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### The Trial of John Peter Zenger: An Account

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# The Trial of John Peter Zenger: An Account

By Doug Linder (2001)

No country values free expression more highly than does the United States, and no case in American history stands as a greater landmark on the road to protection for freedom of the press than the trial of a German immigrant printer named John Peter Zenger. On August 5, 1735, twelve New York jurors, inspired by the eloquence of the best lawyer of the period, Andrew Hamilton, ignored the instructions of the Governor's hand-picked judges and returned a verdict of "Not Guilty" on the charge of publishing "seditious libels." The Zenger trial is a remarkable story of a divided Colony, the beginnings of a free press, and the stubborn independence of American jurors.

## Background

The man generally perceived to be the villain of the Zenger affair, William Cosby, arrived in New York on August 7, 1731 to assume his post as Governor for New York Province. Cosby quickly developed a reputation as "a rogue governor." It is almost impossible to find a positive adjective among the many used by historians to describe the new governor: "spiteful," "greedy," "jealous," "quick-tempered," "dull," "unlettered," and "haughty" are a sample of those that have been applied.

Within a year after arriving on American shores, Cosby embroiled himself in a controversy that would lead to Zenger's trial and ultimate acquittal. The man with whom Cosby chose to pick his first fight, Rip Van Dam, was the seventy-one-year-old highly respected senior member of the New York provincial council. Cosby demanded that Van Dam turn over half of the salary he had earned while serving as acting governor of New York during the year between Cosby's appointment and his arrival in the colony. The hard-headed Van Dam agreed--providing that Cosby would split with him half of the perquisites he earned during the same time period. By Van Dam's calculations, Cosby would actually owe him money--over £4000.

Governor Cosby responded in August 1732 by filing suit for his share of Van Dam's salary. Knowing that he had no chance of prevailing in his case if the decision were left to a jury, Cosby designated the provincial Supreme Court to sit as a "Court of Exchequer" (without a jury) to hear his suit. Van Dam refused to roll over, and had his lawyers challenge the legality of Cosby's attempt to do an end-run of the colony's established jury system. The decision on the legality of Cosby's creation of the new court fell to the three members of the Supreme Court itself, and in April 1733 it voted 2 to 1 to uphold Cosby's action. Cosby wrote a

letter to the dissenting judge, Chief Justice Lewis Morris, demanding that he explain his vote. Morris did so, but to Cosby's great displeasure, his explanation appeared not in a private letter to the Governor, but in a pamphlet printed by John Peter Zenger. Cosby "went ballistic," removing Morris as Chief Justice and replacing him with a staunch royalist, James Delancey.

Cosby's action of firing Morris intensified the growing opposition to his administration among some of the most powerful people in the colony. Rip Van Dam, Lewis Morris, and an energetic attorney named James Alexander organized what came to be known as the Popular Party, a political organization that would constitute a serious challenge to Cosby's ability to govern.

Cosby attempted to maintain his grip on power by employing Francis Harison--a man called by historians Cosby's "flatterer-in-chief" and "hatchetman"--to become censor and effective editor of the only established New York newspaper, the *New York Gazette*. Harison defended Cosby both in prose and strained verse, such as this poem that appeared the *Gazette's* January 7, 1734 issue:

Cosby the mild, the happy, good and great,  
The strongest guard of our little state;  
Let malcontents in crabbed language write,  
And the D...h H....s belch, tho' they cannot bite.  
He unconcerned will let the wretches roar,  
And govern just, as others did before.

James Alexander, often described as the "mastermind" of the opposition, decided to take the unprecedented step of founding an independent political newspaper. Alexander approached John Peter Zenger who, along with William Bradford, the *Gazette's* printer, was one of only two printers in the colony, with the idea of publishing a weekly newspaper to be called the *New York Weekly Journal*. Zenger, who had made a modest living the past six years printing mainly religious tracts, agreed. In a letter to an old friend, Alexander revealed the *Journal's* mission: "Inclosed is also the first of a newspaper designed to be continued weekly, chiefly to expose him [Cosby] and those ridiculous flatteries with which Mr. Harison loads our other newspaper which our Governor claims and has the privilege of suffering nothing to be in but what he and Mr. Harison approve of."

