earlier expressions of the rule, the Bar Standards Board Code of Practice states that the rule does not apply to instructions requiring a self-employed barrister to do any “foreign work”, defined as ‘legal services of whatsoever nature relating to... court or other legal proceedings taking place or contemplated to take place outside England and Wales’. It is commonly thought this exception was introduced to avoid barristers being obliged to appear for defendants before the International Military Tribunal at Nuremberg in 1945⁵ .

Besides England and Wales, the Cab Rank Rule in the Common Law world governs the profession of advocates in Scotland, and barristers in Northern Ireland, the Republic of Ireland, Australia, New Zealand and South Africa and a small number of other countries⁶. Conspicuously, reflecting an important divergence of ethics in professional advocacy, it has never applied to attorneys in the United States where the conscience of a lawyer whether or not to accept a case is pre-eminent⁷. Early expressions of this include Alexander Hamilton, who in 1786 after successfully representing a man who he believed guilty resolved never again to take up a cause which he believed should not prevail, and in the following century Abraham Lincoln, it is said, refused to take cases which though strong in law would have unjust consequences. In effect he constituted his own court of equity ⁸.

Not all barristers follow the Cab Rank Rule, perhaps claiming through their clerk to be unavailable or that a matter is beyond their expertise or even openly state, as a small number do, that they will not act on behalf of certain categories of clients, for example employers, landlords, persons charged with sexual offences. The reality is that such clients seldom would come to their doors. During the Irish Republican Army bombing campaign of mainland Britain in the 1970s, including the Old Bailey, the Central Criminal Court in London, difficulties arose in obtaining

⁵ Two leading Queen’s Counsel (QC) accepted instructions during 2021 on controversial cases in foreign jurisdictions. The first involved prosecution of a number of prominent pro-democracy activists in Hong Kong and the second arguing on behalf of the Cayman Islands government that the Bill of Rights in the Caymanian Constitution does not guarantee same-sex couples the right to marry. Their decisions to accept these briefs attracted much publicity and both were subject strong storms of criticism, placing barristers’ professional ethics in the spotlight and raising questions about the scope and importance of the cab rank rule. It was accepted that the Cab Rank Rule did not apply in the former and the barrister withdrew. This did not occur in the latter case where it was asserted that the Cab Rank Rule did apply because the case would be heard in London by the Privy Council, the ultimate court of appeal for the Caymen Islands. See Mathew Happold .”The Cab Rank Rule : English Barristers in Foreign Courts”. *New Law Journal* , 10th February, 2021, Issue 7920 and Lord John Hendy QC, “The Cab Rank Rule”, *Oxford Human Rights Hub*, March 7th, 2021.

⁶ Andrew Watson, *Speaking in Court, Developments in Court Advocacy from the 17th to the 21st Century*, Palgrave MacMillan, 2019, page 37.

⁷ David Pannick, *Advocates*, Oxford University Press, 1992, pp.137-138. However Rule 1.2b of the Model Rules of the American Bar Association 2020 states: “A lawyer’s representation of a client, including representation by appointment, does not constitute an endorsement of the client’s political, economic, social or moral views or activities” and paragraph 5 of the Commentary on this rule sets out “Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval”.

⁸ David Pannick, *The Morality of Advocacy*, Hamlyn Trust Lecture, Senedd Cymru, 10th November, 2021.

defence counsel necessitating the Bar to remind its members of their duties under the Cab Rank Rule, in order to ensure defendants were represented. It is difficult to empirically assess the extent of non-compliance with the rule. There has only been one case of professional proceedings brought by the Bar Council. This involved a committed Christian barrister, and regional chairman of the Lawyers' Christian Fellowship, who in 2006 declined "the case of an illegal immigrant who wanted to use his homosexual relationship as grounds to stay in this country"⁹. Although the extent of non-compliance is unknown, and probably unquantifiable given few barristers would admit to it, the strength of the Bar's attachment as a profession to the rule was demonstrated in the vehemence of the reply given to recommendations of a report published in 2013 by the Legal Services Board¹⁰. It recommended removing the rule from the Bar's Code of Conduct on the grounds it was an impractical unenforced antiquity with an over-exaggerated relevance perpetuated by the Bar and that it should be considered a "principle" rather than a rule. Some years earlier in 2007 at The Bar Councils annual conference barristers overwhelmingly voted to retain the Cab Rank Rule and rejected arguments for its abolition on the grounds it might breach lawyers' human rights by forcing them to act against their moral or religious convictions in some cases¹¹. A former Chairman of the Professional Standards Committee of the Bar Council, just over a decade before, said of the cab rank rule " *This is to barristers what the Hippocratic oath is to doctors*"¹².

Thomas Erskine and Thomas Paine and entrenchment in the 19th

Perhaps, if asked today, most barristers would trace the Cab Rank Rule to Thomas Erskine's defence of Thomas Paine in 1792. At a time of fear the Revolution in France might spread to Britain, the government began to suppress works that espoused social ideas believed threatening. Paine, a radical writer, philosopher, and political theorist, whose writings had done much to support the American Revolution at crucial times, was charged with seditious libel arising from publication of Part II of

⁹ *Daily Mail* report, 26 July 2006: "*James Mills, Barrister who refused to represent gay client reprimanded*". Mr Mills was ruled to have breached the cab rank rule and guilty of professional misconduct, for which he was reprimanded and ordered to pay £1,000 towards the cost of the case. Before this the nearest allegations nearest to professional proceedings seems to have been in 1953. Lord Shawcross, a former Attorney General and Chairman of the General Council of the Bar, in the course of a lecture, reported in the *Times* said that he had heard it said "*that certain members of the Bar refused to accept a brief to defend an African accused of offences of a quasi-political nature against public order. The suggestion is that those barristers made excuses and declined to act, their true reason being that they thought that their popularity or reputation might be detrimentally affected by appearing for the defence in such a case. For the prosecution they might appear, but not for the defence. If this report were true, it would disclose a wholly deplorable departure from the great traditions of our law and one which, if substantiated, both the Attorney General and the Bar Council would have to deal with in the severest possible way*". Reported in the *Times* of London 19th February, 1953.

