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### Cover Page Footnote

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## FREEDOM OF THE PRESS: CROSWELL'S CASE\*\*

MORRIS D. FORKOSCH\*\*

THE practical freedom of the press in the United States was not first established in 1964, when the Supreme Court held that a public official could not recover damages for a libel relating to his official conduct unless he first proved actual malice;<sup>1</sup> usually the *Case of John Peter Zenger* in 1735,<sup>2</sup> the last of its kind to be tried by the royal judges, is referred to as the one in which truth, as a defense to criminal libel, had been judicially accepted. But not only was and is this not so, *i.e.*, the judicial acceptance in *Zenger* of truth as a defense, but there had been earlier and later cases in which the freedom of the press was significantly defended.<sup>3</sup> *Croswell's Case*,<sup>4</sup> which involved the indictment of Harry Croswell for criminal libel, is one such case. It may be noted that the *Zenger* case, regardless of its historical importance, had involved a jury verdict of not guilty, so that no appellate views were obtained. Tech-

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1. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).
2. *The Trial of Mr. John Peter Zenger*, 17 Howell, St. Tr. 675 (1735), there being a collection of thirty-four volumes published in London between 1816 and 1828.
3. See the discussion by L. Levy, *Legacy of Suppression* 1-37 (1960), for an excellent, albeit brief, analysis of these early cases.
4. *People v. Croswell*, 3 Johns. Cas. 337 (1804), reprinted in 1 N.Y. Common Law Rep. App. 717-41 (1883). The original report should not be confused with "Johnson's Reports." Separately, there is a seventy-eight page pamphlet entitled *The Speeches at full length of Mr. Van Ness, Mr. Caines, The Attorney-General, Mr. Harrison, and General Hamilton in the Great Cause of The People against Harry Croswell, on an Indictment for a Libel on Thomas Jefferson, President of the United States* (G. & R. Waite 1804) [hereinafter cited as *The Speeches*], in the library of the Association of the Bar of the City of New York, stack room #12185, C8844. See also note 57 *infra*, on Kent's Notes.

nically, therefore, it was not legally controlling or of appellate precedential value, and this is indicated by the arguments and opinions in *Crosswell's Case*. There, the only mention of it in argument and in opinion are passing ones, with Chief Justice Lewis, who had also been the trial judge, referring to *Zenger* only to underscore his own view of the law, namely, that the earlier trial judge and he agreed that truth was not a defense in a prosecution for a libel.<sup>5</sup>

While no earth-shaking judicial pronouncements emerged from the *Crosswell* opinions, still the case became the basis of the New York legislative adoption of a statute paralleling an earlier English one, and in turn this entered the stream of statutory adoptions of criminal and civil libel principles which gradually broadened the freedom of the press until the 1964 decision almost made it an absolute (at least for public officials concerning their official conduct).<sup>6</sup> An analysis of *Crosswell's Case*

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5. 3 Johns. Cas. at 344, 398-99. See also 2 Stephen, *A History of the Criminal Law of England* 323 n.4 (1883): "A remarkable case had occurred in New York. See The case of Zenger, 17 State Trials, 675, A.D. 1735. The speech of Zenger's counsel, Hamilton, was singularly able, bold, and powerful, though full of doubtful, not to say bad, law, which is brought out in some very able letters published at the end of the case. I may observe that the author of those letters would have found it difficult to defend himself on his own principles if he had been tried for a libel on Hamilton."

However, the reason why Alexander Hamilton, in the *Crosswell* case, understandably felt the *Zenger* victory was a *Crosswell* defeat, is given in text. See text accompanying note 124 infra.

6. For example, the obnoxious Alien and Sedition Acts, 1 Stat. 566 (1798); 1 Stat. 596 (1798), made unlawful and permitted an indictment for printing, etc., libels against the federal government, the Congress, or the President, The Sedition Act, ch. 74, § 2, 1 Stat. 596-97 (1798); but § 3 of the Sedition Act then stated: "That if any person shall be prosecuted . . . it shall be lawful for the defendant, upon the trial of the cause, to give in evidence in his defence, the truth of the matter contained in the publication charged as a libel. And the jury . . . shall have a right to determine the law and the fact, under the direction of the court, as in other cases." Ch. 74, § 3, 1 Stat. 597 (1798). Although never declared unconstitutional by the Supreme Court, the statute was denounced by Jefferson and others, as well as by the state legislatures, e.g., the Virginia and Kentucky resolutions introduced in 1798, and it died a statutory death by virtue of its own time-limitation on March 3, 1801, The Sedition Act, ch. 74, § 4, 1 Stat. 597 (1798).

As will later be noted, a distinction must be drawn between common law and statutory crimes, i.e., criminal libel, for in 1812 the Supreme Court held that the federal courts have no common law jurisdiction in criminal cases. *United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812). This case was a demurrer to an indictment on a libel against the President and Congress in the Connecticut Currant on May 7, 1806, "charging them with having in secret voted two millions of dollars as a present to Bonaparte for leave to make a treaty with Spain . . ." *Ibid.* The opinion by Mr. Justice Johnson states the law as "the opinion of the majority of this court . . ." *Id.* at 33. Four years later, in *United States v. Coolidge*, 14 U.S. (1 Wheat.) 415, 416 (1816), the "difference of opinion [which] has existed, and still exists, among the members of the Court" was resolved by

points up the political ferment still existing in the newly-formed states and union, and discloses that the fight against repression had not yet been won by 1804. Whether or not freedom of speech and press is the greatest single basis upon which to maintain a democracy such as ours, it must be conceded that these freedoms are still under attack today, that not only must they be protected but they must also be expanded and increased, and that history may offer a clue to these modern struggles.

*Croswell's Case* began on September 9, 1802. On that date Harry Croswell, the editor of *The Wasp*, a Federalist newspaper in Hudson, New York, thought fit to chide Republican editor Charles Holt, formerly of New London, Connecticut, and now responsible for the *Hudson Bee*, for certain remarks the latter had made in his paper. *The Wasp* had begun publishing on July 7, 1802, and like a great many newspapers in those days had been founded for purely partisan purposes, e.g., its prospectus stated it would, among other things, fight the forthcoming *Bee*. Holt began publishing on August 17, 1802, and in three weeks Croswell's response appeared. Holt was now alleged to have written that "the burden of the federal song is, that Mr. Jefferson paid Callender for writing against the late administration. This is wholly false," charged Croswell, for "the charge is explicitly this: Jefferson paid Callender for calling Washington a traitor, a robber and a perjurer; for calling Adams a hoary-headed incendiary; and for most grossly slandering the private characters of men who he well knew were virtuous. These charges, not a democratic editor has yet dared, or ever will dare, to meet in open and manly discussion."<sup>7</sup>

As disclosed shortly, Callender had turned upon and attacked Jefferson, and the latter's champions, writing in his defense, were now themselves attacked by Jefferson's political opponents. Thus Holt, in his first issue defending the President against Callender's accusations, was himself made the butt of Croswell's ire. For this statement in *The Wasp*, an indictment for seditious libel at common law was found against Croswell almost exactly four months later, on January 10, 1803 (the federal

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following the earlier decision, even though now under peculiar conditions, i.e., the Attorney-General declined to argue the case, and no counsel appeared for the defendant. In the latter case, the former case is referred to by the Attorney-General as having been decided in 1813. Since the Coolidge case, however, the Supreme Court has many times adhered to this view, e.g., *United States v. Eaton*, 144 U.S. 677, 687 (1892).

7. 3 Johns. Cas. at 340. The instant quotation, taken from the "official" report, is not exactly as published with respect to punctuation and minor items; throughout, however, these reports are used.

While the charges against Croswell were based upon two issues, the serious libel was found in this seventh issue, and the fourth issue of August 12, 1802 is disregarded because of its unimportance here.

Sedition Act had lapsed on March 3, 1801), by a grand jury which, it has been said, was made up solely of Columbia County Republicans who had been summoned by the Republican sheriff. The attitude of many Federalists and Republicans toward seditious libel had changed after the election of Jefferson in 1800. Editor Holt, when previously the publisher of the *New London Bee*, had been indicted under the Sedition Act for libeling Alexander Hamilton. He was found guilty in April, 1800, before Associate Justice Bushrod Washington of the United States Supreme Court, while the latter was on circuit in New Haven. Holt had been fined two hundred dollars and sentenced to a month in prison.<sup>8</sup> This background of the Holt-Hamilton connection helps somewhat to explain Hamilton's later interest in the *Croswell* defense. While this is not meant to denigrate the plea made by him on behalf of the defendant, it discloses personal and political considerations did enter even though liberty of the press was involved. It may even be inquired whether political, rather than libertarian, principles were uppermost in Hamilton's view (and in those of his co-counsel).

In the instant bill *Croswell* was described in the rather horrendous words then used as "being a malicious and seditious man, of a depraved mind and wicked and diabolical disposition," who had tried to traduce and slander President Jefferson so as to alienate the allegiance and obedience of the good people of the country from him.<sup>9</sup> As Sir James Stephen earlier wrote, the form of an indictment for seditious libel "preserved the style and temper of an age when round, full-mouthed abuse of people who gave offense to the government was thought natural and proper . . . ."<sup>10</sup> However, as he had also remarked, with the growth of the desire for more representative government, men's views on the relationship between governors and governed, in the later eighteenth and early nineteenth centuries, were in a state of flux, and the law of seditious libel, which reflected an older attitude of rulers to ruled, was being challenged.<sup>11</sup>

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8. Holt's Connecticut trial is described in Smith, *Freedom's Fetters* 373-84 (1956). Hamilton, *The Intimate Life of Alexander Hamilton* 177 (1910) says that the Holt involved in this case was named John, and that he was editor of the *New York Evening Post*. The editor of that paper in 1802 was William Coleman. It would appear to be fairly certain that the Holt in question was the former Connecticut editor. He left New London for Hudson where he commenced publication of *The Bee* on August 17, 1802. *Croswell*, who also published the *Hudson Balance*, founded *The Wasp* to counteract the forthcoming *Republican Bee*. Mott, *American Journalism* 168 (rev. ed. 1950); 1 Brigham, *History and Bibliography of American Newspapers, 1690-1820*, at 52, 585 (1947).

9. 3 Johns. Cas. at 337. L. Levy, op. cit. supra note 3, at 297, attributes the initiation of the *Croswell* case to "Clinton's administration."

10. 2 Stephen, op. cit. supra note 5, at 354.