On November 5, 1733, Zenger published the first issue of the *Weekly Journal*. The issue included a detailed account of the victory the previous week of Lewis Morris as Popular Party candidate for assemblyman from Westchester. Morris won the election despite the best efforts of Cosby to rig the election against him by having the sheriff disqualify Quaker voters (expected to be heavily pro-Morris) on the ground that the Quakers only "affirmed" rather than swore the

oath required at the time of all voters. The election story, almost certainly written by Alexander, included this description of the sheriff's intervention:

[T]he sheriff was deaf to all that could be alleged on that [the Quaker] side; and notwithstanding that he was told by both the late Chief Justice and James Alexander, one of His Majesty's Council and counsellor-at-law, and by one William Smith, counsellor-at-law, that such a procedure [disqualifying the Quakers for affirming rather than swearing] was contrary to law and a violent attempt upon the liberties of the people, he still persisted in refusing the said Quakers to vote....

No doubt to the surprise and disappointment of Cosby, Morris won the election even without the Quakers' votes. The *Journal* story told of Morris's election being celebrated with "a general fire of guns" from a merchant vessel and "loud acclamations of the people as he walked the streets, conducted to the Black Horse Tavern, where a handsome entertainment was prepared for him."

Subsequent issues of the *Journal*, in addition to editorializing about other dubious actions of the Governor, contained ringing defenses of the right to publish, authored by Alexander, such as this offered in the second issue:

The loss of liberty in general would soon follow the suppression of the liberty of the press; for it is an essential branch of liberty, so perhaps it is the best preservative of the whole. Even a restraint of the press would have a fatal influence. No nation ancient or modern has ever lost the liberty of freely speaking, writing or publishing their sentiments, but forthwith lost their liberty in general and became slaves.

Cosby put up with the *Journal's* attacks for two months before deciding that it must be shut down. The first effort to silence the *Journal* occurred in January 1734 when Chief Justice Delancey asked a Grand Jury to return indictments based on the law of seditious libel. The Grand Jury, however, refused. Delancey tried again when the next Grand Jury met in October. He presented the grand jurors with broadsides and "scandalous" verse from Zenger's *Journal*, but the jurors, claiming that the authorship of the allegedly libelous material could not be determined, again refused to return indictment.

Cosby responded to these frustrations by proclaiming a reward of fifty pounds for the discovery of the authors of the libels and by issuing an order that Zenger's newspapers be publicly burned by "the common hangman."

Then, in an effort to get around the Grand Jury's refusal to indict, Cosby ordered his attorney general, Richard Bradley, to file "an information" before Justices Delancey and Philipse. Based on the information, the Justices issued a bench warrant for the arrest of John Peter Zenger. On November 17, 1734, the sheriff

arrested Zenger and took him to New York's Old City Jail, where Zenger would stay for the next eight months.

The *Weekly Journal* was not published the next day, November 18. It would be the only issue missed in its publishing history. The next week, with the help of Zenger's wife, Anna, the *Journal* resumed publication with an issue that included this "apology":

As you last week were disappointed of my *Journal*, I think it incumbent on me to publish my apology, which is this. On the Lord's Day, the seventeenth, I was arrested, taken and imprisoned in the common jail of this City by virtue of a warrant from the Governor, the honorable Francis Harison, and others in the Council (of which, God willing, you will have a copy); whereupon I was put under such restraint that I had not the liberty of pen, ink or paper, or to see or speak with people, until my complaint to the honorable Chief Justice at my appearing before him upon my habeas corpus on the Wednesday following. He discountenanced that proceeding, and therefore I have had since that time the liberty of speaking thro' the hole of the door to my wife and servants. By which I doubt not you will think me sufficiently excused for not sending my last week's *Journal*, and hope for the future, by the liberty of speaking to my servants thro' the hole of the door of my prison, to entertain you with my weekly *Journal* as formerly.