¹⁰ *The Cab Rank Rule: Its Meaning and Purpose in the New Legal Services Market*, John Flood and Morten Hviid, 2013.

¹¹ *Law Society Gazette*, 9th November, 2007.

¹² Anthony Thornton, *The Professional Responsibility and Ethics of the English Bar*, in Ross Cranston, *Legal Ethics and Professional Responsibility*, Clarendon Press, 1995, page 68.

his work *The Rights of Man*. This book, a bestseller which sold the then huge number of one and a half million copies, was critical of the monarchy and the aristocracy, proclaimed the need for universal public education, for children's allowances and old age pensions, for public provision of work and wages for the unemployed and for the financing of these measures by a progressive income tax.

Paine, wisely as it transpired, on the advice of the poet and artist William Blake and the moral philosopher Jeremy Bentham, left the country for what he thought was the safety of Revolutionary France, where he had been elected as a member of the National Assembly, although he was later to be proved cruelly, and nearly fatally, wrong, narrowly escaping execution only by the downfall of Maximilien Robespierre, who regarded him as an enemy.

Thomas Erskine, who was certainly not strongly in sympathy with his views, received a brief to act for Paine. Erskine's friends, who believed he might soon be appointed Lord Chancellor, urged him not to accept. In reply to one friend, he was reported as having said, "*But I have been retained, and I will take it by God*"¹³. Erskine's decision to act for Tom Paine undoubtedly cost him a valuable retainer as an adviser to the Prince of Wales. Scurrilous attacks were made upon him in government newspapers and elsewhere in the months leading up to Paine's trial which was listed in absentia in the Court of King's Bench at the Guildhall, before the Lord Chief Justice, Lord Kenyon, and a Special Jury, selected by Crown lawyers. It commenced on 18th December 1792. Erskine's task was not assisted by the Attorney General, Archibald MacDonal, reading to the jury portions of a letter written to him by Paine from Paris which contained attacks on the character of both the King and the Prince of Wales, the constitution, the government, "the greatest perfection of fraud and corruption that ever took place", and in which he regarded conviction, as relevant as "*a verdict against the man in the moon*"¹⁴.

Erskine offered no evidence following the prosecution's case and admitted Paine had written both the letter and the *Rights of Man*. Condemning the "*calumnious clamour*" raised by those against him representing Paine he continued:

"I will for ever, at all hazards, assert the dignity, independence and integrity of the English Bar, without which impartial justice, the most valuable part of the English Constitution, can have no existence. From the moment that any advocate can be permitted to say he will, or will not stand between the Crown and the subject arraigned in the court where he daily sits to practice, from that moment the liberties of England are at an end. If the advocate refuses to defend, from what he may think of the charge or of the defence he assumes the character of the Judge; nay, he assumes it before the hour of judgment: and, in proportion to his rank and reputation puts the heavy influence of perhaps, a mistaken opinion in to the scale against the

¹³ According to John Lord Campbell, the friend was Lord Loughborough, soon to be appointed Lord Chancellor, who he met on a dark November evening whilst walking home on Hampstead Heath. See John Lord Campbell, *The Lives of the Lord Chancellors*, 1868, Vol VIII, page 295.

¹⁴ State Trials, vol xxii, pp. 398-399.

*accused, in those favour the benevolent principle of English law makes all presumptions.....”*¹⁵

Whilst the Attorney General had argued Paine’s work served only to inflame the populace and disseminate radical ideas to those lacking knowledge and experience to understand them in context, Erskine submitted radical works helped improve the quality of government by highlighting its weaknesses and, if published in good faith, could not therefore be seditious. The Libel Act 1792 required the prosecution to show the publication was motivated by malice and this submitted Erskine it had failed to do¹⁶.

The Special Jury was not receptive and found Tom Paine guilty of seditious libel even before the prosecution replied and the Lord Chief Justice had an opportunity to sum up the case. He was sentenced to outlawry, a punishment medieval in origin, under which he was to be put to death if he returned to England and his property was seized. The cab-rank rule expounded by Erskine, building on pre-existing rules of professional etiquette, fared considerably better. On emerging from court he was cheered by a crowd and shouts were heard of *"Damn Tom Paine, but Erskine for ever, and the Liberty of the Press; the King, the Constitution, and Erskine for ever"*¹⁷. Numerous transcripts and reports emphasising Erskine’s speech were published. The popular press hailed him as *"the Peoples Advocate"*¹⁸. A frequent toast at barristers’ dinners became *"To Erskine and Independence"*. The cab-rank rule was rapidly adopted as a moral basis for advocacy and in its early years was much championed by Lord Brougham. On that basis, despite it has emerged doubts about her character and moral probity, he accepted the brief to defend Queen Caroline in 1820 against the King’s allegations of adultery. During his opening speech for her Henry Brougham expounded what was to become a highly influential principle of zealous advocacy:

"[A]n 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. To save that client by all expedient means - to protect that client at all hazards and costs

¹⁵ State Trials, vol xxii, page 412. In a letter written to the editor of State Trials a few years before his death, Erskine described the *"unquestionable right of the subject to make his defence by any counsel of his free choice if not previously retained or engaged by office from the Crown"* as itself an invaluable part of the constitution. State Trials, vol xxvi page 715.

¹⁶ John Hostettler, *Thomas Erskine and Trial by Jury* (2nd ed.). Waterside Press, 2010, page 96.

