

PENN do therefore think fit to Nominate and Appoint such Persons for *Judges, Treasurers, Masters of the Rolls, Sheriffs, Justices of the Peace and Coroners*, as are most fitly qualified for those Employments; to whom I shall make and grant *Commissions* for the said *Offices*, respectively to hold to them to whom the same shall be granted, for so long time as every such Person shall *Well behave himself* in the *Office* or *Place* to him respectively granted, and no longer. And upon the Decease or Displacing of any of the said Officers, the succeeding Officer or Officers shall be chosen as aforesaid. . . .

XXI. And that at all times, when and so often as it shall happen, that the GOVERNOUR shall or may be an *Infant* under the Age of One and Twenty years, and no *Guardians* or *Commissioners* are appointed in writing by the *Father* of the said *Infant*, or that such *Guardians* or *Commissioners* shall be deceased, that during such *Minority* the PROVINCIAL COUNCIL shall from time to time, as they shall see meet, constitute and appoint *Guardians* or *Commissioners*, not exceeding *Three*, one of which three shall *Preside* as *Deputy* and *Chief Guardian*, during such *Minority*, and shall have and execute with the Consent of the other *Two* all the Power of a GOVERNOUR in all the publick Affairs and Concerns of the said *Province*.

XXII. That as often as any day of the Moneth, mentioned in any Article of this Charter, shall fall upon the *First Day* of the Week, commonly called the *Lords Day*, the Business appointed for that day shall be deferred till the next day, unless in case of *Emergency*.

XXIII. That no *Act, Law or Ordinance* whatsoever, shall at any time hereafter be made or done by the GOVERNOUR of this *Province*, his HEIRS or ASSIGNS, or by the FREE-MEN in the PROVINCIAL COUNCIL of the GENERAL ASSEMBLY, to *Alter, Change or Diminish* the *Form* or *Effect* of this CHARTER, or any *Part* or *Clause* thereof, or contrary to the true Intent and Meaning thereof, *without the Consent of the GOVERNOUR, his HEIRS or ASSIGNS, and Six Parts of Seven of the said FREE-MEN in PROVINCIAL COUNCIL and GENERAL ASSEMBLY*.

XXIV. And *Lastly*, That I, the said WILLIAM PENN, for MY SELF, my HEIRS and ASSIGNS have *Solemnly Declared, Granted and Confirmed*, and do hereby *Solemnly Declare, Grant and Confirm*, That neither I, My HEIRS nor ASSIGNS shall *procure or do any thing or things, whereby the Liberties in this Charter contained and expressed, shall be infringed or broken*: And if any thing be procured by any Person or Persons contrary to these Premises, it shall be held of *no Force or Effect*. IN WITNESS whereof I the said WILLIAM PENN have unto this present CHARTER of LIBERTIES set my Hand and Broad Seal this Five and Twentieth Day of the Second Moneth, vulgarly called *April*, in the Year of our Lord One Thousand Six Hundred Eighty and Two.

William Penn

The seditious libel trial of John Peter Zenger remains an important, if confused, event in American constitutional and legal development. In 1733, Zenger, a German immigrant, published the first opposition newspaper in the American colonies. His paper, *The New York Weekly Journal*, vigorously attacked the royal governor of New York, Col. William Cosby. After a series of futile attempts to have a grand jury indict Zenger, Governor Cosby's attorney general, Richard Bradley, brought an information charging the printer with seditious libel. In defiance of the rules of libel law at the time, Zenger's attorney, Andrew Hamilton, argued that his client should be acquitted because what he had published about the governor was in fact true. Although he was apparently guilty under the accepted understanding of libel law, the jury acquitted Zenger.

While scholars agree on the general facts surrounding the case, the meaning of the case has been subject to contested analysis. Until the middle of the twentieth century, the case was seen as a central and defining moment in the evolution of a free press in America. However, some modern historians have argued against the significance of the case. Leonard Levy correctly noted that Zenger's case established no legal precedent and did not change either the common law or the way most lawyers and judges thought about the law. It was, rather, an instance of a single-minded jury determined to acquit a popular editor. According to Levy, Zenger's was purely a personal victory, "like the stage-coach ticket inscribed 'Good for this day only.'" Similarly, Stanley N. Katz argued that the case was not "a landmark in the history of law or of freedom of the press" because the evolution of a free press in the twentieth century pretty much ignored Zenger.