The enormous bail of £800 set for Zenger turned into an important tactical advantage for the imprisoned printer. As a result of his stream of "letters" from prison, an outpouring of public sympathy for his cause developed.

### The Trial

Zenger's defense would fall to sixty-year-old Andrew Hamilton of Philadelphia, perhaps the ablest and most eloquent attorney in the colonies--though that was not the initial plan. James Alexander and William Smith initially undertook Zenger's defense, but both were disbarred in April 1735 by Chief Justice Delancey when they audaciously objected to the two-man court (consisting of Justice Delancey and Philipse) Cosby had hand-picked to try Zenger's case.

Jury selection began on July 29, 1735, and once again Cosby attempted to influence events by having his henchman, Francis Harison, produce a roll of potential jurors that included forty-eight nonfreeholders, men presumed to be sympathetic to the Governor, including former magistrates and persons in Cosby's employ. This departure from normal procedures was too much even for Cosby's handpicked judges who, sitting behind an ornate bench in their scarlet robes and huge white wigs, rejected the ruse. Twelve jurors were quickly selected.

The trial opened on August 4 on the main floor of New York's City Hall with Attorney General Bradley's reading of the information filed against Zenger. Bradley told jurors that Zenger, "being a seditious person and a frequent printer and publisher of false news and seditious libels" had "wickedly and maliciously" devised to "traduce, scandalize, and vilify" Governor Cosby and his ministers. Bradley said that "Libeling 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."

After a brief statement from John Chambers, Zenger's court-appointed attorney, Andrew Hamilton rose to announce that his client--sitting in an enclosed box in the courtroom--would not contest having printed and published the allegedly libelous materials contained in the Weekly Journal and that "therefore I shall save Mr. Attorney the trouble of examining his witnesses to that point."

Following Hamilton's surprise announcement, the prosecution's three witnesses (Zenger's journeyman associate and two of his sons) were sent home, and there was a long silence. Finally, Bradley spoke: "As Mr. Hamilton has confessed the printing and publishing of these libels, I think the Jury must find a verdict for the king. For supposing they were true, the law says that are not the less libelous for that. Nay, indeed the law says their being true is an aggravation of the crime." Bradley proceeded to offer a detailed and generally accurate account of the state of law on seditious libel of the time, supporting his conclusion that the truth of a libel is no defense.

Andrew Hamilton rose to argue that the law ought not to be interpreted to prohibit "the just complaints of a number of men who suffer under a bad administration." He suggested that the Zenger case was of transcendent importance:

From what Mr. Attorney has just now said, to wit, that this prosecution was directed by the Governor and the 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. 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.

Hamilton argued that the libel law of England ought not to be the libel law of New York:

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. Although 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 can not 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 of 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....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.

His arguments might have been well-received by jurors, but Hamilton had almost no law to support his position that the truth should be a defense to the charge of libel. Not surprisingly, Chief Justice Delancey ruled that Hamilton could not present evidence of the truth of the statements contained in *Zenger's Journal*. "The law is clear that you cannot justify a libel," Delancey announced. "The jury may find that Zenger printed and published those papers, and leave to the Court to judge whether they are libelous."

In response to Delancey's ruling, Hamilton revealed the true nature of the defense strategy--jury nullification:

I know, may it please Your Honor, the jury may do so. But I do likewise know that they may do otherwise. I know that they have the right beyond all dispute to determine both the law and the fact; and where they do not doubt of the law, they ought to do so. Leaving it to judgment of the court whether the words are libelous or not in effect renders juries useless (to say no worse) in many cases. But this I shall have occasion to speak to by and by.