¹⁷ Mark Crosby. "The Voice of Flattery vs Sober Truth: William Godwin, Thomas Paine and the 1792 Trial of Thomas Paine for Sedition". *The Review of English Studies*. Oxford University Press, 62, page 253, 2010.

¹⁸David Lemmings, *Professors of the Law. Barristers and English Legal Culture in the Eighteenth Century*, Oxford, 2000, page 307.

*to all others, and among others to himself - is the highest and most unquestioned of his duties*¹⁹ .

Returning to the cab – rank rule in a speech to the House of Lords Brougham explained:

*“if once a barrister is to be allowed to refuse a brief , and to say that he will not defend a brief, and to say he will not defend a man because he is wrong, many will be found who will refuse to defend men, not on account of the case, but because they are weak men, under pressure of unpopularity, against whom power has set its mark, because they are victims of oppression, or are about to be made so , or because it will not be convenient for parties at all times to beard power on behalf of individuals in the situation of prisoners”*²⁰ .

Some years before Lord Eldon, then Lord Chancellor, in a case in 1822 expressed support for the rule *“He (the advocate) lends his exertions to all, himself to none. The result of the cause is to him a matter of indifference. It is for the court to decide”*. He then contended that without the cab rank rule observers of the legal system would find even more difficult to comprehend that an advocate is *“merely an officer assisting in the administration of justice”*²¹ .

In 1876 the Lord President of the Court of Session, John Inglis, clarified that the Cab Rank Rule applied in Scotland²² . The rule, which spread throughout the British Empire, was not without some detractors who, far from seeing it as a noble ethic to ensure that even the grossly unpopular should not go unrepresented, perceived the rule to be pure convenient self - interest by the Bar enabling its members to take any case they pleased for remuneration. Some reference was made to Jonathan Swift (1667-1745), himself a disappointed litigant, in Gulliver’s Travels in which he said of lawyers:

*“they were a society of men bred up from their youth in the art of proving by words multiplied for the purpose that what is white is black and black is white according as they are paid”*²³ .

¹⁹ Henry Brougham, *Speeches of Lord Henry Brougham*, Edinburgh, Adam and Black, Volume 1, page 105.

²⁰ Lord Brougham’s speech to the House of Lords in 1840, 55 Parliamentary Debates, House of Lords (5th Series) August 10, 1840, cols. 1401-2.

²¹ *Ex parte Lloyd* 5th November 1822, Montagu’s Reports , page 70.

²² *Batchelor v. Pattison & Mackersy* (1876) 3 R. 914, 918.

²³ Jonathan Swift, *Gullivers Travels*, 1726. Reprint, Harmondsworth Press, Middlesex, 1985, page 291.

The search for earlier origins.

The principle that the advocate is in the same position of cab-driver on the rank bound to answer the first hail existed as a matter of professional etiquette before Thomas Erskine's eloquent exposition. Just when it originated is however far from easy to locate.

First published in 1791, James Boswell's *Life of Samuel Johnson* is notable for its extensive reports of Johnson's conversation. When asked by Boswell, himself a Scottish Advocate, whether it was proper for a barrister to support a cause he knew to be bad Johnson (1709 -84) replied: "*You do not know it to be good or bad till the judge determines it....An argument which does not convince yourself may convince the Judge to whom you urge it; and if it does convince him, why then Sir, you are wrong, and he is right. It is his business to judge; and you are not to be confident in your own opinion that a cause is bad, but to say all you can for your client, and then hear the judge's opinion*"²⁴. Such an opinion seems supportive of the professional rule of etiquette to take cases regardless of consideration of their strength and identity of the client. How far it was accepted in the decades preceding Thomas Paine's case amongst Johnson's circle of contemporaries and more widely can only be speculated.

Until 1980 the Bar had no written code of conduct. Previously professional rules and obligations, known colloquially as the Bar's conduct and etiquette, were mainly passed on verbally, usually during pupillage. They stemmed from tradition, judicial influence, usually by dicta in judgements concerning points of court procedure, growing influence of both the circuit system and the Attorney General in the Nineteenth Century and from the end of that century, when it was established, resolutions and specific rulings of the Bar Council²⁵. That the Bar lacked any written code for over six hundred years is explained by the tightly knit nature of the profession. Barristers had acquired exclusive rights of audience in the higher courts. They lived and worked in close proximity with each other and the judges. Conduct was that to be expected of gentlemen in their profession and where necessary enforced by strong peer pressure. Records do not exist of the Inns of Court disciplining members for breaches of professional etiquette, confining themselves to dealing with conduct associated with drunken or riotous behaviour, occupancy of rooms or chambers within the Inns and financial improvidence. Unfortunately this form of professional regulation with its lack of written sources does not assist tracing when the cab rank principle came into being. Neither does an absence of evidence of instruction on professional ethics at the Inns of Court whose main function, from the early fifteenth century until the outset of the Civil War in 1642²⁶, was the education of students and practitioners of law. Because lawyers would have doubtless discussed matters of conduct amongst themselves, and specific instances

²⁴ James Boswell, *Life of Johnson*, 1791 (ed R.W. Chapman, corrected by J.D. Fleeman), Oxford University Press, 1970) page 388.

²⁵ See Anthony Thornton, *The Professional Responsibility and Ethics of the English Bar* in Ross Cranston, *Legal Ethics and Professional Responsibility*, Clarendon Press, 1995, Chapter 3, pp.54 – 71.

²⁶See John Baker, *An Introduction to English Legal History*, Butterworths, 2002, pp. 159 -162.

where it fell short of accepted norms, formal training in this area may have been considered unnecessary.

The trial of John Cooke in 1660.