11. Id. at 292-301.

The Croswell indictment was executed by his arrest the following day, and his arraignment before the General Sessions of the Peace for Columbia County, a court inferior to the Supreme Court and which may be analogized to today's Justice of the Peace court.<sup>12</sup> Appearing on behalf of the prosecution was not a local district attorney but Ambrose Spencer, the Attorney-General of the State since February 3, 1802. As disclosed later, Spencer had a political and almost personal interest in the case, for Croswell's *Wasp* had attacked Spencer in several issues.<sup>13</sup> The defendant was then represented by local counsel, namely, William W. Van Ness (who later continued as co-counsel on the motion for a new trial and whose background is shortly given), Jacob Rutsen Van Rensselaer, and Elisha Williams, all among the leaders of the bar there. Several objections were interposed by defense counsel as to pleading and for an adjournment, but to all these Spencer's objections were sustained and the trial (of the Callender issue) was set for the morrow. The adjournment had been requested for the purpose of securing Callender as a witness to the truth, and the effect of the court's rejection of this request presaged the law which later was to be again urged by Spencer and now adopted by the trial judge as the law to be applied in this case; so, too, did the defendant's challenge to this law disclose his later contentions. Nevertheless, and before the next day's trial opened, Spencer offered to withdraw his objection to an adjournment upon certain conditions; the defense thereupon presented an affidavit by Croswell as to what he intended to prove, which enabled an adjournment to the June term of the same court to be granted; Spencer now urged that Croswell furnish bail for appearance and to guarantee his good behavior, *i.e.*, in effect to prevent further publications or, at least, to render them innocuous. As to the appearance, the court granted the motion, but as to the good behavior it was denied. Before the adjourned date Elisha Williams, on behalf of Croswell, obtained *writs of certiorari* from Justice Kent (later appearing on the bench which heard the motion for a new trial), and thereby sought to transfer the trial to the Supreme Court sitting in circuit in Claverack, New York.<sup>14</sup> Spencer's efforts to retain the matter in the inferior court

12. For its background see Street, *The Council of Revision of the State of New York* 23-24 (1859).

13. As an aftermath of the criminal proceedings here discussed, Spencer (and another) sued Croswell civilly for damages, and a judgment for \$126 was recovered by Spencer. 1 Goebel, *The Law Practice of Alexander Hamilton* 344 (1964).

14. The background of these inferior (and other) courts, prior to the Revolution, has been traced by Goebel & Naughton, *Law Enforcement in Colonial New York* (1944), and, speaking of these Sessions Courts, the authors write: "[T]he notion had become seated that serious crime was the business of the highest provincial tribunal." *Id.* at 92. Whether or not the present indictment for seditious libel was such a "serious crime" apparently

proved ineffective. He finally stipulated to the removal and for the trial at the next (July) term of the higher court.

The trial of Harry Croswell for seditious libel thus opened July 11, 1803, at the Circuit of the Supreme Court held in Claverack before Chief Justice Morgan Lewis, a Republican, who had been appointed to the bench on December 24, 1792, and became Chief Justice October 28, 1801. This time Spencer was assisted by District Attorney Ebenezer Foote, Van Ness and Williams; and, in place of Van Rensselaer, James Scott Smith, of New York City, and Abraham Van Vechten, of Albany.<sup>15</sup> The Chief Justice was the son-in-law of Chancellor Robert R. Livingston, who was then a political ally of Republican Governor George Clinton and his nephew, De Witt Clinton.<sup>16</sup> Within a week after the arguments on the motion for a new trial in *Croswell's Case* were concluded, as discussed below, the Chief Justice was nominated by the Republican caucus to succeed Clinton as Governor, and the following April he was so elected. These connections, and also those later discussed concerning the other judges who heard the motion, disclose still further the politics involved in this prosecution, even though, as one newspaper reported, in his closing charge the Chief Justice "insisted upon his impartiality of spirit and disclaimed any political intent, asserting that judges 'left party spirit at the foot-stool of the judgment seat.'"<sup>17</sup> At the opening of the court Croswell, in an affidavit, now immediately asked Chief Justice Lewis to postpone the trial until James Thomson Callender, the man mentioned in the alleged libel, could arrive to prove the truth of his statements, or else to permit an application to be made at the next term to take his commission.

Who was Callender? He was a journalist, then living in Richmond, Virginia, who was well acquainted with trials for seditious libel. He had been charged with this crime in his native Scotland in 1793 and, after having been proclaimed an outlaw, had fled to the United States. On his arrival he was befriended by Jefferson and other Republicans as a man who had suffered in the cause of liberty. He clearly demonstrated his talent for scabrous invective in 1797 when he published a *History of the United States for 1796*, an anti-Federalist pamphlet, in which, among other details of administration perfidy, he exposed Alexander Hamilton's liaison with Mrs. James Reynolds. To save his public honor Hamilton was

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did not matter; it was politically most serious. On the method and use of certiorari to transfer cases up from the Sessions Courts, see *id.* at 154-61.

15. See generally 1 Goebel, *op. cit. supra* note 13, at 779-80.

16. Dangerfield, *Chancellor Robert R. Livingston of New York, 1746-1813*, at 189, 305-06 (1960); 11 *Dictionary of American Biography* 322-23 (Malone ed. 1933).

17. 1 Goebel, *op. cit. supra* note 13, at 789, quoting *The Balance*, September 13, 1803.

forced to admit his affair with her and to confess that money she and her husband had received from him was blackmail and not a reward for assistance in speculating with United States Treasury funds.<sup>18</sup> In 1798 Callender, fearing indictment under the Sedition Act of that year, fled from Philadelphia to Virginia where, in attempting to escape the federal law, he ran afoul of a local vagancy statute. He was not a prepossessing man and had once been put out of the halls of Congress because of his personal uncleanness. He was arrested near Leesburg, Virginia, and Senator Stevens T. Mason, who had offered him refuge, had to come to his aid and swear to his good character. Callender became associated with the *Richmond Examiner* and, with Jefferson's assistance, published a pamphlet in 1800 entitled *The Prospect Before Us*, in which he attacked Washington and John Adams in the terms Crosswell had cited. In May, 1800, Callender was tried for libeling President Adams. The trial was before Samuel Chase, an Associate Justice of the United States Supreme Court. Chase was a strong Federalist partisan, and was then on circuit in Richmond; Callender was found guilty, fined, and put in prison. When Jefferson became President, and in connection with the general amnesty granted to all convicted under the Alien and Sedition Acts, he pardoned Callender and, in addition, restored his fine to him. Apparently Callender did not regard this gesture as a sufficient reward for services rendered and sufferings endured and, when his request for the position of postmaster at Richmond was not granted, he turned on his Republican friends in the autumn of 1802. On July 17, 1803, "in a drunken seizure he fell off a ferry [in the James River] and was drowned,"<sup>19</sup> thus ending his stormy career.

This was the man Crosswell averred he had good reason to expect to attend as a witness for the defense at the next sitting of the court, although it is entirely possible that Callender was dead at that time.<sup>20</sup> Crosswell swore that Callender would voluntarily appear and testify that Jefferson, well knowing the contents of *The Prospect Before Us*, had paid the author fifty dollars prior to its publication and another equal sum after it had been issued, for the purpose of aiding and assisting in its publication; further, that Callender would bring two letters to him from

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18. B. Mitchell, Alexander Hamilton, *The National Adventure, 1783-1804*, at 406-22 (1962); Schachner, Alexander Hamilton 364-72 (1946). It may be noted that politics does make strange bedfellows, for now Hamilton, in effect, was holding Callender up as a truth-monger!

19. Miller, *Crisis in Freedom* 210-20 (1951). See also 3 Malone, *Jefferson and His Times* 463-72 (1962); Smith, *op. cit. supra* note 3, at 334-53.

20. Letter from Ernest H. Breuer, N.Y. State Law Librarian, to Father Vincent C. Hopkins, S.J., March 3, 1964.

Jefferson which showed the latter's approbation of the said pamphlet. The Chief Justice felt, and ruled, that truth was inadmissible as a defense so that even if Callender could be present his testimony would be ruled out; as to the request to obtain a commission at the next term, this was denied. During the oral argument on this motion Croswell's lawyers urged four points, their major contentions being that a public libel, *i.e.*, of an official of the government, not a private one, was involved, and that in such a case truth could be proved as a defense; in effect, and so continued the argument, this would overcome the English common law of libel. But, as just noted, Lewis rejected these views and ordered the defendant to trial the next day.<sup>21</sup> On July 12th a jury was obtained and the trial began.

The prosecution thereupon opened and, as its case, proved that Croswell was responsible for *The Wasp*, though on its title page it was stated that it was published by Croswell for an editor named "Robert Rusticoat" (unquestionably known and accepted as a cover), that he had published the remarks for which he was charged with libel, and, through a witness called to testify, the truth of the innuendoes. The prosecution also produced witnesses who testified they had purchased a complete file of the paper at Croswell's office, the first five from Croswell himself and the next seven from a journeyman printer working in his shop, with the last number appearing shortly after Croswell's indictment. The malice of Croswell's intention, it was claimed on summation, was manifest in each such number of *The Wasp*. The defense at first offered to prove that Croswell had had no part in the actual writing of the article, that is, that it had been handed to an employee of his to be printed when he was away from the premises. To this the prosecution successfully objected, with the Chief Justice refusing to receive this evidence unless Croswell meant also to prove that he was not privy to the actual printing and

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21. 3 Johns. Cas. at 339. 3 Malone, *op. cit.* supra note 19, at 468-69, has examined the truth of Croswell's charge, a fairly common Federalist one, that Jefferson paid Callender both before and after the publication of the pamphlet. Malone says that, while Callender was the guest of Senator Mason, Jefferson was informed of his dire poverty and instructed Mason to draw fifty dollars on his Richmond agent for Callender. When Callender was preparing the work which turned out to be "The Prospect Before Us," he wrote Jefferson that the latter was to be a subscriber to his next volume and that in Virginia it was the custom to pay in advance. In reply Jefferson wrote Callender that his agent at Richmond would give him fifty dollars on account and that Callender was to send him two or three copies when the work was published and to hold the others until Jefferson requested them. Jefferson saw the book, probably in page proofs, during the autumn of 1799 and, when its composition was far advanced, gave some information to Callender which was of no particular importance. According to Malone, there is no evidence that Jefferson seriously influenced the contents of the work.

publication of the alleged libel. This, however, Croswell did not feel confident in establishing. The defense then introduced, by reading, certain excerpts from Holt's *Bee*, claiming the opening portion of the alleged libel was but a reproduction of these, but in then attempting to introduce the Callender pamphlet, they were unsuccessful; thus *The Prospect Before Us* was not presented to the jury. Counsel then proceeded to sum up and defendant's counsel, in arguing to the jury, sought to establish the substantial truth of Croswell's printed charges by reading to them relevant lines from Holt's *Bee*.<sup>22</sup> In rebuttal the Attorney-General, over objection, read other passages from numbers of *The Wasp* theretofore not placed in evidence and which, it was felt, showed Croswell's intent and malice.<sup>23</sup>

The Chief Justice then proceeded to charge the jury and it was no surprise when he restated his prior views on the law of libel. He first charged that the rule of law which confined jurors to a consideration of facts alone was strictly applicable in libel cases, where the question whether a certain writing was libelous or not was an inference of law from the facts; and, so far as he knew, this was the only case in which the courts regarded a general as a special verdict.<sup>24</sup> He next read to them at length the opinion of Lord Mansfield in the *Case of William Shipley, Dean of St. Asaph*, and charged that the law concerning libel, as there laid down, was the law of this state.<sup>25</sup> This case, regarded by Chief Justice

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22. 3 Johns. Cas. at 341. This was "to show that he declared the burden of the federal song to be such, as mentioned in the libel. Though this had not been previously proved or read in evidence, it was not objected to." *Ibid*.

