

The Trial of John Peter Zenger

A Play in Five Scenes

By

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The Trial of John Peter Zenger

Cast of Characters, in Order of Appearance (With Names of Actors at Initial Performance)

John Peter Zenger, a Printer (Scott Armstrong)
Chief Justice James Delancey (Tim Miller)
James Alexander, a Lawyer (David Keyser)
Richard Bradley, Attorney General of New York (Mac Williams)
John Chambers, a Lawyer (Rick Froom)
Andrew Hamilton, a Lawyer (Michael E. Tigar)
Margaret Hamilton, His Daughter (Katherine Tigar)
Peter Zenger, Zenger's Son (Steve Cummins)
Thomas Hunt, Foreman of the Jury (G. William Birrell)

Scene I: Supreme Court, New York City, April 1735
Scene II: Andrew Hamilton's Home in Philadelphia, August 1735
Scene III: The Black Horse Tavern, New York City, August 1735
Scene IV: Supreme Court, New York City, August 1735
Scene V: Supreme Court, New York City, August 1735

Program Notes:

The libel trial of John Peter Zenger was a celebrated event in American colonial history: it fueled the dispute over freedom of the press in New York for decades thereafter.

Briefly, Zenger was arrested and charged with libeling the Colonial Governor, William Cosby. The Chief Justice, James Delancey, who presided at the trial, was a wealthy adherent to Cosby's cause, and was only 32 years old at the time of the trial. Cosby appointed Delancey to be chief justice when the former Chief Justice ruled against Cosby in a celebrated suit. But he kept Delancey on a tight rein, and appointed him to serve during Cosby's "will and pleasure." Zenger's paper protested these arbitrary actions.

Zenger was initially represented by James Alexander, a young lawyer who was a financial supporter of Zenger's paper and probably author of some of its more controversial material. When, as we will see, Chief Justice Delancey disbarred Alexander in reprisal for his moving to unseat him, the defense was left in a quandary. Zenger moved for appointed counsel, and John Chambers was appointed. Chambers, however, was a known supporter of Governor Cosby, and Zenger's friends feared to let him conduct the defense alone. (Zenger was also represented by William Smith, who was also disbarred for joining in the motion. For purposes of this dramatization, we have left Mr. Smith in the wings.)

Enter Andrew Hamilton. Hamilton, born in Scotland in 1676 (1656 according to one source), was a renowned trial lawyer who in 1735 lived in Philadelphia. He was (according to some sources) the only American of his time who had been admitted to practice in the Inns of Court in London. He was counsel to the family of William Penn in a celebrated case that spawned legal proceedings on both sides of the Atlantic. He was a friend of Benjamin Franklin, who was at that time a printer in Philadelphia. Hamilton held many public offices in Pennsylvania, and was Speaker of the Assembly from 1729 until he retired in 1739 (with the exception of one year).

Zenger was a German Immigrant, born in 1697. He came to America in 1710. Zenger did an apprenticeship and thereafter ran a printing business in various locations until he was financed in business by the opponents of Governor Cosby in 1731. His New York Weekly Journal, the subject of this prosecution, first appeared in November 1733. Governor Cosby finally became sufficiently upset by Zenger's paper that he began proceedings against it in October 1734.

The script of this play is based in part upon the transcript of the trial authored by Hamilton and Alexander, and upon other contemporary records. Much dialogue has been recreated, and the proceedings have been heavily edited. However, the attitudes and thoughts expressed by the parties are well-documented. This play faithfully recreates the role of advocates in 18th Century libel cases, of which Zenger's was the most celebrated. For further reading, See 5. Katz, ed., a Brief Narrative of the Case and Trial of John Peter Zenger, Printer of the New York Weekly Journal, by James Alexander (2d Ed. 1972); V. Buranelli, ed., Notes on the Trial of Peter Zenger (1957) L. Rutherford, John Peter Zenger: His Press, His Trial (1904).

Hamilton's arguments in Zenger's case represented a considerable stretching of the rigorous law of libel as it stood in 1735. He had concluded that he could not convince the Judges of his position, and was really speaking to the Jury. Indeed, Professor Katz's Book reprints some rejoinders to Hamilton that appeared in print in New York two years after the trial. However, Benjamin Franklin wrote in 1738 that an English lawyer said of Hamilton's argument: "If it is not law, it is better than law, it ought to be law, and it will always be law wherever Justice prevails." Gouverneur Morris said much later that "the trial of Zenger in 1735 was the Morning Star of that Liberty which subsequently revolutionized America."

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The Trial of John Peter Zenger

Scene I

The Courtroom in New York. Alexander is at counsel table. The Attorney General is at his table. Chambers is seated in the audience. Zenger is in the dock.

Voice off: Be upstanding in court.

(The Chief Justice enters. He takes his place. He nods to everyone to be seated.)

Chief J: The cause is the Attorney General against John Peter Zenger, on information for a misdemeanor. Is the prisoner in court?

Alexander: He is, Your Honor.

Chief J: Mr. Attorney General?

Att'y Gen'l: Your Honor, I have filed the information with Mr. Clerk. In brief, I charge that John Peter Zenger, of the city of New York, being a seditious person; and a frequent publisher of false and seditious libels, and wickedly and maliciously devising to traduce, scandalize and vilify the government of our Lord the King under the administration of Governor William Cosby and his ministers and officers, did upon two named days print and publish and cause to be printed and published certain false, malicious and scandalous libels.

Chief J: This is not an indictment, then?

Alexander: As Your Honor well knows, for your honor was unable to persuade the grand jury to return an indictment. So it is that Mr. Attorney comes to court with his information.

Chief J: That will be enough, Mr. Alexander. The court knows the state of these proceedings. And what, has that to do with the application you bring before me?

Alexander: Everything, your honor. From the grand jury refusing to indict, to the order in council to burn Mr. Zenger's papers, to the excessive bail, to the application of today, it is all woven from the same cloth.

Chief J: You have a care, Mr. Alexander. The court is not accustomed to these liberties. What is your application?