Although not referred to as such, a form of cab rank principle was considered in the trial of John Cooke in 1660, who was central in the prosecution of King Charles I for High Treason in 1649. Cooke was a barrister at Gray's Inn respected for his knowledge of law and for his independence from established patronage and power. He also displayed considerable independence of thought writing and publishing tracts advocating extensive legal and social reforms, breath-taking in scope at the time, including the abolition of the death penalty, except for murder and treason, ending imprisonment for debt, abolition of Latin in the courts, a system of legal aid, barristers should work *pro bono* in ten percent of their cases, limits to lawyers' fees (the last two hardly endearing him to the leaders of his profession), probation for offenders and establishing a national health service. Cooke also took up controversial cases in court, including that of the radical and Leveller John Lilburne, which damaged his career.

When the Rump Parliament ²⁷decided to put the King on trial in the name of the people of England, an action never before imagined, many lawyers, particularly the most senior, fearing enormous consequences, including themselves facing charges of treason should there be a change in regime, left their chambers in the Inns of Court for the country to avoid receiving the brief to prosecute. John Cooke did not and accepted it without hesitation, along with appointment as Solicitor General. Soon afterwards, as he prepared evidence and arguments to persuade the court neither divine right or sovereignty immunity gave impunity to a monarch from oppressing his own people, Cooke began to receive death threats and vilification in royalist news-sheets, still circulating in London though officially banned. Young barristers who he had tutored or befriended beseeched him to abandon the task. All to no avail as Cooke told them it was his professional duty to continue. On 20 January 1649, a week after Cooke's acceptance of the brief, the trial of the King, on charges of high treason and other high crimes, began in Westminster Hall before a High Court of Justice established by Parliament and consisted of 135 commissioners, drawn from members of parliament, civic and business leaders, country officials and army officers. The King refused to accept the authority of this body and to speak in his defence. When Cooke began to introduce the indictment he had prepared Charles twice tried to stop him by ordering him to "Hold" and twice tapping him sharply on the shoulder with his cane. Cooke ignored this so King Charles then rose to speak, but Cooke resumed speaking, at which point King Charles struck Cooke so forcefully on the shoulder that the ornate silver tip of the cane broke off and rolled down the barrister's robe onto the floor. The King nodded to Cooke to pick it up, but Cook did not and after a long pause, King Charles stooped to retrieve it himself, causing gasps from some present. The symbolism of this was

²⁷This was the name given to the English Parliament after it had been purged on the 6th December, 1648 by Colonel Thomas Pride, acting on behalf of the New Model Army, to prevent Parliament from agreeing the Treaty of Newport which would have reinstated Charles I. 231 members who supported the Treaty were excluded from sitting in Parliament and some 45 were arrested. This event is considered the only recorded military *coup d'état* in English history. The Rump Parliament, backed by the army, lasted until 1653 when it was dissolved by Oliver Cromwell.

plain: The divine monarch had bowed to the majesty of the law²⁸. The King continued to object to the jurisdiction of the court and refused to plead either guilty or not guilty. On account of this Cooke urged the court to take the charge *pro confesso*. In other words Charles's refusal to plead constituted a confession of guilt to all particulars of the charges against him. The court adjourned three times in the hope the King would plead not guilty and the evidence, against him, assembled by Cooke, would be heard, and reported widely, that he had waged war against Parliament, bore responsibility for the war crimes of his soldiers, was responsible as an individual for ordering and approving torture of prisoners and plunder of towns and had secretly attempted to procure military assistance from Catholic powers and from Ireland and Scotland²⁹. However the King would not come out and fight and the court proceeded on the basis of *pro confesso* to deliver sentence of death. It was not until 1827 in English Law that a refusal to plead was to become treated as a plea of not guilty. King Charles was executed outside the Banqueting House in Whitehall some days afterwards. Cooke has been praised by some as a father of international criminal law for making tyranny a crime and being the first lawyer to prosecute a head of state for waging war against his people – the forerunner of the prosecutions of Augusto Pinochet, Slobodan Milosevic and Saddam Hussein in our times³⁰.

Appointed by Cromwell, Cooke became a reforming Chief Justice in Ireland. On the return of the Stuart monarchy in 1660 he was arrested, brought back to London and tried before a special jury at the Old Bailey for High Treason, his trial being one in a series of trials of regicides – persons specifically excluded from the indemnity granted under the Indemnity and Oblivion Act to opponents of the monarchy for crimes they may have committed during the Civil War and the Interregnum 1642 – 1660.

A major, although by no means the only, part of Cooke's defence was that he had done nothing maliciously – malice being an element the prosecution had to prove. He had received instructions as counsel from the government to lay a charge and ask for judgement. The court was free to accept or reject his submissions. Guilt, innocence, and if necessary sentence, were matters for the court. His duty was to make the best of his client's cause against the King including, given the King's refusal to plead, urging that the charge must be taken *pro confesso*³¹. "*I did what I was required and commanded to do; acting only within my sphere and element as a counsellor, and no otherwise*"³². Cooke maintained he had spoken for his fee "*I may*

²⁸ See Geoffrey Robinson, *The Tyrannicide Brief*, Vintage Books, 2006, page 17.

²⁹ This evidence, involving some thirty three witnesses, was heard by a committee elected by the court and then read back in the form of witness statements to the full court the following day.

³⁰ Harry Potter, *Law, Liberty and the Constitution*, Boydell Press, 2015, page 147; and Geoffrey Robinson, *The Tyrannicide Brief*, Vintage Books, 2006, page 3.

³¹ For other strands in John Cooke's defence see Geoffrey Robinson, *The Tyrannicide Brief*, Vintage Books, 2006, Chapter 18, The Trial of John Cooke.

³² State trials, -12 Charles II. 1660.- The Trials of the Regicides, page 1091.

be called avaricious but not malicious..... I had no power to act judicially – I was not magisterial , but ministerial” ³³.