Hamilton's lengthy summation to the jury still stands as an eloquent defense not just of a German-born printer, but of a free press:

It is natural, it is a privilege, I will go farther, it is a right, which all free men claim, that they are entitled to complain when they are hurt. They have a right publicly to remonstrate against the abuses of power in the strongest terms, to put their neighbors upon their guard against the craft or open violence of men in authority, and to assert with courage the sense they have of the blessings of liberty, the value they put upon it, and their resolution at all hazards to preserve it as one of the greatest blessings heaven can bestow....

The loss of liberty, to a generous mind, is worse than death. And yet we know that there have been those 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.... This is what every man who values freedom ought to consider. He should act by judgment and not by affection or self-interest; for where those prevail, no ties of either country or kindred are regarded; as upon the other hand, the man who loves his country prefers its liberty to all other considerations, well knowing that without liberty life is a misery....

Power may justly be compared to a great river. While kept 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, then, this is the nature of power, let us at 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 hope to be pardoned, Sir, for my zeal upon this occasion....While we pay all due obedience to men in authority we ought at the same time to be upon our guard against power wherever we apprehend that it may affect ourselves or our fellow subjects....

You see that I labor under the weight of many years, and am bowed 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 services could be of any use in assisting to quench the flame of prosecutions upon informations, set on foot by the government to deprive a people of the right of remonstrating and complaining, too, of the arbitrary attempts of men in power....

But to conclude: The question before the Court and you, Gentlemen of the jury, is not of small or private concern. It is not the cause of one poor printer, nor of New York alone, which you are now trying. No! It may in its consequence affect every free man that lives under a British government on the main of America. It is the best cause. It is the cause of liberty. And I make no doubt but your upright conduct this day will not only entitle you to the love and esteem of your fellow citizens, but every man who prefers freedom to a life of slavery will bless and honor you as men who have baffled the attempt of tyranny, and by an impartial and uncorrupt verdict have laid a noble foundation for securing to ourselves, our posterity, and our neighbors, that to which nature and the laws of our country have given us a right to liberty of both exposing and opposing arbitrary power (in these parts of the world at least) by speaking and writing truth.

Chief Justice Delancey seemed unsure how to react to Hamilton's eloquence. He instructed the jury that its duty under the law was clear. There were no facts for



it to decide, and it was not to judge the law. Delancey all but ordered the jury to return a verdict of "Guilty":

The great pains Mr. Hamilton has taken 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 in the information are confessed, the only thing that can come in question before you is whether the words as set forth in the information make a libel. And that is a matter of law, no doubt, and which you may leave to the Court.

The jury withdrew to deliberate. A short time later, it returned. The clerk of the court asked the jury foreman, Thomas Hunt, to state the verdict of the jury. "Not guilty," Hunt answered. There followed "three huzzas" and "shouts of joy" from the crowd of spectators in the courtroom. Chief Justice Delancey demanded order, even threatening spectators with arrest and imprisonment, but the celebration continued unabated. Defeated, Delancey "left the courtroom to the jubilant crowd."

#### Trial Aftermath

Anti-administration supporters hosted a congratulatory dinner for Andrew Hamilton at the Black Horse Tavern. The next day, on the start of his return trip to Philadelphia, a "grand salute of cannon was fired in his honor."

The Zenger trial established no new law with respect to seditious libel, but in unmistakable terms it signaled the public's opposition to such prosecutions. Concern about likely jury nullification discouraged prosecutions, and press freedom in America began to blossom. A half-century after the Zenger trial, as members of the First Congress debated the proposed Bill of Rights, one of the Constitution's principal drafters and great-grandson of Lewis Morris, Gouverneur Morris, would write of the Zenger case: "The trial of Zenger in 1735 was the germ of American freedom, the morning star of that liberty which subsequently revolutionized America."

<https://www.famous-trials.com/zenger>