23. *Ibid*.

24. As then urged by Hamilton in his argument for a new trial, a plea of not guilty "embraces the whole matter of law and fact involved in the charge, and the jury have an undoubted right to give a general verdict, which decides both the law and the fact." *Id.* at 345. The special verdict was a restricted one, i.e., to those questions of fact as propounded by the court, or solely to questions of fact in the case.

Thus the court's charge in effect meant that whether or not the language was libelous was for the court to decide once the jury had determined the facts. As to which facts see note 25 *infra*.

25. "[T]hat it was no part of the province of a jury to inquire or decide on the intent of the defendant; or whether the publication in question was true, or false, or malicious; that the only questions for their consideration and decision were, first, whether the defendant was the publisher of the piece charged in the indictment; and, second, as to the truth of the innuendoes; that if they were satisfied as to these two points, it was their duty to find him guilty; that the intent of the publisher, and whether the publication in question was libellous or not, was, upon the return of the postea, to be decided exclusively by the court, and, therefore, it was not his duty to give any opinion to them, on these points; and accordingly no opinion was given." 3 Johns. Cas. at 342. (Italics omitted.) See also the Chief Justice's language on the motion for a new trial. *Id.* at 395.

Lewis as determinative of the jury's province and function in the matter before him, is worthy of special and somewhat detailed analysis.

There had been many cases of seditious libel tried in the English courts from 1760 on, and among these the *Dean's Case* was a leading one both because of the plea of his lawyer, Thomas Erskine, and the opinion of the Lord Chief Justice of the King's Bench, Mansfield. Political reform was in the air and a desire for greater freedom of speech (than the law as it then stood allowed) took the form of insisting that malicious intention was of the essence of the crime of seditious libel.<sup>26</sup> The Shipley family, at the head of which was his father, the Bishop of St. Asaph, had reforming tendencies which the Dean shared. The latter had been quite impressed by a small tract written in 1783 by William Jones, the well-known Orientalist and barrister (who later married into the Dean's family), which was entitled *A Dialogue Between a Farmer and a Gentleman, on the Principles of Government*.<sup>27</sup> In its reform of representation in the House of Commons was urged. An occasion for this agitation was the notable failure of the ministry in conducting the war against the American colonies. The Dean submitted the tract to the local committee of the Society for Constitutional Information in Flintshire, Wales, which considered translating the work into Welsh but, on second thought, came to the conclusion that its contents might be misunderstood. Later, however, their vote of approval of the essay was attacked by the Court party, who were supporters of the *status quo* and were led by the Honorable Thomas Fitzmaurice, the brother of the Marquess of Landsowne; thereupon the Dean, considering himself implicated, and desiring vindication, had the tract reissued in a small edition prefaced by a defense of his activities.<sup>28</sup> For this he was indicted in 1783 for seditious libel and the case was put on the calendar of the Wrexham assizes for the summer of that year. It was postponed, however, at the request of the prosecution because of the circulation of a paper in the neighborhood in which it was asserted that, in cases of libel, the jury was the judge of law and fact. In April, 1784, the case was removed by *certiorari* to the Court of King's Bench and was heard in August of that year at the Shrewsbury assizes in Shropshire by Mr. Justice Buller. The future Lord Chancellor, Thomas Erskine, had been retained by the Society for Constitutional Information to defend the Dean, and he had already made a fruitless two hundred

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26. 8 Holdsworth, *A History of English Law* 345 (1926).

27. See *The Modern Orator, The Most Celebrated Speeches of the Right Hon. Lord Erskine* 298 (1847). Mr. Jones subsequently became Sir William, and one of the judges of the Supreme Court at Bengal.

28. *Id.* at 299; Stryker, *For the Defense* 122-36 (1947).

mile trip by post-chaise to Wrexham. He now went to the Shrewsbury assizes to represent the defendant.<sup>29</sup>

Erskine contended that the *Principles of Government* was innocent and that it was the right of the jury to judge its guilt or innocence and whether it was malicious or not. He ended his plea by saying: "Let me, therefore, conclude with reminding you, gentlemen, that if you find the defendant guilty, not believing the thing published to be a libel, or the intention of the publisher seditious, your verdict and your opinions will be at variance; and it will then be between God and your own consciences to reconcile the contradiction."<sup>30</sup> He argued that the jury was the judge of the libelous character of the tract, and not only of the fact of publication, and that it also had to determine whether "G." in the dialogue meant "Gentlemen," the "F.", "Farmer," that the King mentioned was George III, and that the Parliament discussed was that of England. With this Justice Buller did not agree and charged the jury that, if they were satisfied that the defendant had published the pamphlet, that they recognized that the various characters in the tract were a gentleman, a farmer, George III, and the British Parliament, then they were to find the Dean guilty; otherwise, of course, they should acquit him.<sup>31</sup> After about half an hour's discussion the jury returned and gave a rather peculiar verdict, "Guilty of publishing only." Buller, rather surprised, found the verdict incorrect and wished the word "only" dropped. Erskine insisted that if the jury now omitted the word "only" their verdict would be changed, and demanded that the verdict as given be recorded. This led to an altercation, rather famous in English law, between Buller and his former law student, during which the judge said to the persistent lawyer, "Sit down, sir. Remember your duty, or I shall be obliged to proceed in another manner." To this veiled threat of being held in contempt of court Erskine replied, "Your Lordship may proceed in what manner you think fit. I know my duty as well as your Lordship knows yours. I shall

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29. 6 Lord Campbell, *The Lives of the Lord Chancellors and Keepers of the Great Seal of England* 338 (2d Amer. ed. 1851); Stryker, *op. cit. supra* note 28, at 123; Walford, *Speeches of Thomas Lord Erskine* 90 (1880). Erskine's plea for the Dean is in Walford, *supra* at 96-125.

30. Walford, *op. cit. supra* note 29, at 125. See also *The Modern Orator*, *op. cit. supra* note 27, at 299: "Mr. Erskine, in his speech for the defence, insisted on two great principles: 1st, That the Jury were not restricted to finding the mere fact of the publishing, without regard to the nature of the matter published, but that they had the right of determining whether the matter charged in the indictment as a libel were a libel or not; and, 2ndly, That the intention and motive in the publishing must be taken into consideration, and that, if the publication was not with a criminal motive, it could not be held as libellous."

31. Walford, *op. cit. supra* note 29, at 129.

not alter my conduct."<sup>32</sup> After further discussion, which became better natured, Justice Buller said to the jury, "You say, Guilty of publishing; but whether a libel or not, you do not find,—is that your meaning?" To which a juror replied, "That is our meaning." When asked if they left the defendant's intention to the court, a juror answered, "Certainly." Finally, when the prosecution asked if the jury meant to leave the law as it stood, the reply was again, "Certainly."<sup>33</sup>

In the following term Erskine moved for a new trial on the ground of misdirection by the judge, and the motion was argued on November 15th before Lord Chief Justice Mansfield in Westminster Hall. Erskine laid down several propositions. The first was that when a bill of indictment was found charging any crime or misdemeanor known to the law of England, and the accused party put himself upon the country (*i.e.*, threw himself upon the jury for deliverance) by pleading the general issue (*i.e.*, not guilty), the jury was charged generally with his deliverance from that crime (*i.e.*, a general verdict of acquittal after an investigation as general and comprehensive as the charge), and not charged specially to determine guilt or innocence from the facts of which the crime consisted (*i.e.*, as occurred here).<sup>34</sup> Erskine next maintained that no act which the law held to be criminal was in itself a crime, apart from the mischievous intention of the one who performed the act. Third, an indictment for libel formed no exception to the jurisdiction of juries or the practice of judges in other criminal cases. He then argued that a seditious libel contained no question of law and, lastly, that in all cases where malicious intent could be deduced by inference from the fact charged, but the defendant had evidence to rebut such a charge, his intention became an unmixed question of fact for the consideration of the jury.<sup>35</sup> Despite Erskine's eloquence Lord Mansfield and his fellow judges denied the motion for a new trial. A few days later Erskine moved in arrest of judgment, which was granted. The Dean returned to his native county where he was greeted with great enthusiasm. Afterwards, when Erskine was defending Thomas Paine, he remarked of Mansfield's attitude during the

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32. *Id.* at 127.

33. *Id.* at 129-30. 2 Stephen, *op. cit.* supra note 5, at 332, poses Buller's question to the jury as "whether you say guilty only of publishing, or guilty of publishing only, that amounts to the same thing. You may put it thus: 'Guilty of publishing, but whether it is a libel or not you don't know,' if that is your intention." To which one of the jury replied, "That is our intention." (Emphasis omitted.) There are thus two accounts of the argument. See also *The Modern Orator*, *op. cit.* supra note 27, at 299.

34. But see *An Act to Remove Doubts Respecting the Functions of Juries in Cases of Libel*, 1792, 32 Geo. 3, c. 60, § 3, in which a proviso nevertheless permitted the jury in a libel case to bring in a special verdict, in their discretion.

35. 2 Stephen, *op. cit.* supra note 5, at 330-33; Walford, *op. cit.* supra note 29, at 146-54.