Alexander: May it please the court. On the 15th of October last, being the year 1734, Your

Honor charged the grand jury in terms that suggested that Zenger should be indicted for felony for publishing certain seditious libels, allegedly criticizing the Governor and his officers. The grand jury declined to indict. Two days later, on the 17th of October, the Governor and his council, which Governor had appointed your honor, ordered the assembly to meet and inquire into Zenger and those who wrote the words that gave the Governor offense. When the Assembly refused to do any such thing, and so reported on the 22d of October, the council took matters into its hands. At a meeting of the council at which you, Mr. Chief Justice, were present, it was determined to order Zenger's papers burnt by the public hangman. When the Court of Quarter Sessions refused to carry out this order, because it was clearly unlawful, the Sheriff ordered his own slave to light the fire. That was November 6. On November 17, the Sabbath, the prisoner Zenger was arrested in his home. Was this upon a judicial warrant? No, Your Honor, it was upon another of these orders of the council, at a session presided over by the Governor himself. So Zenger was held until the grand jury's term ended without it returning an indictment. If Zenger then had a hope of his freedom, it was dashed by the Attorney General, who filed this information on the very day the grand jury adjourned without day, the 28th of January 1735.

Chief J: You omit to say, Mr. Alexander, that I myself issued the writ of habeas corpus to have Mr. Attorney general show cause why Zenger was held.

Alexander: And then again committed Zenger to jail for want of the four hundred pounds bail.

Chief J: Enough of this. What is your application?

Alexander: We take exception, pleasing the Court, to the commission by which you sit.

Chief J: You take exception to what, sir? Never was a Scotsman but knew the sea, but you, sir, are closer to the wind than is safe for your craft.

Alexander: Your Honor's commission, and I have it here, recites that Governor William Cosby, exercising the authority of King George the second, appoints you to serve as Chief Justice in this province, and here are the words upon which we found our exception "during our will and pleasure."

Chief J: And what moves you to take exception, as you put it, to my commission?

Alexander: My submission rests upon two points, the one in law and the other in fact. By the statutes and the common law, judges are to be appointed and serve during good behavior, and not at the will and pleasure of the Sovereign's deputy. A judge who sits at the Governor's pleasure is no judge at all, but only another arm of the executive. Nor does it appear that the commission was granted with the advice and consent of the council, without which advice and consent his excellency the Governor cannot issue a commission. That is my first

submission.

Chief J: Mr. Attorney General?

Att'y Gen'l: Your Honor, Mr. Alexander is out of place. Not simply that he does not, so far as one can see, know his place, but he does not know the law of this place. Whatever Parliament may have done about the judges of England, His Majesty's right to control matters in these, his colonies and dominions, is not subject to such a question. And if His Majesty should wish his judges in these colonies to serve at the will and pleasure of a Governor, that is his prerogative. . . and the Governor's.

Chief J: I thought as much. Your second submission, sir.

Alexander: It follows from the first. You serve at the Governor's will and pleasure. Now, this is the same Governor that sent to have Zenger arrested without a judicial warrant, that had Zenger's newspapers burned, and that sent your honor before the grand jury to charge them so that Zenger would be indicted. If you sit at the will and pleasure of such a governor as Mr. Cosby, then his cause is your cause, and my Lord Coke, (Nods at Attorney General) who is authority on both sides of the ocean, says in Dr. Bonham's case, that "it is an established maxim that no man can be judge in his own case."

Chief J: That will be enough, sir. I see where this is going. You thought to gain a great deal of applause and popularity by opposing this court, but you have taken matters so far that either I must go from the Bench or you, Mr. Alexander, from the Bar. Therefore, this court orders that you, having been forewarned, having actually put these exceptions into court, your name is ordered struck from the roll of attorneys.

Alexander: You order me disbarred? For filing a motion in court?

Chief J: Yes, sir, I do. I tell you Alexander, that the grand jury heard, as did I before them, enough of your dealings with the prisoner Zenger that I know, although perhaps I cannot prove, how this scandalous paper came to be. Your money, Alexander, yours and others of your party. Your words, Alexander. And now your insolence. I tell you straight, sir, that I would as leave you stood in the dock with the prisoner, but I content myself with the order I have given.

Zenger: Your Honor, does this mean Mr. Alexander cannot be my attorney?

Chief J: It means, sir, that he cannot be anyone's attorney, not in this court.

Zenger: Then, if I understand the law, this is a case of misdemeanor, because the grand jury did not return a true bill.

Chief J: Sir, this point has been argued by Mr. Alexander.

Zenger: Not this point, I should hope. In cases of misdemeanor, I am by the common law allowed counsel. Is this so?

Chief J: Ah. . . yes.

Zenger: Then I should wish that the court would appoint a counsel for me, to conduct my defense.

Chief J: (After a look at the Attorney General.) Very well. I see Mr. Chambers in court. He is appointed to act as your counsel. Mr. Chambers?

Chambers: (Comes forward.) Your Honor?

Chief J: You will act as the prisoner's counsel.

Zenger: But Mr. Chambers is a member of Governor Cosby's party.

Chief J: And perhaps the more likely to know the proper procedure in this court, for all that. Mr. Chambers, have you an application?

Chambers: Only for a struck jury, selected from the book of freeholders, your honor.

(Zenger tries to get Chambers' attention.)

Chief J: Have you another application, sir? (Smiles.)

Chambers: No, sir.

Chief J: The court appreciates your service, Mr. Chambers. We stand adjourned to the 4th of August of this year, three and one-half months hence. The prisoner is remanded to jail.

(Lights down.)

Scene II

Library in Hamilton home, Philadelphia, August 1735. There is a large chair, in which Hamilton has fallen asleep, his foot on a gout stool. This is right front. (The rest of the set is in darkness, and this area is defined with a spotlight.) Margaret enters from left, and stands in front of chair.

Margaret: Father. Father....

Hamilton: (Waking up.) HmMMMM (Stretches, yawns.) Oh, Margaret. I must have drifted off. (Pauses.)

Margaret: Father, the coach is here. Samuel has put the bags in, all but your satchel.

Hamilton: Oh, good. Good. Margaret, please, help me gather these papers. (Rises, with difficulty.) There, that one. (Margaret begins to collect books and papers.)