Both Levy and Katz are correct that the Zenger trial did not change the common law of libel in America or Great Britain. Nevertheless, the trial was significant for at least four reasons. First, it changed the practical reality of libel law in America. After Zenger's acquittal, no colonial governor ever sought the prosecution of a printer for attacks on the administration. The message of the Zenger jury was loud and quite clear: Americans would not punish their neighbors for criticizing the king's appointed rulers. Second, the case did prove to be a beacon for Americans of a later generation who sought to establish greater liberty in America and to secure a free press. Both during and after the Revolution, Americans recalled Zenger when considering the importance of a free press. In addition to its role in developing a free press, Zenger's case affected the development of other protections later written into the Bill of Rights, including the right to counsel, the requirement of a grand jury indictment, and the notion that due process implied an independent jury. Finally, in more modern times, Zenger is evoked by courts to strengthen ideas of liberty. Courts use it as an artifact of our distant past, usually to support the notion of an expansive

right to a free press and for other Bill of Rights protections. For example, in his concurring opinion in *New York Times v. Sullivan* (1964), Justice Arthur Goldberg cited Zenger's trial for the understanding that those who fought the Revolution realized the necessity of allowing the people to criticize the government.

These uses of Zenger's trial are not strictly legal. It is not a case that can be cited as a binding legal precedent. Rather, it remains a political, historical, and cultural precedent that provides a useful reminder to lawyers, judges, and politicians that a free society must preserve the right of the press to criticize the government and also provide due process and fair trials for accused criminals.

The following excerpt includes the opening statement of the prosecuting attorney, the attorney general of the colony, Richard Bradley, and the response by the renowned Philadelphia attorney Andrew Hamilton, brought out of retirement to argue on Zenger's behalf.

See introduction to Stanley N. Katz, ed. *A Brief Narrative of the Case and Trial of John Peter Zenger* (2nd ed., 1972); introduction to Paul Finkelman, ed. *A Brief Narrative of the Case and Trial of John Peter Zenger* (2000); Leonard W. Levy, *Emergence of a Free Press* (1985).

Mr. Attorney General opened the information, which was as follows:

Mr. Attorney. May it please Your Honors, and you, gentlemen of the jury; the information now before the Court, and to which the Defendant Zenger has pleaded *not guilty*, is an information for printing and 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 that has no regard to law nor justice; with much more, as will appear upon reading the information. This of libeling is what has always been discouraged as a thing that tends to create differences among men, ill blood among the people, and oftentimes great bloodshed between the party libeling and the party libeled. There can be no doubt but you gentlemen of the jury will have the same ill opinion of such practices as the judges have always shown upon such occasions: But I shall say no more at this time until you hear the information. . . . To this information the Defendant has pleaded *not guilty*, and we are ready to prove it. . . .

Then *Mr. Hamilton*, who at the request of some of my friends was so kind as to come from Philadelphia to assist me on the trial, spoke.

Mr. Hamilton. May it please Your Honor; I am concerned in this cause on the part of Mr. Zenger the Defendant. The information against my client was sent me a few days before I left home, with some instructions to let me know how far I might rely upon the truth of those parts of the papers set forth in the information and which are said to be libelous. And though I am perfectly of the opinion with the gentleman who has just now

Source: Paul Finkelman, ed., *A Brief Narrative of the Case and Trial of John Peter Zenger, Printer of the New York Weekly Journal* 103 (1997; 2000)

spoke on the same side with me as to the common course of proceedings, I mean in putting Mr. Attorney upon proving that my client printed and published those papers mentioned in the information; yet I cannot think it proper for me (without doing violence to my own principles) to deny the publication of a complaint which I think is the right of every free-born subject to make when the matters so published can be supported with truth; and therefore I'll save Mr. Attorney the trouble of examining his witnesses to that point; and I do (for my client) confess that he both printed and published the two newspapers set forth in the information, and I hope in so doing he has committed no crime.

Mr. Attorney. Then if Your Honor pleases, since Mr. Hamilton has confessed the fact, I think our witnesses may be discharged; we have no further occasion for them.

Mr. Hamilton. If you brought them here only to prove the printing and publishing of these newspapers, we have acknowledged that, and shall abide by it. . . .