In reply to Cooke that no malice could be implied by acceptance of the brief the Solicitor General, Sir Heneage Finch, asserted “ *no man can have a lawful calling to pursue the life of a king*”³⁴. Sir Edward Turner, representing the Royal Family, dismissed Cooke’s argument in the following brief and emotive terms “ *what saith he, I acted as a counsellor for my fee; it was that fee that Judas had ,the thirty pieces of silver that made him hang himself*” ³⁵. Wadham Wyndham, junior counsel to the Solicitor General, began by “*As I understandthe chief argument he shelters himself under was his profession, which gives a blast to all of us of the long robe.....I was appointed and the words dictated to me ; and a counsellor carrying himself within the compass of his profession is not answerable*” . However he continued “ *but if he exceeds the bounds of his profession , then so far from sheltering him it amounts to aggravation*”. Advising how to prosecute a king and appear in what he, referring to the High Court of Justice, termed a “*mock court*” with a “*mock jurisdiction*”, was simply to him beyond the bounds of a barrister’s duty³⁶

Lord Chief Baron Orlando Bridgeman during the course of the evidence had accepted that Cooke was acting under instructions and had been directed by the court to charge the King in the name of the Commons and the people of England ³⁷. However in his summing up to the Jury he refused to accept that the court was lawful, the prosecutor a valid prosecutor, or that the King could be a defendant. If counsel spoke treason from the bar on his client’s instructions he went outside his professional duty³⁸.After the jury (selected from those with ultra loyalty to the royalist cause³⁹) without retiring to consider their verdict, found Cooke guilty. Later in the day, after the trial for treason of the cleric Hugh Peters had concluded and was to be sentenced with Cooke, Bridgeman asked Cooke if he had anything to say why the court should not pronounce judgement of death upon him. After defects in the indictment against him were raised by Cooke and flatly rejected, he returned to his defence that he had acted professionally only to be met by Bridgeman with “*The profession of a lawyer will not excuse treason – this has been overruled and is overruled again*” ⁴⁰. Cooke’s final submission that it was the High Court of Justice and not him that had passed sentence on the King was also disallowed. He was then condemned to death in public by drawing, hanging and quartering⁴¹– the deliberately terrible penalty prescribed for treason under the Treason Act 1351 and

³³State trials, -12 Charles II. 1660.- The Trials of the Regicides, page 1096.

³⁴ State trials, -12 Charles II. 1660.- The Trials of the Regicides, page 1102.

³⁵ State trials, -12 Charles II. 1660.- The Trials of the Regicides, page 1103.

³⁶ State trials, -12 Charles II 1660.- The Trials of the Regicides, page 1105.

³⁷ State trials, -12 Charles II. 1660.- The Trials of the Regicides, page 1083.

³⁸ State trials, -12 Charles II. 1660.- The Trials of the Regicides, page 1111.

³⁹ Geoffrey Robinson, *The Tyrannicide Brief*, Vintage Books, 2006, page 308.

⁴⁰State trials, -12 Charles II. - The Trials of the Regicides, page 1143.

⁴¹ State trials, -12 Charles II. 1660.- The Trials of the Regicides.page 1145.

technically still possible until 1870. The death penalty for treason was abolished in 1998.

What is abundantly clear from the comments of the Lord Chief Baron, and counsel, in trial of John Cooke is that professional duty of counsel to take any brief offered for an appropriate fee and make the best argument for a client's cause irrespective of danger to himself or his reputation could not apply to prosecution of a monarch for treason. However, there does appear to be some acceptance, or at least recognition, amongst them the duty may apply in other matters. As these were not set out, a reasonable interpretation might be that only treason was excluded. Other than their verdict of guilty it is not possible to say to what extent members of the jury, as representatives of a wider public, recognised the existence of such a professional duty or etiquette of counsel.

Cases during the Interregnum, Treasons Trial Act 1695 and Charles Talbot.

During the Interregnum (1649 -1660) George Coney, a merchant in the City of London and hitherto a strong supporter of Oliver Cromwell, refused to pay customs duty levied by the Protectorate, which he maintained had no lawful authority and contrary to Magna Carta. Further he urged others not to do so as well. Goods were seized from Coney who began proceedings against the collector. Cromwell, determined to stop a dangerous precedent, attempted to cajole Coney into proceeding no further. Meeting no success, Cromwell had him imprisoned. Coney instructed Serjeants Maynard and Twysden, with Wadham Wyndham, as their junior, to apply, in the Upper Bench (formerly the King's Bench) for Habeas Corpus, on the basis that both committal to prison and imposition of the customs duty was unlawful. Before judgement could be given all three lawyers were imprisoned in the Tower of London for presuming to question or doubt Protector Cromwell's authority. After apologising profusely for accepting the brief and abandoning George Coney they were released three or four days later, necessitating him to plead for himself when next before the court. Cromwell appears not to have recognised the barrister's professional ethic that they speak on behalf of their clients for their fee and not for themselves – at least in this case. However that elsewhere the three lawyers received criticism for “*unworthily*” choosing to sacrificing their client rather “*than to endure a little restraint with the loss of fees for a few days*” indicates acceptance that cases should be taken by counsel and not subsequently abandoned by them⁴².

Further during the Interregnum, following committal of two people by the High Commission Court to prison, a counsel called Fuller was instructed by them to obtain their release. He moved the court for a writ of Habeas Corpus on the ground the High Commissioners had no power impose such a sentence. Fuller himself was arrested and “lay in goal to the day of his death”⁴³. Also during this period a suitor

⁴² State Trials – Charles II – during the usurpation pp. 936 – 938. The judges in Coney's case were summoned before Cromwell. When they mentioned Magna Carta and the law the Protector forthrightly replied “their Magna F**** should not control his actions which he knew were for the Safety of the Commonwealth.