Dean's trial: "I ventured to maintain this very right of a jury over the question of libel under the same ancient constitution, before a noble and reverend magistrate of the most exalted understanding and of the most uncorrupted integrity. He treated me—not with contempt, indeed, for that his nature was incapable—but he put me aside with indulgence, as you do a child when it is lisping its prattle out of season."<sup>36</sup>

In arguing as he did in the matter of the Dean of St. Asaph, as well as in similar cases, Erskine was aware that his purpose was not merely to state the law of seditious libel, but also to change it. Lord Chancellor Campbell owned a copy, which had belonged to Erskine, of the latter's argument in the *Dean's Case* and in which Erskine had noted that he had made the motion for a new trial with no hope of success "but from a fixed resolution to expose to public contempt the doctrines fastened on the public as law by Lord Chief Justice Mansfield, and to excite, if possible, the attention of Parliament to so great an object of national freedom."<sup>37</sup> Erskine's desire was fulfilled in a degree by the passage, in 1792, of Charles James Fox's Libel Bill according to which "the jury sworn to try the issue may give a general verdict of guilty or not guilty upon the whole matter . . . and shall not be required or directed by the court or judge . . . to find the defendant or defendants guilty merely on the proof of the publication . . . of the paper charged to be a libel, and of the sense ascribed to the same in such indictment or information."<sup>38</sup> It was left to the discretion of the trial court or judge whether or not to inform the jury about their or his own opinion of the matter, and to give directions to the jury, in like manner as in other criminal cases.<sup>39</sup> This law, which passed unanimously, was phrased so as to make it appear to be a declaration of the common law as it then existed despite the fact that the bench, in its reply to questions put to it on the subject by the House of Lords, repeated the law as laid down in the *Dean's Case*. The statute contained no provision about proving the truth of a libel.<sup>40</sup>

This brief resumé of the *Dean's Case* serves to point up the startling similarities between it and the *Croswell Case* twenty years later; the parallel is almost amazing, even unto the statutory generation which followed, for in the New York situation the legislature there also, by

36. 6 Lord Campbell, *op. cit.* supra note 29, at 343.

37. *Id.* at 342.

38. An Act to Remove Doubts Respecting the Functions of Juries in Cases of Libel, 1792, 32 Geo. 3, c. 60, § 1.

39. An Act to Remove Doubts Respecting the Functions of Juries in Cases of Libel, 1792, 32 Geo. 3, c. 60, § 2.

40. 11 English Historical Documents, 1783-1832, at 363-64 (Aspinall & Smith, eds. 1959); 2 Stephen, *op. cit.* supra note 5, at 344-45.

statute, changed the law. It is therefore not surprising that without referring to Fox's Libel Act of 1792, perhaps because of a belief that it was inapplicable,<sup>41</sup> but instead following the opinion of Lord Mansfield as

41. During the argument on defendant's motion for a new trial (see note 57 *infra*), counsel stated, concerning the right of a jury in these cases to decide the law and the fact, that "the English declaratory act of 1793 [sic] put this question at rest in England . . . ." 3 Johns. Cas. at 347. The reference, of course, is to Fox's Libel Act, passed in 1792. For the "main stages in the history" of English common law to this Act see, e.g., 2 Stephen, *op. cit. supra* note 5, at 300-01.

What, however, is involved in *Croswell's Case*, is not only the English common law, but also the English statutory law. Both must be considered for an understanding of Hamilton's argument and the Chief Justice's charge and decisions.

First: many of the colonies-turned-sovereigns incorporated the English common law by reference in their first constitutions or early statutes. E.g., N.Y. Const. art. XXXV (1777) (now N.Y. Const. art. I, § 14): "Such parts of the common law . . . as . . . did form the law of the said colony" on April 19, 1775, and not theretofore or thereafter repealed, altered, or repugnant to this Constitution, "shall be and continue [to be] the law of this state . . . ."

Second: to the extent that this common law was based upon, or emanated from, English statutes, the American approach is typified by *Commonwealth ex rel. Chew v. Carlisle*, Brightly 36 (Pa. Nisi Prius 1821). There it was said that the English "law of conspiracy, as respects artisans, which may be said to have, in some measure, indirectly received its form from the pressure of positive enactment, and which therefore may be entirely unfitted to the condition and habits of the same class here," need not be considered adopted or followed in America. *Id.* at 37-38. See generally Forkosch, *The Doctrine of Criminal Conspiracy and Its Modern Application to Labor*, 40 Texas L. Rev. 303, 324 (1962).

Third: as to these statutes, the approach found in the "Declaration of Colonial Rights," adopted by the First Continental Congress as a series of resolutions, on October 14, 1774, is apropos. Resolution 6 stated: "That they [the colonies] are entitled to the benefit of such of the English statutes, as existed at the time of their colonization; and which they have, by experience, respectively found to be applicable to their several local and other circumstances." 1 Journals of the American Congress, 1774-1788, at 21 (1823).

Fourth: as to the unwritten or non-statutory common law, whether or not later codified, its adoption by the people of the new American states "does not compel us to incorporate into our system of jurisprudence principles, which are inapplicable to our circumstances and which are inconsistent with our notions of what a just consideration of those circumstances demands. . . . Such [common law doctrines] as were inconsistent with the spirit of our institutions, or had special reference to the physical conditions of a country widely differing from our own, never became a part of our law, upon the organization of this state." *Town of Brookhaven v. Smith*, 188 N.Y. 74, 79, 80 N.E. 665, 667 (1907).

Fifth: in *Croswell's Case*, therefore, the English statute of 1792 could not, as such, be utilized to form the basis of the New York law of libel, for it did not antedate that state's Constitution of 1777.

Sixth: however, to the extent that such English statute of 1792 was declaratory of, or codified, the common law existing before 1777, the statute could be referred to and even used as evidence of that earlier common law which had been so adopted and continued by the Constitution of 1777.

indicative of the common law *sans* the statute, Chief Justice Lewis charged the jury at Claverack in 1803 that it was not within their province to decide questions concerning the defendant's intent, or the truth, malice, or falsity of the article in *The Wasp*; they were to decide only whether Croswell had published the piece alleged to be libelous. If the jury was convinced that Croswell had published it, and that the innuendoes in it were true, *e.g.*, that Jefferson was the man referred to in it, then it was their duty to give a verdict of guilty,<sup>42</sup> and that nothing else should be considered by them, *e.g.*, truth, falsity or intent. The jury did as it was told and eventually pronounced such a verdict, but since they were out all night in their deliberations, apparently it was reached only after some soul-searching.

Counsel for the defense thereupon moved<sup>43</sup> for a new trial<sup>44</sup> which came on to be heard by, and was argued in Albany before, the full bench of the Supreme Court of Judicature, at that time the last court of resort, on February 13-15, 1804.<sup>45</sup> On the Bench sat Chief Justice Lewis, related by marriage to the Livingstons,<sup>46</sup> whose prior opinion on the matter was well known; (Henry) Brockholst Livingston, the son of former Governor

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Seventh: regardless, three questions still remained: (a) was the English statute really declaratory, or did it change the common law; (b) in either case, the common law had to be separately obtained, for purposes of use if change or for purposes of comparison if unchanged; and (c) even if declaratory, was this English common law such a one which, as to this particular case, should be used here in the light of present (1803) conditions, differences and desires?

42. See note 25 *supra*.

43. See The Speeches 6 for the extensive grounds of this motion.

44. For the reason why this particular type of motion was used see *e.g.*, 1 Goebel, *op. cit.* *supra* note 13, at 790; Goebel & Naughton, *op. cit.* *supra* note 14, at 183-90, 680-83.

45. Actually, the highest state court consisted of the upper house of the legislature and was officially denominated the "Court for the Trial of Impeachments and the Correction of Errors," and while the Chancellor and the judges of the Supreme Court of Judicature were members and could sit and explain their decisions, they could not vote. The Court of Errors continued until 1821, but for practical purposes the Supreme Court was the court of last resort. However, in Croswell's Case it would be interesting to speculate on the result of an appeal to the Court of Errors in view of the legislative enactment of the Libel Act of 1805. See Croswell's Case, 3 Johns. Cas. at 412, and the conclusion of this article. The reason why the motion for a new trial came before the full bench of the Supreme Court, and not before the single Chief Justice at the Circuit Court, was because the latter tribunal, on removals such as this from an inferior court, itself tried the issues, but the full bench thereafter pronounced judgment; all motions thus came before the Supreme Court sitting en banc.

46. He was married in 1779 to Gertrude, a sister of Robert R. Livingston, and within five years began his political climb, *e.g.*, Attorney-General of the State in 1791, a Supreme Court Justice the following year, and in 1801 a Chief Justice, culminating in a victory over Aaron Burr for the Governorship in 1804.

William Livingston of New Jersey, appointed to the bench on January 8, 1802, but who was appointed by Jefferson to the United States Supreme Court on November 20, 1806, serving there until his death on March 18, 1823; Smith Thompson, who was allied by marriage<sup>47</sup> to the Livingston family, appointed on the same day as Brockholst Livingston but who succeeded Kent as Chief Justice when the latter became Chancellor, and who was, after Livingston's death, appointed to the United States Supreme Court on December 9, 1823, serving there until 1843; and James Kent, formerly (and after his judicial retirement) a professor of law at Columbia University, later the famous Chancellor Kent, and the author of the *Commentaries*, a strong Federalist, and the only judge sitting in review not connected with the Livingstons.<sup>48</sup> The inferences to be drawn from this brief analysis of background are left to the reader; suffice it to mention that in the decision Thompson allied himself with Kent, perhaps because he had studied law with Kent, and with what family consequences are here unknown (although in view of his later appointments, not unsatisfactory).

The legal talent which came to Albany to defend Croswell before this rather close-knit and formidable bench was unusually brilliant. The acknowledged leader of the New York bar, former Secretary of the Treasury Alexander Hamilton, was there. An attempt had earlier been made, albeit unsuccessful, to secure his services for Croswell at the trial. Elizabeth Schuyler Hamilton had received a letter from her father, General Philip Schuyler, dated June 23, telling her that about a dozen Federalists had begged him to write to his son-in-law to ask him to appear for the defense. The cause was worthy, Schuyler wrote, because in his opinion Jefferson disgraced the place he filled and caused immorality by his pernicious example. Hamilton, however, although sufficiently interested in the case to have been indirectly of aid, had been prevented from then attending by the press of other business.<sup>49</sup> With him now appeared a close friend, Richard Harison, a son of a Tory councillor of New York Province who had fled to England. Despite this liability, President Washington had appointed him a federal district attorney and, in 1803, he was a leading New York lawyer and active in the affairs of Trinity Church.<sup>50</sup>

47. He married Sarah, daughter of Gilbert Livingston, in 1794; after her death he married her cousin, Eliza, daughter of Henry Livingston, a brother of Gilbert.

48. Kent was appointed February 6, 1798, became Chief Justice July 2, 1804, and later became Chancellor on February 25, 1814. "He introduced the practice, subsequently followed by the members of the court, of presenting written opinions in all matters decided, of importance sufficient to become a precedent." Street, *op. cit. supra* note 12, at 56-57. See also *id.* at 163, speaking of Kent's original appointment in 1798.