Margaret: Father, are you sure you are well enough for this. All the way to New York and then a trial? Your gout is so bad that it.

Hamilton: (Interrupting.) Margaret, I'm quite well aware of my gout, thank you. My gout is so bad that it threatens to take me like the forester takes the tree.

Ham. & Mar: (Together, it being obvious that this is a ritual between father and daughter.)
With broad ax blows at the base.

Margaret: But why you father. Why must you go? It is not as if Mr. Franklin were being tried. He at least is here in Philadelphia, and a friend. You don't even know this man Zenger.

Hamilton: Margaret, I am going because Alexander asked me to. He is an old friend from many cases, and he is in trouble. I am not quite sure how much trouble. Look ye here. Look at these articles. Do you think Zenger, with his background, could have written them. Portraying the Governor as a dog. Dripping with irony.

Margaret: If Zenger did not write them, who then?

Hamilton: Why Alexander, of course. Don't you see. That's why this case is so important to him. If Zenger does not keep silent, Alexander is in the dock. And Zenger has kept silent, and has spent eight months in jail when just by telling the Governor who wrote those articles he could be free. Eight months, from November last until now.

Margaret: But, father, why can't Zenger be on bail. You told me it was four hundred pounds. Surely Alexander could raise that much, even if Zenger could not.

Hamilton: I don't know, Margaret. I don't know. Perhaps the plan is to gain public sympathy for poor Zenger, so the jury will be more inclined to acquit.

Margaret: But that does not tell me why you must go. Surely there are other lawyers in New York than Alexander.

Hamilton: Of course there are other lawyers. Just as William Penn could have had other lawyers. But he did not. He sought me, and we went to London and pleaded for him. And saved his inheritance. Of course there are other lawyers, but there is not another in His Majesty's American colonies who is a member of the Inns of Court in London. And not another one who is speaker of the Assembly in Pennsylvania. (Pauses, grimaces.) And not another who is a sixty-eight year old windbag with the gout. Oh, Margaret, I don't know.

Margaret: Father, you are so stubborn. Mr. Franklin says it is because you are a Scotsman.

Hamilton: Margaret, you stay away from Mr. Franklin. He can't restrain his tongue, ahem, nor his other appetites. I have loaned five hundred pounds to young Ben Franklin, to help him start his paper. I am not willing that he should be wooing my daughter into the bargain. (Pauses.) As for me, I am stubborn by birth, a dissenter by choice, and an advocate by profession. And we are going to New York.

Margaret: Of course, father. And I know you have no equal as lawyer. I know that.

Hamilton: Not so, Margaret. Not I. Margaret, I tell you a story. These Quakers, as they call themselves, come together in a meeting house. They sit in straight chairs, in silence, and soon or late one of them speaks. They claim, or so they say to believe, that the speaker voices not his own voice, but that the spirit moves and calls out from that frail vessel of a body. And I would hope to think that when I speak to a jury about liberty, I only gave voice to a spirit, not God's but man's, that strives and struggles to be free. (Pauses, tired.) Let's go.

Scene III

The black horse tavern, with two tables. Alexander and Chambers are discussing the case. Zenger's son is listening.

Chambers: But what was I to do?

Alexander: Do? You were to have asked that the exceptions be made part of the record.

Chambers: And join you, thrown out of court?

(Hamilton and Margaret enter.)

Hamilton: Alexander, my good friend. And you must be Chambers. (They shake hands.)

Chambers: An honor to meet you, sir.

Alexander: How are you, sir?

Hamilton: How I am, Alexander, is that I have an attack of gout that threatens to fell me like a tree.

Margaret: I'm worried, Mr. Alexander. Can you reason with him?

Hamilton: Alexander, don't even try. What Margaret means is that I have been so cross for the whole journey that she despairs whether I will ever speak a civil word

again. Just the mood one needs for a trial like this one. (Turns, notices young Zenger.) And who is this?

Zenger, Jr.: Peter Zenger, sir. The son of John Peter. They say, sir, that I am called to testify tomorrow against my father.

Hamilton: Who says?

Chambers: Young Zenger here has been subpoenaed by the Attorney General. We may be able to interpose an objection.

Hamilton: And when you have done with that objection, I suppose you think to argue to this Chief Justice Delancey the finer points of libel.

Chambers: I had prepared some authorities on that subject.

Hamilton: Oh, you are a fox, Chambers.

Chambers: Why, thank you, sir.

Hamilton: That is not a compliment. A fox knows many things, but they are little things, clever things. For such a case as this, you must, like the hedgehog, know one big thing. And that, young sir, is how to speak to a jury.

Chambers: I had only thought to look up the decisions and statutes, to be of what assistance I might in this case. But, there has been a difficulty with the jury.

Hamilton: Difficulty?

Alexander: The clerk of court was choosing a very particular sort of jury, to consist exclusively of the governor's baker, tailor, shoemaker, candlemaker and so on.

Hamilton: And young Chambers, did you have a thought to object to packing the jurybox with these tradesmen, these men who might "crook the pregnant hinges of the knee, when thrift may follow fawning"?

Alexander: (Breaking in). Oh, yes. Zenger passed a note, and Chambers objected. Now we think the jury will be taken only from the list of freeholders.

Zenger, Jr.: That will mean that most of them will be inclined against the Governor and in favor of my father.

Hamilton: How so?

Zenger, Jr.: Well, sir, father and Mr. Alexander have known since January that this case would sometime come before a jury. And since there are only one thousand men listed in the freeholder book and eligible to serve, we have each week had an article in the newspaper about the duties, and the powers, of jurors in libel

cases.

Margaret: How did you know what to write in such an article?

Zenger, Jr.: Well, Mr. Alexander

Hamilton: (Interrupting) That will be enough. Margaret, there are some things in this practice of law that best repose in confidences shared and kept. Let us leave it that while Zenger is in prison, many talented writers have done their part. (Turns to Chambers.) now, listen to me, Chambers. You are, I hear, of Governor Cosby's party, and signed an address complimenting him.