Mr. Chief Justice. Well Mr. Attorney, will you proceed?

Mr. Attorney. Indeed sir, as Mr. Hamilton has confessed the printing and publishing these libels, I think the jury must find a verdict for the King; for supposing they were true, the law says that they are not the less libelous for that; nay indeed the law says their being true is an aggravation of the crime.

Mr. 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: You will have something more to do before you make my client a libeler; for the words themselves must be libelous, that is, *false, scandalous, and seditious* or else we are not guilty.

[As Mr. Attorney has not been pleased to favor us with his argument, which he read, or with the notes of it, we cannot take upon us to set down his words, but only to show the book cases he cited and the general scope of his argument which he drew from those authorities. He observed upon the excellency as well as the use of government, and the great regard and reverence which had been constantly paid to it, both under the law and the gospel. That by government we were protected in our lives, religion and properties; and that for these reasons great care had always been taken to prevent everything that might tend to scandalize magistrates and others concerned in the administration of the government, especially the supreme magistrate. And that there were many instances of very severe judgments, and of punishments inflicted upon such, as had attempted to bring the government into contempt; by publishing false and scurrilous libels against it, or by speaking evil and scandalous words of men in authority: to the great disturbance of the public peace. And to support this, he cited 5 Coke 121 (suppose it should be 125), Wood's Instit. 430, 2 Lilly 168, 1 Hawkins 73, 11.6. From these books he insisted that a libel was a malicious defamation of any person, expressed either in printing or writing, signs or pictures, to asperse the reputation of one that is alive or the memory of one that is dead; if he is a private man, the libeler deserves a severe punishment, but if it is against a magistrate or other public person, it is a greater offense: for this concerns not only the breach of the peace, but the scandal of the government; for what greater scandal of government can there be than to have corrupt or wicked magistrates to be appointed by the King to govern his subjects under him? And a greater imputation to the state cannot be than to suffer such corrupt men to sit in the sacred seat of justice, or to have any meddling in or concerning the administration of justice; And from the same books Mr. Attorney insisted that whether the person defamed is a private man or a magistrate, whether living or dead, whether the libel is true or false, or if the party against whom it is made is of good or evil fame, it is nevertheless a libel: For in a settled state of government the party aggrieved

ought to complain for every injury done him in the ordinary course of the law. And as to its publication, the law had taken so great care of men's reputations that if one maliciously repeats it, or sings it in the presence of another, or delivers the libel or a copy of it over to scandalize the party, he is to be punished as a publisher of a libel. He said it was likewise evident that libeling was an offense against the law of God. *Act. XXIII. 5. Then said Paul, I wist not brethren, that he was the High Priest: For it is written, thou shalt not speak evil of the ruler of the People. 2 Pet. X. II. Despite government, presumptuous are they, self-willed, they are not afraid to speak evil of dignitaries, etc.* He then insisted that it was clear, both by the law of God and man, that it was a very great offense to speak evil of or to revile those in authority over us; and that Mr. Zenger had offended in a most notorious and gross manner in scandalizing His Excellency our Governor, who is the King's immediate representative and the supreme magistrate of this Province: For can there be anything more scandalous said of a Governor than what is published in those papers? Nay, not only the Governor, but both the Council and Assembly are scandalized; for there it is plainly said that *as matters now stand, their liberties and properties are precarious, and that slavery is like to be entailed on them and their posterity.* And then again Mr. Zenger says *the Assembly ought to despise the smiles or frowns of a governor; that he thinks the law is at an end; that we see men's deeds destroyed, judges arbitrarily displaced, new courts erected without consent of the legislature; and that it seems trials by juries are taken away when a governor pleases; that none can call anything their own longer than those in the administration will condescend to let them do it.*—And Mr. Attorney added that he did not know what could be said in defense of a man that had so notoriously scandalized the Governor and principal magistrates and officers of the government by charging them with depriving the people of their rights and liberties, and taking away trials by juries, and in short, putting an end to the law itself.—If this was not a libel, he said, he did not know what was one. Such persons as will take those liberties with governors and magistrates he thought ought to suffer for stirring up sedition and discontent among the people. And concluded by saying that the government had been very much traduced and exposed by Mr. Zenger before he was taken notice of; that at last it was the opinion of the Governor and Council that he ought not to be suffered to go on to disturb the peace of the government by publishing such libels against the Governor and the chief persons in the government; and therefore they had 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.