49. Hamilton, *op. cit. supra* note 8, at 180-84; Schachner, *op. cit. supra* note 18, at 145.

50. Fox, *The Decline of Aristocracy in the Politics of New York* 12-13 (1918).

At the conclusion of his argument Harison stated that "I myself have frequently been a public prosecutor, and wherever I have been engaged, never have I refused to suffer the truth to be shewn."<sup>51</sup> The third lawyer for the defense was William W. Van Ness, born in Claverack where the trial had been held, a highly talented trial lawyer and a leading member of the Federalist Party in New York. When he was made a New York Supreme Court judge June 9, 1807, a brother attorney is reputed to have said, "Thank God! I have no longer an opponent to beat me by asking the foreman of the jury for a chew of tobacco."<sup>52</sup>

The prosecution had originally been conducted by Attorney-General Ambrose Spencer,<sup>53</sup> who began as an ardent Federalist but who became a Republican in 1798. This change of political loyalties at such a time caused some to doubt the purity of his motives. He was now politically allied with the Clintons (and therefore, as noted earlier, with Chief Justice Morgan Lewis), and the alliance became closer when, after the death of his first wife, Laura Canfield whom he had married February 18, 1784, he married De Witt Clinton's widowed sister, Mary Norton, in 1807, and later, when Mary died, her widowed sister, Catherine Norton,<sup>54</sup> in 1809. Spencer and De Witt Clinton parted politically in 1812. Spencer was assisted on the argument by George Caines who, in 1804, was appointed by the legislature as the first official court reporter in New York, and probably on the continent.<sup>55</sup> However, on February 3, 1804, Spencer was appointed a judge of this very court, in place of the fifth judge who had resigned.<sup>56</sup> He nevertheless orally argued against the motion before his soon-to-be brethren. Apparently questions of ethics and good conduct then were not as stringent as they may be today, at least for appearance's sake.

Van Ness opened for the defense, then came Caines for the prosecution, followed by Spencer, and in reply first Harison, with the redoubtable

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51. The Speeches 62.

52. Fox, *op. cit.* supra note 50, at 43.

53. *Croswell's Case*, 3 Johns. Cas. at 362: ("Mr. Justice Spencer having, while Attorney-General, conducted the prosecution against the defendant"). See also note 56 *infra*.

54. The sisters apparently married brothers or close relations bearing the same family name.

55. See 17 Dictionary of American Biography 443-45 (Malone ed. 1935): 3 *id.* at 404-05 (Johnson ed. 1929).

56. The fifth justice, Jacob Radcliff, had resigned, and the new appointee, Spencer, was so designated February 3, 1804, but did not sit as he had been the Attorney-General who had conducted the prosecution against *Croswell* in the lower court. The February 3 date is given in *Croswell's Case*, 3 Johns. Cas. at 362 n.(a), whereas the February 13 date for the case is found at the very opening of the report, just above the headnote and immediately following the title. 3 Johns. Cas. at 337. See also note 53 *supra*. Spencer became Chief Justice on February 9, 1819, in place of Smith Thompson, who resigned.

Hamilton closing.<sup>57</sup> The report of the argument discloses that the speech of Van Ness took thirteen pages, that of Caines twenty-three, Spencer nine, Harison nine, and Hamilton sixteen, or that the defendant's counsel argued for about thirty-eight pages to the prosecutors' thirty-two, with Hamilton and Caines bearing the respective burdens.<sup>58</sup> According to Kent's Notes of the argument, Van Ness and Caines spoke on Monday the 13th, Spencer, Harison, and Hamilton on Tuesday the 14th, and "Mr. Hamilton this morning [Wednesday the 15th] recapitulated the Substance of his argument of yesterday in the following Propositions which he read from his Notes, & from which I copied them."<sup>59</sup>

In particular, and as already has been suggested, the main contention of the defense, with which the prosecution locked horns,<sup>60</sup> and which in effect shortly led to a legislative reversal of the common law rule, concerned the ruling and charge by Chief Justice Lewis to the jury that "in cases of libel, they were not the judges of law and fact . . . [and] that the law laid down in the case of *The Dean of St. Asaph*, is the law of this

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57. This case was not officially reported, as we use the term today, but, "it was obligingly communicated to the reporter [then], by a person of great legal eminence, on whose accuracy and judgment the utmost reliance is placed." Preliminary Note, *Croswell's Case*, 3 Johns. Cas. at 337. See also Schachner, *op. cit. supra* note 18, at 416. There is no "official" way, therefore, of knowing who spoke for the defendant or the prosecution but, factually, the historical documents bear out the order given. The present order is taken from *The Speeches* 6, 19, 45, 54, & 62. See also Kent, *The Case of Harry Croswell ads. The People* 6, 52 (1805) (ms. on file in New York Public Library, Ms. Div., Rm. 319) [hereinafter cited as *Kent's Notes*].

58. This is a superficial analysis, for it was understood that Caines prepared the pamphlet and did not slight himself, that is, his is about the only verbatim argument so printed. That this conclusion is not inaccurate may be judged by Hamilton's plea which, although six hours in length, occupies but a bare sixteen pages; it should, undoubtedly, have been in the low three figures. Furthermore, the pamphlet account is unquestionably not a complete one, as witness Kent's unreported, handwritten notes on the arguments and his comments on Van Ness, e.g., "a philippic on Lord Mansfield," and on Hamilton, e.g., "masterly and eloquent" views on truth, although none of this appears in the pamphlet. See *Kent's Notes* 6, 52. See B. Mitchell, *Alexander Hamilton, The National Adventure, 1788-1804*, at 753 n.70 (1962), which refers to Kent's Notes as a source, and thereafter gives numerous references to other sources.

Kent's Notes on the arguments may also be an indication of time and length; he starts with Van Ness at page 1, then Caines at 13, Spencer at 20, Harison at 30, and Hamilton at 41, with the recapitulation beginning at 64 and going to 71. In other words, Hamilton took about three times as many pages of Kent's Notes as did any of the others (although the fifteen paragraphs of the recapitulation were verbatim).

59. *Kent's Notes* 64.

60. The historical cases and aspects in the arguments by Harison and Hamilton were not directly answered by Caines or Spencer, undoubtedly because no briefs had been exchanged in advance of the arguments and therefore these references were a surprise to the prosecution. Regardless, the bench probably was not influenced by this phase.

State . . . ."<sup>61</sup> As we have also seen in the extended analysis of that earlier English case, it had been followed by a Parliamentary reversal of its principles through the enactment of Fox's Libel Act of 1792,<sup>62</sup> but insofar as the *Dean's Case*<sup>63</sup> stated the common law prior to this statute, it was the anvil upon which the prosecution sought to break the *Croswell Wasp*.

The arguments of the defense and the prosecution, leading up to Hamilton's speech in favor of an enlightened judicial approach to libels at least where public officials were involved, indicates, or at least permits the inference, that the latter's part was basically expository and admonitory. The main lines of Croswell's defense had already been evolved before Hamilton's arrival upon the scene, the legal research had probably occurred and been handed over to the star performer, and it was Hamilton's prestige, oratory, and unquestioned political position which, aside from his personal reasons, influenced his participation. The arguments of Hamilton's co-counsel disclose the degree to which this conclusion may be accepted and, while the participants other than Hamilton surrendered to the technicalities of the case, *e.g.*, the request for the adjournment, Hamilton kept to the basic concept to which he had probably been assigned.

Van Ness argued "with great Zeal and Energy,"<sup>64</sup> and his first contention was that the trial should have been delayed since the law allowed a man indicted for libel to plead, so as to vindicate himself, the truth of his statements, and that Callender could have supported Croswell's charge. In view of that journalist's vendetta with Jefferson and the Republicans, he might very well have made the trip to Claverack, though this circumstance does not appear on the record. Van Ness attempted to prove that such a defense of truth was a common law rule which had never been changed by competent authority. Going back to medieval England he cited cases and also the various statutes *De Scandalo Magnatum*, the first of which had been passed in 1235 during the reign of the English Justinian, Edward I. Falsity, he argued, was there made a material ingredient in the crime of spreading rumors or scandal which would cause discord among the king, the magnates, and the people.<sup>65</sup> The

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61. *Croswell's Case*, 3 Johns. Cas. at 342. This embraced the sixth ground of the motion for a new trial, and as to a portion omitted see the Chief Justice's remarks that "in case of libel, the court could only set aside a general verdict of guilty." *The Speeches* 6 n.l. See notes 24-25 *supra*.

62. An Act to Remove Doubts Respecting the Functions of Juries in Cases of Libel, 1792, 32 Geo., c. 60. See notes 34, 38-39 and accompanying text.

63. See notes 25-37 *supra* and accompanying case.

64. Kent's Notes 11.

65. The magnates were specified in 1378 as peers, prelates and certain officials. The

authority of Lord Chief Justice Coke was invoked to show that these statutes were declaratory of the common law and, as a consequence, that falsity was of the essence of the crime of libel, and that "not a trace of the contrary opinion [was] to be met with in the simplicity of ancient times."<sup>66</sup> The defense then made a spirited attack on the court of Star Chamber, termed "the polluted source"<sup>67</sup> of the doctrine which considered a writing equally libelous whether it was true or false. It was argued that the Star Chamber had had no right to change the common law and that those who had emigrated to America had brought the common law with them as "their inheritance and birthright."<sup>68</sup>

Turning to public policy Van Ness urged again upon Chief Justice Lewis and his brethren, on the present motion for a new trial, the contention that Chief Justice Lewis, who had tried the matter below, had erred in rejecting the defense of truth, and also in his instructions to the jury. As to the first argument, counsel felt that refusing to admit truth, even though the libel is "promulgated with the purest motives, is repugnant to the first principles of policy and justice, and contrary to the genius of a free representative republic. Freedom of discussion and freedom of the press, under the guidance and sanction of truth, are essential to the liberties of our country, and to enable the people to select their rulers with discretion, and to judge correctly of their merits."<sup>69</sup> As to the second argument, it was urged that the trial judge had "misdirected the jury, in saying they had no right to judge of the intent and of the law."<sup>70</sup> On this point the defense went back to the reign of Charles II and a decision given by Lord Chief Justice Vaughan in 1670 in *Bushe's Case*.<sup>71</sup> Crosswell's lawyer argued that the jury had the right, in criminal matters, to give a general verdict which decided both questions of law and of fact, and that this verdict was a final one which could not be questioned by the court. Furthermore, intent was essential to the commission of a

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purpose of these statutes was political, and the action was a criminal one tried by the Council. Plucknett, *A Concise History of the Common Law* 485-87 (5th ed. 1956).