Chambers: But, sir

Hamilton: Please, I am only saying facts. I don't care a jot for your politics, sir. You have sworn an oath, the same one as mine, and you will be faithful to it by defending this client even if it means the ruin of your political fortunes and perhaps of the governor himself. When we are done, you will probably surprise even yourself at how far loyalty to our client can carry you. I trust you, sir, to keep these confidences you have learned. Zenger has chosen to be silent, and not to name the authors of these supposed libels. We can but salute his courage. Young Zenger, I must go to the jail and speak to your father this night. I cannot think what manner of man would call a son to testify against his father, but, young man, this Attorney General seems bent upon just that mischief. Chambers, come to my rooms for dinner, you, too, Alexander, and bring your clever ideas. On tomorrow, I will play hedgehog to your fox, and together we will deprive the Chief Justice, that pompous periwig-pated hunter, of his intended quarry. Come along, Margaret.

Scene IV

(The courtroom, just before the trial is to begin. The Chief Justice is standing in front of bench, robe on but no wig. The Attorney General enters from left.)

Att'y Gen'l: You asked me to come.

Chief J: Yes, Bradley. They say that Zenger has new counsel.

Att'y Gen'l: Who says?

Chief J: The rabble. The prisoner's friends. The cheap rag you have tried to suppress. What's the difference? They have brought Andrew Hamilton from Philadelphia.

Att'y Gen'l: With respect, Your Honor, am I to tremble before this Hamilton? He was, so the legend goes, formidable as a younger man and now, in his seventh, or perhaps eighth decade, somewhat a parody of himself. The legal argument is

the same. I can prove Zenger published the papers. The rest is Your Honor's business.

Chief J: Not quite. Suppose he takes you on a new tack. Suppose he sails right into the wind of your argument and aims for the jury? What then, Bradley? Are you the man to pursue him?

Att'y Gen'l: I can, I think, chase the old man on to whatever lee shore he heads for.

Chief J: Bradley, with all respect, don't let your confidence outrun your ability.

Att'y Gen'l: And with respect to Your Honor's position, and to the family name you bear, it is my job to prosecute this case.

Chief J: And mine to judge it. I say only that your arguments may at some point run out. And if this fellow Hamilton should decide to rest himself upon some novel theory, that is my province and not yours. Do not be drawn into public confrontations that I can rule out of bounds, and that you cannot win.

Att'y Gen'l: I appreciate Your Honor's concern, though your honor will excuse me if I do not share your assessment of my abilities.

Chief J: I am not talking about abilities, but of whose responsibility a thing may be.

Att'y Gen'l: if that is Your Honor's concern, so be it. I ask only that if your honor is to try my case, then, for the sake of my honor and my office, don't lose it for me.

(Lights out.)

Scene V

The courtroom. Zenger is in the dock. Chambers is alone at the defense table. Attorney General at government table. Hamilton and Margaret are in front row of audience. Jury foreman Thomas Hunt is in front row of audience.

Voice off: Be upstanding in court. (Chief justice enters.)

Chief J: Is the prisoner in court?

Att'y Gen'l: Yes, your honor.

Chief J: The Attorney General against John Peter Zenger.

Att'y Gen'l: This is an information for publishing a false, scandalous and seditious libel, in which his Excellency the Governor of this province, who is the King's immediate representative here, is greatly and unjustly scandalized, as a person who has no

regard to law nor justice. In particular, that Zenger did liken the conditions of free subjects of these provinces to slavery on account of proceedings taken by and under the authority of his Excellency the Governor. Some of these libels, more particularly described in the information, were written in a scoffing manner, but with the clearest innuendo and overtones of sedition. Other libels appear in the papers to be placed in evidence. All to the great disturbance of the peace of this province, to the great scandal of our said Lord the King; of his Excellency the Governor and all others concerned in the administration of the government of this province.

Chief J: John Peter Zenger, you have seen the information against you. How do you plead?

Zenger: I am not guilty, Your Honor.

Chief J: And how will you be tried?

Zenger: By God and my country Your Honor.

Chief J: Is the jury in court?

(House lights up half. Spot on foreman Thomas Hunt.)

Hunt: Thomas Hunt, foreman, Your Honor. (Motions to designate audience.) And the other jurors.

Chief J: Members of the jury, you have heard the charge, and the prisoner's plea of not guilty. And you have heard that he places himself upon the country for trial, which country you are. Hearken to the evidence. (House lights down.)

Chambers: First, may it please the Court, I have studied the authorities and respectfully submit that proof of a libel requires that some particular person be held up to ridicule, and that it must appear from the paper so clearly who is meant that there is no room to doubt. We believe that when the evidence is received, that Mr. Attorney will fail in his proof on this point. That is, the innuendos referred to will not be made out by the proof, so will show that Mr. Zenger did not mean to refer to the Governor. (Zenger passes chambers a note.) Your Honor, I have also an application. I introduce Andrew Hamilton of the Bar of Gray's Inn, London, and of the city of Philadelphia, as counsel for the prisoner.

(Hamilton hobbles up.)

Chief J: Your reputation precedes you, Mr. Hamilton.

Hamilton: As yours precedes you, Mr. Chief Justice.

Att'y Gen'l: We call Peter Zenger as our first witness.

(Peter Zenger comes forward. Zenger passes Hamilton a note. Hamilton leans back

to confer. Hamilton rises.)

Hamilton: What is the purpose of calling this young man.

Att'y Gen'l: To prove the publication, by the prisoner Zenger, of these libels.

(Hamilton looks queryingly at Zenger, Sr., who nods vigorously.)

Hamilton: Very well. I will say that while I agree with Mr. Chambers as to the matters he spoke of, I cannot think it proper for, me to deny the publication of a complaint, which I think it is the right of every freeborn subject to make, when the matters so published can be supported with truth. Therefore, I'll save Mr. Attorney the trouble of examining witnesses to that point.

Att'y Gen'l: Do I understand that he confesses publishing these papers?

Chief J: Is that how you wish to be understood, Mr. Hamilton?

Hamilton: Understood! I wish to be understood as seeing what is plain to everyone in this court. If the boy speaks the truth, his father's liberty may be imperilled. If he lies, he imperils his own. And if he should refuse to give evidence, Your Honor would no doubt commit him for contempt. I wish to be understood that we will have done with this business of calling a child to bear witness against his father. And I, for my client, confess that he printed and published the two newspapers set forth in the information.