Mr. Chambers then summed up to the jury, observing with great strength of reason on Mr. Attorney's defect of proof that the papers in the information were *false, malicious, or seditious*, which was incumbent on him to prove to the jury, and without which they could not on their oaths say *that they were so, as charged.*]

Mr. Hamilton. May it please Your Honor; I agree with Mr. Attorney, that government is a sacred thing, but I differ very widely from him when he would insinuate 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 law, I should not have given the Court the trouble of hearing anything that I should say in this cause. I own when I read the information I had not the art to find out (without the help of Mr. Attorney's *innuendoes*) that the Governor was the person meant in every period of that newspaper; and I was inclined to believe that they were wrote by some who from an extraordinary zeal for liberty had misconstrued the conduct of some persons in authority into crimes; and that Mr. Attorney out of his too great zeal for power had exhibited this information to correct the

indiscretion of my client; and at the same time to show his superiors the great concern he had lest they should be treated with any undue freedom. But from what Mr. Attorney has just now said, *to wit*, that this prosecution was directed by the Governor and Council, and from the extraordinary appearance of people of all conditions which I observe in Court upon this occasion, 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 good deal more at stake, than I apprehended: And therefore as it is become my duty to be both plain and particular in this cause, I beg leave to bespeak the patience of the Court.

I was in hopes, as that terrible Court, where those dreadful judgments were given and that law established which Mr. Attorney has produced for authorities to support this cause, was long ago laid aside as the most dangerous court to the liberties of the people of England that ever was known in that kingdom; that Mr. Attorney knowing this would not have attempted to set up a Star Chamber here, nor to make their judgments a precedent to us: For it is well known that what would have been judged treason in those days for a man to speak, I think, has since not only been practiced as lawful, but the contrary doctrine has been held to be law. . . .

It is 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? And which is yet more astonishing, to see that a people can be so wild as to allow of and acknowledge those prerogatives and exemptions, even to their own destruction? Is it so hard a matter to distinguish between the majesty of our Sovereign and the power of a governor of the plantations? Is not this making very free with our Prince, to apply that regard, obedience and allegiance to a subject which is due only to our Sovereign? And yet in all the cases which Mr. Attorney has cited to show the duty and obedience we owe to the supreme magistrate, it is the King that is there meant and understood, 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. The several plantations are compared to so many large corporations, and perhaps not improperly; and can anyone give an instance that the mayor or head of a corporation ever put in a claim to the sacred rights of majesty? Let us not (while we are pretending to pay a great regard to our Prince and his peace) make bold to transfer that allegiance to a subject which we owe to our King only. What strange doctrine is it to press everything for law here which is so in England? I believe we should not think it a favor, at present at least, to establish this practice. In England so great a regard and reverence is had to the judges, that if any man strikes another in Westminster Hall while the judges are sitting, he shall lose his right hand and forfeit his land and goods for so doing. And though the judges here claim all the powers and authorities within this government that a Court of King's Bench has in England, yet I believe Mr. Attorney will scarcely say that such a punishment could be legally inflicted on a man for committing such an offense in the presence of the judges sitting in any court within the Province of New York. The reason is obvious; a quarrel or riot in New York cannot possibly be attended with those dangerous consequences that it might in Westminster Hall: nor (I hope) will it be alleged that any misbehavior to a governor in the plantations will, or ought to be, judged of or punished as a like undutifulness would be to our Sovereign. From all which, I hope Mr. Attorney will not think it proper to apply his law cases (to

support the cause of his Governor) which have only been judged where the King's safety or honor was concerned. It will not be denied but that a freeholder in the Province of New York has as good a right to the sole and separate use of his lands as a freeholder in England, who has a right to bring an action of trespass against his neighbor for suffering his horse or cow to come and feed upon his land, or eat his corn, whether enclosed or not enclosed; and yet I believe it would be looked upon as a strange attempt for one man here to bring an action against another, whose cattle and horses feed upon his grounds not enclosed, or indeed for eating and treading down his corn, if that were not enclosed. Numberless are the instances of this kind that might be given, to show that what is good law at one time and in one place is not so at another time and in another place; so that I think the law seems to expect that in these parts of the world men should take care, by a good fence, to preserve their property from the injury of unruly beasts. And perhaps there may be as good reason why men should take the same care to make an honest and upright conduct a fence and security against the injury of unruly tongues.