66. Crosswell's Case, 3 Johns. Cas. at 343-44.

67. Id. at 344.

68. Ibid.

69. Id. at 344-45.

70. Id. at 345.

71. Bushel was one of the jury which acquitted William Penn of a charge of unlawful assembly against manifest evidence that Penn had conducted a meeting of the Society of Friends for which he was imprisoned. Vaughan insisted that the jury was not bound to follow the direction of the court because, if they returned a wrong verdict, it was they who could be punished and not the judge who directed it. Plucknett observes that this could be very useful in certain types of political trials, but would work hardship in private litigation. Plucknett, op. cit. supra note 61, at 134.

crime; thus, to require a jury to give a verdict, while not allowing them to consider the intention of the accused, was tantamount to requesting them to perjure themselves. Public liberty and the protection of personal rights, it was urged, demanded that a jury have and exercise the right of judging criminal intent.

Turning to precedents contrary to these arguments the defense stated that before *Francklin's Case*,<sup>72</sup> decided by Lord Raymond in 1731, no court had held it to be law that a jury was not to consider criminal intent in matters of libel. Francklin was the publisher of a paper called *The Craftsman*, which was opposed to the policies of Sir Robert Walpole and for which, in Mansfield's words, "many men of high rank and great talents"<sup>73</sup> wrote. An item appeared in it, known as the Hague letter, probably written by Lord Bolingbroke, which censured the foreign policy of the administration and charged it with incapacity and bad faith; the ministry decided to prosecute. In instructing the jury, Raymond, *inter alia*, said: "So, gentlemen, if you are sensible, and convinced that the defendant published that *Craftsman* of the 2d of January last; and that the defamatory expressions in the letter refer to the ministers of Great Britain; then you ought to find the defendant guilty."<sup>74</sup> So Francklin was convicted.<sup>75</sup> This opinion of Lord Raymond, the defense continued, had been pushed to an alarming extent by Mansfield who, however, had reversed himself in *Horne Tooke's Case* in 1777 when he had left all questions of law, of fact, and of criminal intent to the jury.<sup>76</sup> Both Fox's Libel Act of 1792,<sup>77</sup> and the American Sedition Act of 1798,<sup>78</sup> were said to be

72. 17 Howell, St. Tr. 626 (K.B. 1731).

73. 2 Stephen, A History of the Criminal Law of England 321 (1883).

74. 17 Howell, St. Tr. at 675-76.

75. See generally 2 Stephen, *op. cit. supra* note 73, at 321-22. Francklin here contains the "c" which, in *Croswell's Case*, is omitted by counsel and court.

76. Tooke, a founder of the Society for Constitutional Information, was an English clergyman who caused the Church of England and Pitt's ministry much concern. He had a background of prosecutions against him for libelous attacks upon others. On July 4, 1777, he was tried for a seditious libel published after the battles of Lexington and Concord; he had charged the troops employed against the Americans with murder. Lord Mansfield was the judge, and he had earlier presided over a 1770 indictment upon the trial of which Tooke had been found guilty. (The verdict was later set aside on technical grounds.) Now Tooke reminded Mansfield of his earlier errors, but to no avail, for he was found guilty and imprisoned. In 1794 Tooke was tried for high treason, and was defended by Thomas Erskine before Lord Chief Justice Eyre, but was acquitted. See generally Yarborough, John Horne Tooke 50-54, 74-77, 85-97, 151-76 (1926); Stryker, *op. cit. supra* note 28, at 307-37. In the 1777 indictment, tried by Mansfield, that Justice admitted evidence concerning the truth of the statements made.

77. An Act to Remove Doubts Respecting the Functions of Juries in Cases of Libel, 1792, 32 Geo., c. 60.

78. Ch. 74, § 3, 1 Stat. 597, quoted in note 6 *supra*.

declaratory of the common law and, in the case of the latter, this showed decisively that the general sense of the country was in favor of the right of a jury to judge criminal intent, law, and fact, an opinion which had allegedly been confirmed by Chief Justice John Jay.<sup>79</sup> In closing, the defense argued that the words read to the jury by the prosecution, taken from *The Wasp*, were not libelous because by them Croswell had only refuted Holt's statement in *The Bee*, asserted the true Federalist charge, and invited discussion.<sup>80</sup>

The prosecution then argued against the motion for a new trial, although at the outset Caines flayed the proverbial dead horse, *i.e.*, the defense had abandoned certain grounds which, because of his prepared speech, Caines nevertheless proceeded to refute. Thus, he stated, the Chief Justice when trying the matter, had properly refused to postpone the first trial because Croswell had not shown due diligence to obtain the testimony and there was no probability that (the late) Callender could ever be procured to give testimony. Even if he did come to Claverack his testimony would have been inadmissible as, it was contended (and here the basic issue came to the fore), the law was settled that the truth could not be offered in evidence in a libel case. This was so, Caines urged, "notwithstanding the popular and captivating impression of the contrary doctrine,"<sup>81</sup> since, basically, a libel was punishable because it led to breaches of the peace and not because it was false. The fact that the accepted teaching in prosecutions for criminal libel originated in the court of Star Chamber should not cast doubt on its validity, as "many of the most valuable and received principles in our law, had their origin in that court."<sup>82</sup> The ancient laws treated libelers mercilessly by cutting off their tongues, and statutes such as *De Scandalo Magnatum* did not apply to common law libels; if ancient precedents used the word "false," it was only as a matter of form, and the more modern cases had laid it aside.<sup>83</sup> "The law," it was claimed, "has wisely balanced between extremes upon this subject, and has allowed all reasonable and useful freedom of inquiry, without granting the pernicious indulgence to traduce and blacken private reputation. A free discussion of public measures, without descending to delineate private vices, is sufficient for all beneficial purposes. To expose personal vices, defects, foibles, to the public eye, cor-

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79. See *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1, 4 (1794), a case involving a state law sequestering debts of alien enemies, and the right of these latter, upon peace occurring, to sue thereon; inter alia the Chief Justice spoke "of the good old rule" concerning law-fact and court-jury bifurcation. The case is otherwise here unimportant.

80. *Croswell's Case*, 3 Johns. Cas. at 348.

81. *Id.* at 349.

82. *Ibid.*

83. *Id.* at 349-50.

rupts the morals of the community, tends to drive useful men from office, and to render the press a vehicle to scatter firebrands, arrows and death."<sup>84</sup>

It was next urged that to allow a jury to judge of intent of both law and fact, would make the law uncertain and capricious, and that the province of the jury, especially in this type of case, was of fact alone. Lord Mansfield's reasoning in the *Dean of St. Asaph's Case*, Caines argued, was "eloquent, impressive, and solid,"<sup>85</sup> and should convince any open mind. It was also contended that the opinion of Lord Raymond in *Franklin's Case*, and those of the twelve judges when asked their views on the legal aspects of Fox's Libel Act of 1792, were still the law. While that statute pretended to be declaratory of the common law it was not, and neither had been the American Sedition Act of 1798, which was an amelioration of the common law of England by statute.

Spencer, the next morning, opened with, "he comes to defend the decision on the law as it is, and not as it ought to be."<sup>86</sup> He thereupon likewise began with an attack upon the original request for an adjournment, and then, in effect, urged again the common law as adopted in New York, citing the *Dean's Case* and quoting at length from it, and also citing "Zanger's Case."<sup>87</sup>

After the prosecution had closed its arguments Harison spoke. He opened with a reference to the importance of the case, "as involving the rights and liberties of the press,"<sup>88</sup> and while conceding that Lord Mansfield's great reputation entitled him to the prosecution's "encomiums . . . almost to adoration,"<sup>89</sup> felt that for his errors in libel cases a veil should be drawn. Harison next contended that while the common law controlled the instant case, it was not the common law which, as the prosecution urged, went back to the Anglo-Saxon laws, for these were barbarous and unenlightened. He therefore went into "the most antient [sic] fountains of the common law,"<sup>90</sup> including the cases of *De Scandalo Magnatum* and *De Libellis Famosis*, as well as the early statutes, and urged that "not one indictment for a libel, till of late years, has ventured to omit the word false."<sup>91</sup> In other words, unless the words prohibited were false, there was no libel, which now led to the conclusion advocated by the defense, namely, that it could show the truth. On this basis

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84. Id. at 350. (Emphasis omitted.)

85. Id. at 351.

86. Kent's Notes 20.

87. The misspelling ("Zanger's Case") is found in Kent's Notes 35.

88. The Speeches 54.

89. Ibid.

90. Id. at 55.

91. Id. at 57.

Harison continued with his argument until, at the conclusion, when Spencer interjected that he had "offered to allow the truth to be given in evidence,"<sup>92</sup> Harison replied that "it has however been charged and argued that it cannot, it is against this charge and this position that I have laboured, and it is on account of them, I trust, that a new trial will be awarded."<sup>93</sup> In effect, therefore, Harison continued with the overall arguments of Van Ness, and set the stage for Hamilton to bring together the several contentions of the defense, to point up the basic principle of libel law involved, and to permit the anchor man to make the plea for the freedom of the press which, in the light of history, may well be Hamilton's greatest contribution to this area of the law.

Hamilton's speech took about six hours and spread over two days.<sup>94</sup> He at first apologized to the court for beginning his discussion so late in the day, especially when the case had been so well discussed, if not exhausted, but it was his duty. The matter, he said, was a very important one which touched the character of the President of the United States, which concerned the rights of juries, and the decision of which would have a profound effect upon the liberties of American citizens. He thought it necessary to define what freedom of the press was before taking up the technical questions whether, in libel cases such as this, the truth should be given in evidence, and whether the court had the sole right to judge of the intent of the person charged with libel. "The Liberty of the Press," he said, "consists, in my idea, in publishing the truth, from good motives and for justifiable ends, though it reflect on the government, on magistrates, or individuals."<sup>95</sup> Unless such freedom were allowed, he contended, measures could not be discussed because it would be vain to consider proposals without canvassing their sponsors. It was not enough to say that certain measures were bad, but it was also necessary "to hold up to the people who is the author, that, in this our free and elective

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92. *Id.* at 62.

93. *Ibid.*

94. A bill to change the law so as to allow truth in such a proceeding was then pending in the legislature (see notes 131-44 *infra* and accompanying text). The legislators knew of the *Croswell* case, and even without the connection, the array of counsel, headed by Hamilton, would have sufficed (as it did) to draw them to the oral arguments. Hamilton's influence, as disclosed in the ultimate passage of the bill, may, perhaps, have been of greater importance than his argument. However, this is speculative, and the prestige of Kent, with the politicking of Van Ness, together with the undercurrent of libertarian emotion, may well have accounted for the success of the bill.