⁴³ Henry Hallam, *Constitutional History of England*, 1870 Volume I, page 477. Cited by Black J in a dissenting judgement in the United States Supreme Court. *Cohen v. Hurley* 366 US 117, 139n (US Supreme Court).

lamented “*Serjeant Conyers took a fee of me to move in Chancery and kept it four several daysyet this serjeant just as he came to the bar gave me my fee and ran into court and told me that the Attorney General was against me and he durst not, nor would meddle in the cause; so I was forced to move the commissioners myself*”⁴⁴. The cases involving Coney, Fuller and Conyers seem to show that during this period the principle of accepting briefs from all and not associating counsel with the views, conduct and interests of his client was not broadly understood even amongst the legal profession. How widely it was comprehended, at least outside the Bar in politics, in the early 18th Century is questionable if an account in an incomplete letter from the wife of Charles Talbot, a future Lord Chancellor, is in anyway indicative. Talbot had made a promising start to his career at the Bar until he began to accept briefs from those who his Tory patrons disapproved including a Mr Ridpath ,a Whig political journalist prosecuted by the government in 1713. “*Publicly avowing his principles by appearing a counsel*” led solicitors to desert him and “*were very active in doing him prejudices*” according to Talbot’s wife⁴⁵ .

Some years earlier a development of some note occurred when Parliament, aware of fatal miscarriages of justice that had resulted from treason trials, notably the Popish Plot Trials 1678 – 80, in the decade before the Glorious Revolution 1688-89, passed the Treason Trials Act 1695. This permitted defendants help in such trials from counsel to present their cases⁴⁶ .The reform was also significant for barristers protecting them from the possibility of prosecution under the widely drafted Treason Act 1351 for assisting those charged and was a recognition that they spoke for their fee and their opinions were not to be taken as those who they were defending.

Assigning cases by the courts.

Some see the origins the etiquette of accepting briefs from all, regardless of whatever views of the client’s case and character, from a time when those appearing as advocates before courts were directly admitted by judges and mediaeval statutes gave courts control over them. In return for admission they were obliged to take cases allocated to them by the court even if they may not have desired to do so⁴⁷. In the courts at Westminster Hall those unable to meet the costs of civil suits could apply to sue in *forma pauperis* on production of a certificate from a counsellor or Justice of the Peace as to good character, worthy cause and slender means. If an application was approved, and this was not uncommon, the court would assign to the litigant an attorney and counsel without a fee. The lawyers selected were by no means the most junior or inexperienced. Contemporary comment, however,

⁴⁴ Wilfred Prest, *The Rise of the Barristers: A Social History of the English Bar 1590 – 1640*, Clarendon Press, page 295.

⁴⁵ Letter from Charles Talbot’s wife cited by David Lemmings, *Gentlemen and Barristers: The Inns of Court and the English Bar 1680 -1730*, Clarendon Press, 1990, page 122.

⁴⁶ The prohibition, however, remained for the felony cases, greatly far numerous, only began to erode in the 1730s and was not finally removed until the Prisoners’ Counsel Act 1836 - See John Langbein, *The Origins of the Adversary Trial*. Oxford University Press, 2003.

⁴⁷ Maree Quinlivan, The Cab Rank Rule : A Reappraisal of the Duty to Accept Clients, *Victoria University of Wellington Law Review*, 28(1),1998, page 115.

suggests for most lawyers that lack of a fee made pauper clients “as welcome as Lazarus to Dives”⁴⁸. Assigning cases in this way for those of slender means continued after the Inns of Court became responsible for admitting barristers to practice before the superior common law courts, at the end of the Sixteenth Century, replacing the judges in this role. In the half century that followed the barristers profession grew rapidly and underwent profound structural change⁴⁹. Those who locate the beginnings of the cab rank principle in the assignment of paupers cases by the judges to advocates, as a condition of their rights of audience, are correct in the sense that instructions had to be accepted irrespective of their desire to represent such litigants and what they thought of their causes. However it is submitted that this is far removed from later understandings of the principle built on the basis that a proper fee will be paid and that clients are able to select, through a solicitor, whoever they wish to represent them.

Lord Chief Justices and Serjeants of the Common Pleas.

From the late Fifteenth to the middle of the Sixteenth century, principles of professional conduct, above and beyond mere honesty, began to be formulated for the bar by the Court of Common Pleas, the main common law court of that time. Serjeants had the monopoly of audience in the Court of Common Pleas. They were the elite of the English Bar. Admission to the Order of Serjeants took place every few years. New serjeants were “created”, or “called”, usually about six to nine at a time in a ceremony conducted by the judges of the Common Pleas⁵⁰. They took an oath to serve the sovereign’s people, gave a sumptuous feast, sometimes attended by the monarch, distributed gold rings with mottoes and were presented with their distinctive hooded robes and a coif – a white silk or linen head covering tied under the chin. During this ceremony the Lord Chief Justice would explain the ethics of the profession and the high standards expected of them, often deeply infused with biblical language and not infrequently with references to the classics and history of Rome and Greece. Those recorded during the reign of Henry VIII, 1509-1547, are probably the earliest verbatim texts in the vernacular tongue of any speeches by English judges⁵¹.

A number of specific principles can be extracted from speeches to the new serjeants during his reign (Alas, it is not possible to find evidence of the extent they were always scrupulously obeyed): to deal with business expeditiously and not to prolong it for gain; to keep clients’ business secret; to ‘*stick with hand, foot and nail*’ to the truth, never pretending that a wrong is right; to avoid corruption by money or

⁴⁸ Wilfred Prest, *The Rise of the Barristers. A Social History of the English Bar 1590 – 1640*, page 22.

⁴⁹ At the very apex of those practising in the courts, the serjeants considered themselves at least bound in honour to assist paupers. See John Baker, *The Legal Profession and The Common Law. Historical Essays*, Hambledon Press, 1986, page 106.