Mr. Attorney. I don't know what the gentleman means, by comparing cases of freeholders in England with freeholders here. What has this case to do with actions of trespass, or men's fencing their ground? The case before the Court 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 I think nothing is plainer than that the words in the information are *scandalous, and tend to sedition, and to disquiet the minds of the people of this Province*. And if such papers are not libels, I think it may be said there can be no such thing as a libel.

Mr. Hamilton. May it please Your Honor; I cannot agree with Mr. Attorney: For though I freely acknowledge that there are such things as libels, yet I must insist at the same time that what my client is charged with is not a libel; and I observed just now that Mr. Attorney in defining a libel made use of the words *scandalous, seditious, and tend to disquiet the people*; but (whether with design or not I will not say) he omitted the word *false*.

Mr. Attorney. I think I did not omit the word *false*: But it has been said already that it may be a libel notwithstanding it may be true.

Mr. Hamilton. In this I must still differ with Mr. Attorney; for I depend upon it, we are to be tried upon this information now before the Court and jury, and to which we have pleaded *not guilty*, and by it we are charged with printing and publishing a *certain false, malicious, seditious and scandalous libel*. This 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 am of opinion his information would not be good without it. But to show that it is the principal thing which, in my opinion, makes a libel, I put the case, if the information had been for printing and publishing a *certain true libel*, would that be the same thing? Or could Mr. Attorney support such an information by any precedent in the English law? No, the falsehood makes the scandal, and both make the libel. And to show the Court that I am in good earnest and to save the Court's time and Mr. Attorney's trouble, I will agree that if he can prove the facts charged upon us to be *false*, I'll own them to be *scandalous, seditious and a libel*. So the work seems now to be pretty much shortened, and Mr. Attorney has now only to prove the words *false* in order to make us guilty.

Mr. Attorney. We have nothing to prove; you have confessed the printing and publishing; but if it was necessary (as I insist it is not) how can we prove a negative? But I

hope some regard will be had to the authorities that have been produced, and that supposing all the words to be true, yet that will not help them, that Chief Justice Holt in his charge to the jury in the case of Tutchin made no distinction whether Tutchin's papers were *true* or *false*; and as Chief Justice Holt has made no distinction in that case, so none ought to be made here; nor can it be shown in all that case there was any question made about their being *false* or *true*.

Mr. Hamilton. I did expect to hear that a negative cannot be proved; but everybody knows there are many exceptions to that general rule: For if a man is charged with killing another, or stealing his neighbor's horse, if he is innocent in the one case, he may prove the man said to be killed to be really alive; and the horse said to be stolen, never to have been out of his master's stable, etc., and this I think is proving a negative. But we will save Mr. Attorney the problem of proving a negative, and take the *onus probandi* upon ourselves, and prove those very papers that are called libels to be *true*.

Mr. Chief Justice. 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*.

11

Indian and White Views on Property (1742)

Colonists naturally brought with them concepts of property dominant in the Mother Country, in which individuals owned—that is, exercised complete control over—property, and where, for an exchange of value, property ownership could be sold or acquired. Indians, on the other hand, saw land as held collectively by the tribe. While they exercised rights, such as hunting, fishing, and farming, Indians did not “buy,” “sell,” or “own” land. Indians could allow others to share in land rights and would accept gifts in return. The colonists believed that giving the Indians trinkets and other merchandise bought permanent title to the land. These two conflicting views of land and attached rights led to continual misunderstanding between settlers and Indians. The problem can be seen in this exchange between the Iroquois chief Canassateego and Lieutenant Governor George Thomas of Pennsylvania. The disagreement is even more unfortunate in light of the good relations William Penn had earlier established between his settlers and the Indians.

See W. E. Washburn, *The Indian and the White Man* (1964); I. Sutton, ed., *Indian Land Tenure* (1975), especially the piece on “Aboriginal Occupancy and Territoriality”; and Anthony F. C. Wallace, “Political Organization and Land Tenure,” 13 *Southwestern Journal of Anthropology* 301 (1957).