Hamilton's argument may be found in *Croswell's Case* (see note 58 *supra*), and in 8 *The Works of Alexander Hamilton* 387-425 (Lodge ed. 1904) [hereinafter cited as *Lodge*].

95. *The Speeches* 63; *Lodge* 389-90. "The liberty of the press consisted in publishing with impunity, truth with good motives, and for justifiable ends, whether it related to men or measures." *Croswell's Case*, 3 *Johns. Cas.* at 352.

government, he may be removed from the seat of power."<sup>96</sup> Otherwise a party, once it had attained power, could very easily become tyrannical and suppress all opposition to it. In so arguing for the freedom of the press Hamilton asked that he be not thought of as urging unbridled license; abuse and calumny were pests in the body politic, and he assured his listeners that he knew very well from personal experience that even the best men were not exempt from slanderous attacks. He but argued for the liberty to publish the truth with good motives and for justifiable ends under the restraint of the courts which, when excesses were committed, could intervene and punish the offenders.<sup>97</sup>

Hamilton then raised the question whether it was right that a permanent body of men, the judiciary, appointed by the executive branch of

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96. The Speeches 63; Lodge 390.

97. In *Croswell's Case*, Hamilton stated: "But he did not mean to be understood as being the advocate of a press wholly without control. He reprobated the novel, the visionary, the pestilential doctrine of an unchecked press, and ill fated would be our country, if this doctrine was to prevail. It would encourage vice, compel the virtuous to retire, destroy confidence, and confound the innocent with the guilty. Single drops of water constantly falling may wear out adamant. The best character of our country, he to whom it was most indebted [Washington], and who is now removed beyond the reach of calumny, felt its corrosive effects. No, he did not contend for this terrible liberty of the press, but he contended for the right of publishing truth, with good motives, although the censure might light upon the government, magistrates, or individuals." 3 Johns. Cas. at 353.

As to the authority and ability of the Supreme Court to nullify a state's criminal libel statute when it encroaches on free speech, see *Beauharnais v. Illinois*, 343 U.S. 250 (1952); and also as to a civil suit by a state public official for damages for a libel of his official conduct, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). In the latter case Mr. Justice Brennan, for the majority, wrote: "Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Id.* at 270. And also: "Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth, whether administered by judges, juries, or administrative officials—and especially one that puts the burden of proving truth on the speaker. . . . As Madison said, 'Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press.'" *Id.* at 271. See also note 37 *infra*.

In other words, while truth is ordinarily a defense in a libel case, the federal requirement also "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-80. Presumed malice, as contrasted with proof of actual malice, is insufficient in this type of case. *Id.* at 283-84.

These results, as today's law, may be compared with the textual and above quoted conditional views of Hamilton; forward-looking then, regressive today, but in the surge of history, understandable. And see, on a furthering of the Sullivan views in application to non-public officials, *Pauling v. News Syndicate Co.*, 335 F.2d 659 (2d Cir. 1964).

the government and, to some degree, connected with it, should have the exclusive right of deciding what was a libel on that government. It could not be denied, he continued, that a group of men likely to be influenced by the existing administration might become corrupt and, in the case of judges, lean to party measures in their decisions. He assured the bench that he had the highest respect for American courts, particularly for the one before which he at present had the honor of appearing but, he said, "I must forget what human nature is, and what her history has taught us, that permanent bodies may be so corrupted, before I can venture to assert that it cannot be."<sup>98</sup> He did not think it safe to compromise the independence of the citizenry because, no matter how much the judges as individuals were interested in the general welfare, once they became the government they could, as a group, turn the courts into engines of oppression; and, if these courts were to have complete control of the question of intent, then the most innocent statements could be declared libelous. Hamilton made a distinction between England, where the judges were appointed by an hereditary ruler and could not be attacked without the assent of both Houses of Parliament, and the United States. In the latter, the important factor was "the vibration of party. As one side or the other prevails, so of that class and temperament will be the judges of their nomination."<sup>99</sup> To argue that no man rose to high office at once, with the consequence that his qualifications could be thoroughly examined without discussing them in the press, was to forget "how often the hypocrite goes from stage to stage of public fame, under false array, and how often when men attain the last object of their wishes, they change from that which they seemed to be."<sup>100</sup> Men, he observed, who had been the most zealous reverers of the people's rights, had, when placed in power, become their most zealous oppressors.<sup>101</sup>

At this point the court adjourned for the day. When it reconvened the next morning Hamilton continued with his argument and took up the question of what a libel was.<sup>102</sup> Adverting to the statement of Lord Chancellor Cambden that he had never been able to formulate a satisfactory definition, Hamilton cited Blackstone's and Hawkins' description of the crime as, "any malicious defamation, with an intent to blacken the

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98. The Speeches 64; Lodge 392. In view of the activities of some of the Federalist judges in prosecuting Republican publishers, the passage cited is not without irony; and in view of the political composition of the bench to which he argued, the thrust of the language is understandable. Hamilton's views on human nature, in relation to politics, were outlined by him in the Constitutional Convention of 1787.

99. The Speeches 64; Lodge 392-93.

100. The Speeches 65; Lodge 393.

101. The Speeches 65; Lodge 393-94.

102. *Crosswell's Case*, 3 Johns. Cas. at 354; *Schachner*, *Alexander Hamilton* 416-17 (1946). However, see notes 58 & 59 *supra*, where Kent apparently disagrees on the timing.

reputation of any one, dead or alive."<sup>103</sup> It was malice, Hamilton insisted, that gave a writing its criminal quality; the writer's intention was thus of the essence of the crime. It had been stressed that libels might lead to breaches of the peace and, of course, the publication of such writings he did not advocate; but, Hamilton went on, "surely a man may go far in the way of reflecting on public characters, without the least design of exciting tumult."<sup>104</sup> After considering the remarks of Coke on the subject, particularly in the case of *De Libellis Famosis*, and also the view of Lord Chancellors Loughborough and Thurlow, Hamilton proceeded to define a libel, "with all diffidence after the words of Lord Cambden." as "a slanderous or ridiculous writing, picture, or sign, with a malicious or mischievous design or intent, towards government, magistrates, or individuals."<sup>105</sup> No act, separated from the intent and circumstances under which it was committed, could be considered criminal. He enumerated murder, manslaughter, and justifiable homicide as examples of cases where intent, or the lack of it, or a justification, changed the nature of the act. In an aside, not without its pathos in view of later events, he deplored the practice of dueling because "no man shall be the avenger of his own wrongs, especially by a deed, alike interdicted by the laws of God and of man."<sup>106</sup>

Continuing his attack upon the prosecution's arguments, Hamilton pointed out that their position was that of Mansfield in the *Dean's Case*, and charged that this doctrine had originated in one of the most judicially oppressive institutions that ever existed, the court of Star Chamber.<sup>107</sup>

103. The Speeches 65; Lodge 394. See, however, *Croswell's Case*, 3 Johns. Cas. at 354: "According to Blackstone, it is a malicious defamation made public, with intent to provoke or expose to public hatred and ridicule."

104. The Speeches 66; Lodge 395.

105. The Speeches 66; Lodge 396. See also *Croswell's Case*, 3 Johns. Cas. at 354: "Lord Cambden said, that he had not been able to find a satisfactory definition of a libel. He would venture, however, but with much diffidence, after the embarrassment which that great man had discovered, to submit to the court the following definition. A libel is a censorious or ridiculing writing, picture or sign, made with a mischievous and malicious intent towards government, magistrates or individuals." (Italics omitted.)

Stephen states that, in the latter part of the eighteenth century, a non-technical description of libel was "written censure upon public men for their conduct as such, or upon the laws, or upon the institutions of the country." He says that this was the substance of Coke's views in the case of *De Libellis Famosis*, which is the nearest definition of the crime with which he is acquainted, and the one in which the Star Chamber invariably acted. 2 Stephen, op. cit. supra note 73, at 348. With the return of Charles II in 1660, it was adopted as the law by the Court of King's Bench. The Star Chamber was abolished in 1640.

106. The Speeches 67; Lodge 398.

107. "The court of Star Chamber was the polluted source from whence the prosecutor's doctrine was derived. That is not the court from which we are to expect principles and precedents friendly to freedom. It was a most arbitrary, tyrannical and

If a doctrine, tending to suppress freedom of the press, owed its origin to so foul a source, it was most important to warn the citizens of the nation of the dangers attendant on admitting such teaching into their jurisprudence. Probably thinking of the treatment he had received at the hands of Callender, Bache, and the other Republican publicists, he said: "There may be a fair and honest exposure. But if he uses the weapon of truth wantonly; if for the purpose of disturbing the peace of families; if for relating that which does not appertain to official conduct, so far we say the doctrine of our opponents is correct."<sup>108</sup> While freedom of the press might cause difficulties for government, Hamilton conceded, yet, if it were not permitted, the rights of the people could be encroached on since they would be ignorant of the activities of their rulers. This prospect he found repugnant. After a review of the English precedents mentioned above, he questioned whether the law of libel could be considered settled, since the role of the jury in such cases was still "a mere floating of litigated questions. Different conduct was pursued by different men, and [sic] therefore the [instant] Court is at liberty to examine the propriety of all, and if it be convenient that a contrary mode should be adopted, we ought to examine into what has been done, for we have a right so to do, and it is our sacred duty."<sup>109</sup>

Hamilton next asserted that Fox's Libel Act of 1792<sup>110</sup> was but declaratory of the common law of England,<sup>111</sup> and then turned his attention to the *Zenger Case*.<sup>112</sup> This he termed a bad case, and felt it was "a decision [made] in a factious period, and reprobated at the very time. A single precedent never forms the law."<sup>113</sup> Nevertheless, it was a prior authority in this very State which had to be weakened or rejected. What was the *Zenger Case* about?

A *cause célèbre* on both sides of the Atlantic, Zenger's trial took place in New York City in 1735 and, although previously touched upon,<sup>114</sup> may be reviewed here. New York, which had not been happy with its royal governors, received, as the later successor of Governor John Montgomerie,

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hated tribunal . . . without the wholesome restraints of a jury." *Croswell's Case*, 3 Johns. Cas. at 357-58. See also note 105 supra.

108. The Speeches 70; Lodge 407.

109. The Speeches 74; Lodge 415-16.

110. An Act to Remove Doubts Respecting the Functions of Juries in Cases of Libel, 1792, 32 Geo. 3, c. 60. See notes 34, 38 & 39 supra and accompanying text.

111. Of this statute Sir James Stephen later wrote: "The Libel Act is no doubt on its face declaratory, but I look upon this simply as a statement put in the mouth of Parliament by draftsmen who used that form of expression as a way of saying that the law which the Courts had in fact made ought to have been made otherwise than it was." 2 Stephen, op. cit. supra note 73, at 347-48.