⁵⁰ About one thousand advocates were admitted to the Order of Serjeants in the six centuries following 1300; over half of whom became judges of the superior common law courts – admission to the Order being necessary for appointment.

⁵¹ Assembled and reproduced by John Baker, *The Order of Serjeants at Law*, London, Selden Society, 1984, pp.280 – 294, who also presents a number beyond this period.

favour, not merely in deceiving clients but also for instance in pretending to be 'blind' – unable to assist in a worthy cause; to dissuade clients from pursuing unjust causes and to advise them to abandon causes if it appeared that they were in the wrong; to do nothing contrary to good conscience; to assist the poor and oppressed without reward – *“be as glad to tel the poure man the truth of the law for Gode’s sake as the riche man for his monye”*⁵²; and to give counsel to anyone who should seek it – *“ye shall refuse to take no man undre the protection of your good consell : all partialitye and hatrd layd aside”*⁵³. This last tenet of assisting all who request counsel and also that of not pretending to be “blind” to worthy causes resembles, a cab rank principle. However it is unclear to what extent this may be undercut, or in conflict with, by dissuasion of clients from pursuing unjust causes and doing nothing against conscience, implying that the strength of case and the character of a client should inform a decision whether to represent him or her or not. Interestingly in neighbouring Scotland the Court of Session, as a Rule of Court, expounded, on May 27th 1532, a much cleared rule, closely resembling later formulations in England, which stated *“No advocate without very good cause shall refuse to act for any person tendering a reasonable fee under pain of deprivation of his office as an advocate”*. What is a very good cause was left undefined⁵⁴.

Excerpts from records of speeches from the first half of the Seventeenth Century by Lord Chief Justices of the Court of Common Pleas to new serjeants, also appear relevant. It was the custom in such addresses to relate virtues to specific items of serjeants’ court clothes. For instance, concerning acceptance of briefs it was said at Whitefield’s Call in 1634 *“Your sleeves wyde, to be easy to have accesse unto, not to have a porter, some young fellow to keepe your door. Your helmet or quoife to shew you that you must have fortitude and courage not to be afraid to speak in your client’s case, whomsoever it concerns, soe longe as you speake with modestie and decent fashion as becomes the gravitie of serjant”*⁵⁵. In the same year in Weston’s Call reference is again made to robes and their significations. Specifically on sleeves it was said *“Open sleeves, to shew they must give free access to all suitors”*⁵⁶. What was said in these Calls about easy and free access to suitors provides some evidence of the existence, amongst advocates, of a principle of accepting all briefs sent. It is submitted it adds weight to the principal defence put forward by John Cooke, a barrister and not a serjeant, at his trial in the Old Bailey in 1660, encapsulated in *“but they put it upon me. I cannot avoid it, you see, they put it upon me”* – words, according to John Nutley, a crown witness at his trial, spoken by Cooke shortly after receiving his instructions to prosecute King Charles⁵⁷.

⁵² British Library. MS Harley 160. Reproduced in John Baker, *The Order of Serjeants at Law*, London, Selden Society, 1984, page 292.

⁵³ British Library. MS Harley 160. Reproduced in John Baker, *The Order of Serjeants at Law*, London, Selden Society, 1984, page 292.

⁵⁴ Lord MacMillan speculates it was exceptional such as if it was sought to compel an advocate to appear against his son or other near relation. Lord MacMillan, *Law and Other Things*, Cambridge University Press, 1938, page 179.

⁵⁵ Whitefield’s Call in 1634. Reproduced in John Baker, *The Order of Serjeants at Law*, London, Selden Society, 1984, page 373.

⁵⁶ Weston’s Call in 1634. Reproduced in John Baker, *The Order of Serjeants at Law*, London, Selden Society, 1984, page 370.

⁵⁷ State Trials 12 Charles II Page 1082.

However it is known Sir Mathew Hale, 1609- 1676, called to the bar in 1637, jurist, one of the greatest scholars of the history of Common Law, who became Chief Baron of the Exchequer, would not take briefs as a barrister in early practise for what, according to his conscience, were unjust causes and always tried to be on the “right” side of any case. Further he sought to assist the court reach a “just” verdict, whatever his client's concerns ⁵⁸. If he later saw a cause he accepted was unjust “ *he for a great while would not meddle further in it but to give his advice that it was so; if the parties after that would go on, they were to seek another counsellor, for he would assist none in acts of injustice*” ⁵⁹.

Christopher St Germain's *Doctor and Student* - The influence of conscience

Matthew Hale, of Puritan upbringing and remembered for his belief that “*Christianity is part of the Common Law of England*”, may have been influenced by reading as a student Christopher St Germain's *Doctor and Student*. Published in Latin as *Dialogus de fundamentis legum Anglie et de conscientia* in 1518, and translated into English, probably by the author in 1530, with additional chapters, is a study of the relationship between English Common Law and conscience. As the first study of the place of Equity in English Law, it is recognised as setting the terms of later discussion. St Germain was a barrister learned in Common Law, Canon Law, Civil Law as well as philosophy, other liberal sciences and theology (He was a Protestant and in that cause something of a polemicist). In form, the book is a dialogue between a doctor of divinity and a student of laws. According to the former “*Almighty God has set conscience in the midst of every reasonable soul, as a light whereby he may divine and know what he ought to do and what he ought not to do. Wherefore, forasmuch as it behoveth thee to be occupied in such things as pertain to the law, it is necessary that thou ever hold a pure and clean conscience*”. To St Germain conscience was informed by the law of God and Reason, in essence a reciprocity - do to others as you would hope to be done to you - and the law of the realm should be interpreted accordingly⁶⁰.