Att'y Gen'l: Then, our witnesses may be discharged. We have no further occasion for them.

(There is about ten seconds of silence. Glances are exchanged between Chief Justice and Attorney General.)

Chief J: Well, Mr. Attorney, will you proceed?

Att'y Gen'l: Indeed, sir, as Mr. Hamilton has confessed printing and publishing these libels, I think the jury must find a verdict for the King; for even supposing, as Mr. Hamilton made so bold to suggest, that they were true, the law says they are not the less libelous for that. Nay, indeed, the law says, their being true is an aggravation of the crime.

Hamilton: Not so neither, Mr. Attorney, there are two words to that bargain. I hope it is not our bare printing and publishing a paper that will make it a libel. The words themselves must be libelous, that is, false, scandalous and seditious, or else we are not guilty.

Att'y Gen'l: Mr. Hamilton misapprehends the nature of a libel. Government is a great blessing for civilization. Hawkins says, in the pleas of the crown, the

following: "It is certain that it is a very high aggravation of a libel, that it tends to scandalize the government, by reflecting on those who are entrusted with the administration of public affairs. Such a libel has a direct tendency to breed in the people a dislike of their government, and incline them to faction and sedition."

This doctrine is so well-settled that we find it in biblical teaching. Did not Paul say, "I wish not brethren, that he was the high priest: For it is written, thou shalt not speak evil of the ruler of the people."

We have set these libels out in the information. Some of them do not in so many words speak of his Excellency the Governor and of his magistrates, but the innuendo is clear. The innuendo is clear.

Moreover, the publisher of a libel, such as the prisoner Zenger, is as much guilty as the author, who sometimes cannot be discovered.

Zenger's paper has scandalized the Governor, the King's immediate representative and the Supreme Magistrate of this province. Nothing could have been more scandalous than to print, as the prisoner did, and is now admitted, that the Governor, Council and Assembly threaten the people of this province with slavery, that law is at an end, that Judges are arbitrarily displaced and new courts erected without consent of the Legislature, that trial by jury is threatened and men's liberties taken away. All this is in these papers, all this passed out of Zenger's hands into the public street.

If these are not libels, I do not know what one is. Yet the liberality and humanity of his Excellency permitted these libels to go on for some little time, before his Excellency at last directed this prosecution to put a stop to this scandalous and wicked practice of libeling and defaming His Majesty's government and disturbing His Majesty's peace.

That, if the Court please, is our submission.

Chief J: Mr. Hamilton.

Hamilton: May it please the Court. I agree with Mr. Attorney that government is a sacred thing. I differ very widely from him when he insinuates that the just complaints of a number of men who suffer under a bad administration, is libeling that administration. Had I believed that to be the law, I should not have given this Court the trouble of hearing anything I could say.

Now, I will say that when I read the information, that I could not, with all my poor powers, determine that the Governor was the person referred to in all these papers that Zenger published. I thought that these papers were written by a person with an extraordinary zeal for liberty, and that Mr. Attorney had

reacted out of an extraordinary zeal for power, to correct my client's indiscretion and to show to his superiors that he had their interests in mind.

But that was not so. The *innuendo* by which these words are said to refer to the Governor is not Mr. Attorney's alone. This prosecution, we now hear, was directed by the Governor and Council.

I observe also in court the extraordinary appearance of people in all conditions, and I have reason to think that those in the administration have by this prosecution something more in view, and that the people believe they have a great deal more at stake than I apprehended. Therefore, it becomes my duty to be both plain and particular.

I begin with the authorities that Mr. Attorney brings to court to support his cause. These are Star Chamber cases. Star chamber! Whipping good men through the streets. Breaking dissenters on the rack. I was in hopes that as that terrible court, where those dreadful judgments were given, was long ago torn down as the most dangerous court to the liberties of the people of England that ever was known in that Kingdom, that Mr. Attorney would not have attempted to set up Star Chamber here, nor to make *their* judgments a precedent to *us*. It is well known, if Mr. Attorney does not know it, I hope this Court does, that what would have been judged treason in those days has since not only been practiced as lawful, but the contrary doctrine has been held to be law.

And just as times have made very great changes in the laws of England, so there is good reason that places should do so too.

I speak of Governor Cosby. Is it not surprising to see a subject, upon his receiving a commission from the King to be a Governor of a colony in America, immediately imagining himself to be vested with all the prerogatives belonging to the sacred person of his prince. Is it so hard a matter to distinguish between the Majesty of our Sovereign and the power of a Governor of these plantations. Yet in all the cases that Mr. Attorney has cited, to show the duty and obedience we owe to the Supreme Magistrate, it is the King that is meant, though Mr. Attorney is pleased to urge them as authorities to prove the heinousness of Mr. Zenger's offense against the Governor of New York.

Att'y Gen'l: Your Honor, that is all beside the point. The case is whether Mr. Zenger is guilty of libeling his Excellency, the Governor of New York and indeed the whole administration of the government. Mr. Hamilton has confessed the printing and publishing and nothing is plainer than that the words Zenger used, which are cited in the information, are scandalous, and tend to sedition, and to disquiet the minds of the people. If such papers are not libels, at any time and place, there can be no such thing as a libel.

Hamilton: Of course there are such things as libels. But what Mr. Zenger published is not

one. Mr. Attorney just now used the words scandalous, seditious, tending to disquiet. But, whether by design or not I will not say, he omitted the word false.

Att'y Gen'l: I think I did not omit the word false, but it has been said already that it may be a libel, even if it be true.

Hamilton: No. We are to be tried upon this information now before the Court and jury, to which we have pleaded not guilty. We are charged with printing and publishing a certain false, malicious, seditious and scandalous libel. The word false must have some meaning, or else how came it there? I hope Mr. Attorney will not say he put it there by chance, and I submit the information would not be valid without it. I put the case, suppose the information had been for publishing a certain true libel, would that be the same thing? Could Mr. Attorney support that by any precedent in English law?