In the second part, Dialogue II, the doctor of divinity (really St Germain speaking through him) answers questions from the student about law and conscience in a number of practical instances. The fourth, fifth and sixth questions asked by the student are of particular relevance as they concern whether a man with

⁵⁸John Hostettler, *The Red Gown: The Life and Works of Sir Matthew Hale*. Chichester: Barry Rose Law Publishers, 2002, pp.15-16.

⁵⁹ Gilbert Burnet (Bishop of Salisbury), *The Life and Death of Sir Matthew Hale Lord Chief of England*, 1682, page 79 (in edition published by Nicholson, London, 1805). Interestingly as a result of further investigation of two cases that were brought to him which seemed poor but were really “ *very good and just*” he “*slackened much of his former strictness in cases upon ill circumstances that appeared in them at first.*”

⁶⁰Christopher St Germain, *Doctor and Student. Dialogues between a doctor of divinity and a student in the laws of England*. Revised and corrected by William Muchall, Cincinnati, Robert Clarke & Co 1880, page 43.

conscience can represent a party in a dispute⁶¹. The answer in each case was clearly no as although counsel could plead law conclusively favouring a party it would produce an inequitable result. “*Therefore, he may not, with conscience, be of counsel*”. Until William Blackstone’s *Commentaries on the Laws of England*, 1765 – 69, St Germain’s *Doctor and Student* was read as a student primer. Much aided by the clarity of its introduction to common law concepts, the work remained popular until the 19th century in England, colonial America and latterly the United States. Discussion of conscience and law, its original purpose, particularly the over riding importance of conscience in taking or refusing to accept causes, may have contributed to the primacy of conscience amongst attorneys over a cab rank principle in America⁶².

Indeed it is further possible to speculate that in England at the time of the trial of John Cooke in 1660 and beyond there would have been advocates who put conscience above the evolving notion of the cab rank as a rule of etiquette.

Tentative conclusions.

It can be said with certainty that the cab rank rule - the principle of accepting all briefs in England and Wales, provided they were within their competence, adequately remunerated and did not cause professional embarrassment - became a cornerstone of barristers’ practice after Thomas Erskine’s defence of Thomas Paine in 1792. With it came more or less public acceptance barristers spoke for their fee on behalf of clients and in doing so did not express their own views. Locating the earlier origins of the rule or principle, and strength of adherence to it, is not helped by rather sparse historical records.

For his decision to represent Paine, Erskine faced opposition in much of the press and even some in the legal profession. Whilst it is true supportive comments for the principle may be seen, for example by Doctor Johnson in 1791, opposition to Erskine taking Paine’s case, and implicitly the principle of professional etiquette under which he acted, came from much of the press and even from within the legal profession. (Whether those who criticised Erskine were opposed to the principle in general or just its application in cases of seditious libel or treason cannot be ascertained.) The slender evidence from the early 18th Century, namely that of the

⁶¹ Respectively : IV. “*Whether a man may with conscience be of counsel against him that he knoweth is the heir of right, but he is certified bastard by the ordinary*” V. “*Whether a man may with conscience be of counsel with a man at the common law, knowing that the defendant hath sufficient matter to be discharged in the chancery, that he may not plead at the common law*” VI. “*Whether a man may with conscience be of counsel against the feoffee of trust in an action of trespass that he bringeth against his feoffor of trust for taking the profits*”. Christopher St Germain, *Doctor and Student. Dialogues between a doctor of divinity and a student in the laws of England*. Revised and corrected by William Muchall, Cincinnati, Robert Clarke & Co 1880, pp. 115 – 122.

⁶² Another reason put for the absence of a cab rank rule is that Attorneys in the United States, in contrast to barristers in England and Wales, have always had direct access to their clients, like English and Welsh solicitors, who have never developed a similar rule.

experience of Charles Talbot, points to lack of comprehension of the principle outside the Bar at least amongst the political classes.

The Treason Trials Act 1695 Act was significant in that it gave implied recognition that those who acted for defendants in treason trials spoke for their fee and were not to be taken as holding the views of their clients. In 1660 the principle of accepting all properly remunerated briefs formed a crucial part of John Cooke's defence in his trial. Whilst the judge and counsel were certain it could not apply to prosecuting a monarch for treason, there seems to be at least some recognition it might apply as a rule of professional etiquette in other matters. Just how far this rule was followed by barristers and serjeants is unclear. It is known Sir Mathew Hale would not take briefs as a barrister in early practice which he considered were unjust causes, perhaps influenced by the writings of Christopher St Germain from the previous century. He is unlikely to have been alone. It is not impossible to conceive of two approaches to professional behaviour one willing to take all briefs whilst the other would filter acceptance by conscience. During the Interregnum (1649 -1660) and preceding decade or so the cases involving Coney, Fuller and Conyers indicate acceptance of briefs from all and not associating counsel with the views, conduct and interests of his client was not broadly understood by rulers and not followed by some important members of the legal profession, albeit perhaps from fear of the consequences of doing so.

Passages from available speeches made in the 16th and the first half of the 17th century by the Lord Chief Justice of the Court of Common Pleas to new serjeants about the ethics of their profession show concern about assisting all who request counsel. However it is unclear to what extent this professional principle was undercut, or competed with, extracts that urge dissuasion of clients by serjeants from pursuing unjust causes and to do nothing against their consciences, implying that the strength of case and the character of a client should inform a decision whether to represent him or her or not. (This tension between the two contrasts with the Scottish Court of Session in 1532 which unambiguously established a rule close to a modern cab rank rule). Although identifying the precise origins and adherence to a cab rank rule is difficult before Lord Erskine's defence of Thomas Paine, we can say with assurance in the competition between accepting all properly remunerated matters, subject to limited exceptions of professional embarrassment, and that of filtering acceptance of cases by conscience, the former won out in England and Wales and the latter prevailed in the United States.