To show I am in earnest, and save the Court's time, if Mr. Attorney can show us that what Mr. Zenger published about the Governor is false, I will admit that what Mr. Zenger published was scandalous, seditious and a libel. So now the work is shortened, and Mr. Attorney has only to prove the words to be false, and we are guilty.

Att'y Gen'l: We have nothing to prove. The printing and publishing are confessed. I hope some regard will be had to the authorities that have been produced, and that even if all the words be true, that will not help them. Chief Justice Holt, in his charge to the jury in Tutchin's Case, made no distinction whether Tutchin's papers were false or true. And none ought to be made here. In any case, Your Honor, if it was necessary, which I insist it is not, how can we prove a negative?

Hamilton: "How can we prove a negative?" Very well, if it seem beyond his powers, we will save Mr. Attorney the trouble of proving this negative. We will prove that these papers, and every word in these papers said to be libels, every word about the Governor and his administration to be true.

Chief J: (After the Attorney General looks at him appealingly.) You cannot be admitted, Mr. Hamilton, to give the truth of a libel in evidence. A libel is not to be justified, for it is nevertheless a libel that it is true.

Hamilton: I have not in all my reading met with an authority that says we cannot give the truth in evidence upon an information for a libel.

Chief J: The law is clear, that you cannot justify a libel.

Hamilton: We are not "justifying" a libel, we are *not guilty* of any libel. It is always admitted in any criminal case, that the prisoner may present evidence of the truth of the matter, as going to his acquittal by the jury summoned to hear the

facts and decide where the truth lies.

Chief J: Give me a case that says you may give the truth of a libel in evidence.

Hamilton: I shall do so. But I beg to observe that the law of libel is a child, if not born, yet nursed up and brought to full maturity in the Court of Star Chamber.

Chief J: Mr. Hamilton, you'll find yourself mistaken, for in Coke's Institutes you'll find informations for libels, long before the Court of Star Chamber.

Hamilton: I thank Your Honor. That is an authority I did propose to speak to by and by. But as you have mentioned it, I turn to it now. I think it is in the third volume of Coke's Institutes, under the title "libel." It is the case of John de Northampton, for a letter to one of the King's advisors. But the case of John de Northampton could not be a greater, or at least a plainer, authority for us. By the judgment that my Lord Coke sets out, as the latin text has it, *qua littera continet in se nullam veritatem*. The libelous words were utterly false, and the falsehood was the ground of the crime. And is that not what we contend for? Do we not insist that the falsehood makes the scandal, and both make the libel? And how shall the jury know whether the words in Zenger's paper are true or false but by admitting us to prove them true, since Mr. Attorney will not prove them false? I come to the case of the King against Tutchin, which seems to be Mr. Attorney's chief authority. (Crosses, takes book from the Attorney General's table.) Mr. Attorney is twice mistaken. At his trial Tutchin was asked by the King's Counsel, whether he would say the papers were true, and he never pretended that they were. And, in summing up, Chief Justice Holt turned to the jury and said "you" are to consider the meaning of the words used.

Again in Fuller's Case, the prisoner had made a scandalous and infamous charge of bribery against the late King. Chief Justice Holt said to Fuller, "can you make it appear these words are true? You might have had subpoenas for your witnesses against this day. If you write such things as you are charged with, it lies upon you to prove them, at your peril." Thus said, and thus did, that great Chief Justice, Lord Holt. And now we have acknowledged the printing and publishing of these papers and, with the leave of the Court, we are ready to prove them to be true, at our peril.

Chief J: Let me see the book. (Chambers crosses to the Chief Justice with book and hands it up. There is a lengthy pause.) Mr. Attorney, you have heard what Mr. Hamilton has said, and the cases he has cited, for having his witnesses examined to prove the truth of the several facts contained in Zenger's papers. What do you say?

Att'y Gen'l: The law in my opinion is very clear. They cannot be admitted to justify a libel, for by the authorities I have already read to the Court, it is not the less a libel because it is true. I think I need not trouble the Court with reading the cases

over again; the thing seems to be very plain, and I submit it to the Court. (Begins to sit down, then reconsiders.) There is another ground. I see now where Mr. Hamilton is going. He wants to turn this trial into a contest of party and faction, and not a court of law. He would have sedition and scandal paraded from the witness box before this gallery of Zenger's supporters. That is his object, and to curtail such an ambition is the right reason of the law.

Chief J: Well, Mr. Hamilton, the Court is of the opinion that you may not be permitted to prove the facts in the papers. These are the words of the book, "It is far from being a justification of a libel that the contents thereof are true."

Hamilton: These are Star Chamber cases

Chief J: Mr. Hamilton, the Court has ruled. You are not permitted to argue against the opinion of the Court.

Hamilton: I have seen the practice in very great courts, and never heard it deemed unmannerly to

Chief J: Mr. Hamilton, it is not good manners to argue with the opinion of the Court.

Hamilton: I will say no more at this time. The Court I see is against us in this point, and that I hope I may be allowed to say.

Chief J: Use the Court with good manners, and you shall be allowed all the liberty you can reasonably desire.

Hamilton: I thank Your Honor. (Turns, downstage, towards jury.) Then, gentlemen of the jury, it is to you we must now appeal, for witnesses to the truth of the facts we have offered, and are denied the liberty to prove. I am warranted to apply to you by law and reason.

The law supposes you to be summoned, out of the neighborhood where the fact is alleged to be committed; and the reason of your being taken from the neighborhood is because you are supposed to have the best knowledge of the fact that is to be tried.

To find my client guilty, you must take upon you to say that these papers are false, scandalous and seditious.

I have no fear to put my client's liberty in your hands. You are honest men.

The facts we offer to prove were not committed in a corner. They are notoriously known to be true, and therein lies our safety.

And as we are denied the liberty of giving evidence, to prove the truth of what we have published, I will beg leave to lay it down as a standing rule in such cases, that the suppressing of evidence ought always to be taken for the strongest evidence, and I hope it will have that weight with you.

But I will seek to shorten the dispute with Mr. Attorney, and to that end, will he favor us with some standard definition of a libel by which it may be known whether a writing be a libel, yea or not.

Att'y Gen'l: (Using a book from his table.) A libel is defined in the books: A malicious defamation, expressed either in printing or in writing, tending to blacken the memory of one who is dead, or the reputation of one who is alive. And such a libel may be committed by saying things in a scoffing or ironical manner, such as saying of one known to be a great scholar that he is a good soldier but not a man of learning.

Hamilton: But how can we know, from reading your books, whether the words of any particular paper, such as Zenger's, are malicious, or defamatory, or, especially, spoken in a scoffing or ironical way. Suppose I said of you, sir, that you are a very worthy gentleman. What rule have you to know if I really mean to say you are a knave and a fool?

Chief J: Mr. Hamilton, do you think it so hard to know, when words are ironical, or spoke in a scoffing manner? *All* words are libelous or not, as they are *understood*. Those who are to judge of the words must judge whether they are scandalous. There can be no doubt of it.

Hamilton: I thank Your Honor. I am glad to find the Court of this opinion. Then it follows that you twelve men, the jury, must understand the words in this information against Zenger to be scandalous, that is to say that they refer to the Governor and are false.

Chief J: (Realizing his error.) no, Mr. Hamilton, the jury may find that Zenger printed and published those papers, and leave it to the Court to judge whether they are libelous. You know this is very common. It is in the nature of a special verdict, where the jury leave the matter of law to the Court.

Hamilton: I know the jury *may* do so, pleasing Your Honor. But I do likewise know that they may do otherwise. I know they have the right beyond all dispute to determine the law and the fact, and where they do not doubt of the law, they ought to do so.

And the fact is, these papers are true.

In times past it was a crime to speak truth, and in that terrible Court of Star Chamber many worthy and brave men suffered for so doing. And yet even in those bad times, a brave man durst say, "The practice of informations for libels is a sword in the hands of a wicked King, and an arrant coward, to cut down and destroy the innocent. Neither one can revenge himself in another manner: The King cannot, because of his High Station; and the coward dares not, because of his want of courage."

Att'y Gen'l: Have a care, Mr. Hamilton, what you say. I don't like those liberties.

Hamilton: Oh, no, Mr. Attorney. You surely won't be making any applications to stop my speaking.

Chief J: Gentlemen! This is a court of law.

Hamilton: All men agree that we are governed by the best of Kings, and there is no question in point of duty to my King. But men in authority are not exempt from observing the rules of common justice. And what are we subjects here to do about Governors who refuse to tolerate complaints of any kind about their own government. We are told that they will answer a suit in Westminster, in London, for a wrong done here, but who among us can leave family and home and to prosecute a Governor in London for an injury suffered here.

So what is a man to do, except to tell his sufferings to his neighbor? And when he is prosecuted for libel, what safety does he have except that a jury will follow the law and say, "not guilty"?

And by the law I do not mean old and discredited doctrine. There is heresy in law, as well as in religion, and both have changed very much. We well know that not two centuries ago, a man would have been burnt as a heretic for expressing such opinions in matters of religion as are publicly written and printed at this day. I presume that even in New York, men take this freedom, yet I have heard of no information brought by Mr. Attorney for any offences of this sort.

From which I think it is pretty clear that, in New York, a man may make very free with his god, but he must take special care what he says of his Governor.

Members of the jury, a glorious revolution pulled down the Court of Star Chamber. And the reason assigned was that the proceedings of that Court, even though the greatest men of the realm, nay and a Bishop, too—holy man—sat upon it, had by experience been found to be an intolerable burden.

The people of England clearly saw the danger of entrusting it to these great men to say what was scandalous and seditious, false or ironical. And if Parliament thought this power of judging was too great to be trusted with men of the first rank in the Kingdom, without the aid of a jury, I hope I can be excused for saying that the jury are the proper judges in this case, of what is false at least, if not of what is scandalous and seditious.

Att'y Gen'l: Where is it written that juries are to cut and tailor the law to the fashion set by wandering advocates? What is the case for that?

Hamilton: Where? I may be pardoned for referring to the case of William Penn, for whose family I was at one time counsel. It seems that Mr. Penn and Mr. Mead, being Quakers, were shut out of their meeting house by official order. They then preached in Gracechurch Street to people of their own persuasion. The jury refused to convict them. The Court was so offended that they fined the jurors forty marks apiece, and committed them till paid. But Mr. Bushel, of that jury, valued the right of a jurymen and the liberty of his country more than his own, refused to pay the fine. From whence we get the judgment in Bushel's Case, by Chief Justice Vaughn, that judges, howsoever great they be, have no right to punish a jury, for not finding a verdict

according to the direction of the Court.

Chief J: I remind you, Mr. Hamilton, that Bushel's Case limits not at all the power of judges to punish lawyers, howsoever clever they be, who tell juries to take law into their own hands.

Hamilton: I thank Your Honor. I am doing all in my power to stay within the bounds the Court has set.

Members of the jury, when you come to judge the meaning of these words, you may watch out for what Mr. Attorney claims to be the *innuendos*. Zenger's paper does not always call the Governor by his name, nor does it do more than protest this or that exaction in general terms. Yet Mr. Attorney has said that the forbidden reference to the Governor may be supplied by *innuendo*, that is by Mr. Attorney's pretending to know what is really meant. For example, Zenger's paper speaks of "the condition of the people of New York," but Mr. Attorney charges in his information that Zenger really *meant* the deplorable condition of the people of New York.

I sincerely believe that if some person were to go through the streets of New York these days, and read a part of the bible, if it was not known to be such, Mr. Attorney, with the help of his *innuendos*, would easily turn it into a libel. Suppose someone should repeat, in a manner not pleasing to his betters, from the 56th chapter of Isaiah, "His watchmen are blind, they are ignorant. . . Yea, they are greedy dogs which can never have enough." But to make this a libel, there is, according to Mr. Attorney's doctrine, not more wanting but the aid of his skill, in the right adapting of his *innuendos*, as for instance, "His watchmen (*innuendo*, the Governor's Council and Assembly) are all blind, they are ignorant (*innuendo*, they will not see the dangerous designs of his Excellency). Yea, they (*innuendo*, the Governor and Council) are greedy dogs, which can never have enough (*innuendo*, enough of riches and power).

Such an instance is only fit to be laughed at, but I may appeal to Mr. Attorney himself if this is no more than with some of his *innuendos*.

Once you have disposed of this question of *meaning*, you confront the matter squarely: Have these papers been shown to be false. I . . .

Chief J: Mr. Hamilton, the Court is watching you.

Hamilton: And Mr. Hamilton is watching the Court, Your Honor. Very carefully, indeed.

Gentlemen, if you upon reading these papers be of the opinion that there is no falsehood in them you ought to say so, because you don't know whether others, and I mean the Court, will be of that opinion. It is your right to do so,

and there is much depending upon your resolution and your integrity.

To a generous mind, the loss of liberty is worse than death, yet we know there have been powerful men in all ages, who for the sake of preferment, or some imaginary honor, have freely lent a helping hand to oppress, nay to destroy, their country.

Power, you see, may be compared to a great river. If you keep it within its due bounds it is both beautiful and useful. But when it overflows its banks, it is then too impetuous to be stemmed. It bears down all before it, and brings destruction and desolation wherever it comes. If this is the nature of power, let us least do our duty, and like wise men, who value freedom, use our utmost care to support liberty, the only bulwark against lawless power, which in all ages has sacrificed to its wild lust and boundless ambition, the blood of the best men that ever lived.

I am not equal to this undertaking. As you can see, I labor under the weight of many years, and am borne down with great infirmities of body. Yet old and weak as I am, I should think it my duty if required to go to the utmost part of the land, where my service could be of any use. At the question before you, gentlemen of the jury, is not of small or private concern. It is not the cause of the poor printer, nor of New York alone. No! It may in its consequence affect every freeman that lives under a British government on the main of America. It is the best cause. It is the cause of liberty.

(He sits down, exhausted.) Chief J: Mr. Attorney?

Att'y Gen'l: May it please the Court. Mr. Hamilton has gone greatly out of his way, more greatly even than the journey from Philadelphia to New York, to entertain us. I see that he has made himself quite merry, and some other people as well. But did you listen to the cases he chose to cite, and the parts of them to which he clung? There is no Bushel's Case here, nor any case of a Quaker rioting in Gracechurch Street. There is only the case of a printer, the prisoner Zenger, that the jury has to consider. All you need for your verdict, members of the jury, is to reflect that Zenger printed and published not one but two scandalous libels, which very clearly reflected upon his Excellency the Governor and the principal men concerned in the administration of this government. And now, Zenger has confessed, through his counsel, the printing and the publishing. This being confessed, and the scandalous nature of these papers appearing beyond doubt, I have the greatest confidence in referring you to the Court for your direction upon this case.

His Majesty's Kingdom and dominions may be likened to a house for all his subjects. The laws he makes in parliament are the nails, pegs, joists and rafters of that house. If you take it upon yourselves, as subjects, to pull up the nails, or break the rafters, I warn you that you may be embarked upon a

mischief that ends in tumult and disarray. If you have a care, as loyal subjects, you will respect this structure of laws that His Majesty has built. You will then return a verdict according to the law *and* the evidence: a verdict of guilty.

Chief J: Gentlemen of the jury. There is not a man or woman in this room who can doubt what Mr. Hamilton has tried to do upon this occasion. He has taken great pains to show how little regard juries are to pay to the opinion of judges. And his insisting so much upon the conduct of some judges in trials of this kind is done no doubt with a design that you should take but very little notice of what I might say upon this occasion. I shall therefore only observe to you that, as the facts or words of the information are confessed, the only thing that can come in question before you is, whether the words set forth in the information make a libel. And that is a matter of law, no doubt, and you may leave it to the Court. As Lord Chief Justice Holt once told a jury, "To say that corrupt officers are appointed to administer affairs is certainly a reflection on the government. If individuals should not be called to account for possessing the people with an ill opinion of the government, no government can subsist." You will consider your verdict.

(House lights up half. Spot on foreman of jury. House lights down. Hunt comes forward.)

Chief J: Have you a verdict?

Thom. Hunt: We have, Your Honor. We find the defendant John Zenger "not guilty".

Chief J: The prisoner is discharged. This court is adjourned without day.

(Reaction at counsel table. Judge and Attorney General exit. Lights down on bench. Alexander, Margaret, Hunt and Peter Zenger come forward. Zenger and Hamilton embrace. Margaret and Hamilton embrace. Handshaking all around.)

Alexander: You must come with us, sir. To the Black Horse tavern. They are going to present you the liberty of New York.

Hamilton: Alexander, whoever "they" are, they do not have the "liberty of New York." All we did was to free Zenger here. The liberty of New York will have to be won on some other day, and perhaps in some other manner.

Alexander: They mean to toast your victory.

Margaret: Father should rest. You see how tired he is.

Hamilton: Now Margaret, it is bad manners not to raise a cup to a jury's verdict, when it goes your way. Of course, if it doesn't go your way, it is the usual practice to

raise more than one cup.

Margaret: Perhaps for a little while

Hamilton: We'll join you presently. (All exit except Hamilton and Margaret. Hamilton turns to Margaret.) There is a wind blowing, Margaret.

Margaret: (Puzzled.) But, father, it is a still August night.

Hamilton: (Laughs.) oh, I know that. But there is a wind blowing all the same. It blows from the print shops of men like Zenger, and like young Franklin in Philadelphia. It blows from the coffeehouses and philosophical societies, in Philadelphia and New York, and I hear even in Boston. I do not know, Margaret, what discomfort you younger people will endure before it has blown itself out.

Margaret: I don't understand, father.

Hamilton: (Reaches for a book on counsel table.) It is here in this book. Lord Coke, in Dr. Bonham's case, told us that there is a law, founded upon right reason, that both the subject and the King must obey. When the King sends us men like this Governor, this Attorney General and this Chief Justice, who have no regard for that law, the subjects may decide that they, too, are relieved of the obligation of obedience. That is when the wind begins to blow in earnest. Enough of that. Let's join the others.

(He takes her arm, and they exit as lights go down.)

[Curtain]

Questions about performing [The Trial of John Peter Zenger](#), or comments and fan mail should be directed to [Professor Michael Tigar](#) of the Washington College of Law, American University