112. 17 Howell, St. Tr. 675 (1735).

113. The Speeches 76; Lodge 419.

114. See note 5 supra and accompanying text.

Colonel William Cosby, a man with a record for colonial maladministration. From his arrival in the Province and his assumption of office August 1, 1732, Cosby antagonized a number of the local magnates by his high-handed behavior, particularly by a suit he instituted against Rip Van Dam, the temporary acting governor after Montgomerie's death, for part of Van Dam's salary. Chief Justice Lewis Morris would not hear the case for alleged jurisdictional reasons, whereupon he was dismissed from his post and James De Lancey was given the office in 1733. That same year, those opposed to the Governor, including a group of influential merchants and lawyers, assisted Zenger, a printer born in the Palatinate in Germany, to establish, publish, and edit a newspaper called *The New York Weekly Journal*. The first issue appeared November 5, 1733. Lewis Morris, as one of these opposition leaders, now used the paper to inveigh against Governor Cosby and other leading members of the "Court party," e.g., De Lancey and Frederick Phillipse. Cosby, on November 17, 1734, thereupon caused Zenger to be arrested for a false and scandalous criminal libel. To add insult to the arrest, Zenger's counsel, James Alexander and William Smith, found themselves "exclude[d] . . . from the bar"<sup>115</sup> because they dared bring and argue a writ of habeas corpus before De Lancey and Phillipse. A distinguished Philadelphia lawyer, Andrew Hamilton, was thereupon brought to New York to defend the printer "at the request of some of . . . [Zenger's] friends."<sup>116</sup> The trial opened before Chief Justice De Lancey and Justice Phillipse. Hamilton's defense was truth. To the consternation of the Governor and his friends, Hamilton thereupon attempted to establish the truth of the charges which had been published in the *Journal*. The Chief Justice, following the old cases that "it is nevertheless a libel that it is true,"<sup>117</sup> did not agree. Hamilton, however, in his oratorical plea to the jury, urged upon its members their right to pass upon truth or falsity, and to consider both matters of fact and law. De Lancey, on the other hand, instructed the jury "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 . . . make a libel; and that is a matter of law, no doubt, and which you may leave to the Court."<sup>118</sup> He then read to them a paragraph from Lord Chief Justice Holt's views in *Tutchin's Case*,<sup>119</sup> and closed with a paragraph on what the jury should do.<sup>120</sup> The jury, undoubtedly knowing that the charges were true and undoubtedly

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115. 17 Howell, St. Tr. at 686.

116. Id. at 693.

117. Id. at 699.

118. Id. at 722.

119. 14 Howell, St. Tr. 1095 (1704).

120. 17 Howell, St. Tr. at 723.

influenced by the low esteem in which Cosby and his cohorts were held, returned a verdict of not guilty, at which the large throng attending the trial gave three huzzas.<sup>121</sup>

As Alexander Hamilton pointed out in *Croswell's Case*, the times in which this *Zenger* decision had been given were factious, and yet the verdict would seem to be a point in his favor even if De Lancey's charge was not, and even though subsequent practice varied. The record does not reveal why he viewed the *Zenger Case* so dubiously,<sup>122</sup> but it is not unlikely that he felt as follows: the *Zenger* judge had charged the jury substantially as the *Croswell* judge had done; in *Zenger* the jury had nevertheless disobeyed the judge, no longer fearing that they could be punished, as in prior years in England; this verdict was not appealed by *Zenger* because of the alleged bad charge, for *Zenger* had won; thus the 1735 charge reflected the law, regardless of the jury's verdict, and would ordinarily be used in subsequent prosecutions; the charge, rather than the verdict, therefore had to be attacked. So Hamilton sought aid elsewhere, and found "another [precedent] in the words of Chief Justice Jay,<sup>123</sup> when pronouncing the law on this subject. The jury . . . [is] told the law and the fact is for their determination, I [Hamilton] find him telling them that it is their right. This admits of no qualification. The little, miserable conduct of the Judge in *Zenger's* case, when set against this, will kick the beam, and it will be seen that even the twelve judges do not set up, with deference however to their known abilities, that system now insisted on."<sup>124</sup>

Continuing with his argument on behalf of *Croswell*, and as his peroration, Hamilton now urged that the function of a free press was to be on guard against any attempts at usurpation of power, so that the people might protect themselves in their liberties. "This, then, is a right of the utmost importance, one for which, instead of yielding it up, we ought rather to spill our blood. . . . Never can tyranny be introduced into this

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121. See generally Alexander, *A Brief Narrative of the Case and Trial of John Peter Zenger* 41-105 (Katz ed. 1963); Buranelli, *The Trial of Peter Zenger* 98-132 (1957); 2 Osgood, *American Colonies in the Eighteenth Century* 452-62 (1924); Rutherford, *John Peter Zenger, His Press, His Trial* 173-246 (1904). Rutherford, *supra*, gives a lengthy account of the events and the case with excerpts from the documents. It also has reports of the trial.

While the *Zenger* case was a local one it established a minor precedent and thereby enabled the press slightly to exercise a greater freedom to print and to politic, but the legal principle there established was not necessarily followed. Thus other cases, e.g., *Croswell's Case*, had to continue the fight for the freedom of the press, and as will be noted shortly, the latter case resulted in the passage of the New York law of truth as a defense in libel suits.

122. See note 5 *supra* and accompanying text.

123. See note 79 *supra* and accompanying text.

124. *The Speeches* 77.

country by arms; these can never get rid of a popular spirit of enquiry; the only way to crush it down is by a servile tribunal. It is only by the abuse of the forms of justice that we can be enslaved. . . . It is to be subverted only by a pretence of adhering to all the forms of law, and yet by breaking down the substance of our liberties."<sup>125</sup> Hamilton concluded by recapitulating the substance of the doctrine for which he contended, and set forth in fifteen paragraphs his views on the right of the jury in this type of case to determine in all respects the guilt or innocence of the defendant.<sup>126</sup>

The arguments were thus concluded on February 15, 1804. Briefly, it has already been mentioned that Attorney-General Spencer had been appointed to this very court, although not sitting or participating in the determination but arguing before his "brethren." Within a week thereafter, Chief Justice Lewis was nominated by the Republicans for Governor. Also, while the four judges were still deliberating, they had before them as members of the Council of Revision, a bill which supported the defendant's position, and which the Council, while reporting back with objections, in effect supported.<sup>127</sup> Whether or not, and the degree if any, these political facts influenced the court's determination is speculative, for no facts are forthcoming to establish definite conclusions. Nevertheless, on the last day of the May term, 1804, Chief Justice Lewis announced: (1) that the court was equally divided (Lewis and Livingston were for denying Croswell's motion for a new trial, while Kent and Thompson were for granting it) and that consequently, the motion was lost; (2) that the Justices were prepared to give their reasons at length (questionable, as it implied that the Justices all had opinions to read and factually this was not so), but it was thought unnecessary; and (3) that he took it for granted that the prosecution was entitled to move for judgment on the verdict.<sup>128</sup>

Kent was quite annoyed at the outcome. His approach and conclusion was that Chief Justice Lewis had erred in charging the jury, and that the defendant had a legal right to prove the truth. He felt and wrote that Livingston, to whom he had offered a copy of his opinion but who had not accepted it, had earlier been in favor of a new trial, and Kent strongly suspected that Republican pressure had been brought to bear. Though not reading Kent's opinion, Livingston said that the written opinion of the Chief Justice satisfied him that Lewis' view was the correct one.<sup>129</sup> While Livingston wrote no opinion and did not attend court on

125. *Id.* at 77; Lodge 422-23.

126. *Croswell's Case*, 3 Johns. Cas. at 360-62; Lodge 383-86.

127. See notes 133-36 *infra* and accompanying text.

128. 3 Johns. Cas. at 362-63.

129. See Kent's Notes 74-76.

the day the decision was given, he did send a note saying that he could not attend because of illness,<sup>130</sup> and it is a fair question to ask if this was a feigned illness so as not to face Kent and Thompson.

Since the prosecution had not moved for judgment on the verdict, as suggested by Lewis the court now ordered the new recognizance of the defendant to be cancelled, with Croswell thereupon being left at large. This, however, did not conclude the case. The ferment concerning freedom of the press, which had begun with *Zenger's Case* which Gouverneur Morris declared "to be the germ of the American Revolution,"<sup>131</sup> was smoldering in the public and in the New York legislature while *Croswell's Case* was being tried and the motion for a new trial was pending.<sup>132</sup> The background of politics and political figures already given is but a slight indication of the importance attached to the case. It is not strange, therefore, that on February 4, 1804, a Senate committee reported a bill to permit truth to be given in evidence in criminal trials. Practically simultaneously a like, but not identical, bill was being placed before the Assembly. While *Croswell's Case* was still undecided, and on the last day of the session in April, 1804, a satisfactory bill was finally delivered to the Council of Revision.<sup>133</sup> Its contents provided a statutory basis for the libel doctrine for which Alexander Hamilton had pleaded. According to Kent, who was then in New York holding court, the Council convened in Albany on November 3, 1804, when Livingston's objections were read and the bill was recommitted to Chancellor Lansing. On the 5th, Lewis (the Governor), presided over a Council meeting which included Thompson, Spencer, Kent, and Lansing.<sup>134</sup> In effect, the Livingston ties were still present, although Kent's influence upon Thompson has already been noted. At this second meeting Lansing, and then Kent, presented objec-

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130. Kent's Notes 76; B. Mitchell, Alexander Hamilton, *The National Adventure, 1788-1804*, at 508 (1962).

131. Street, *The Council of Revision of the State of New York* 42 n.1 (1859).

132. B. Mitchell, *op. cit. supra* note 130, at 508.

133. On the background of the Council see Street, *op. cit. supra* note 131, at 5-7, disclosing creation by the Constitution of 1777 (and subsequent amendments) whose third section stated that "the Governor for the time being, the Chancellor and Judges of the Supreme Court, or any two of them, together with the Governor, shall be and hereby are constituted a Council to revise all bills about to be passed into laws by the Legislature . . . ." After passage by the Senate and Assembly, the bill was sent to the Council which could return it with their objections to the House of origination, but by a two-thirds vote in each House the bill could nevertheless become law. The Council lasted until 1821.

134. Lansing was appointed a Supreme Court Justice on September 28, 1790, became Chief Justice on February 15, 1798, and on October 21, 1801 became Chancellor. In February, 1804 he was nominated by a Republican caucus for the governorship but, by letter of February 18th, declined (the Croswell arguments had been heard February 13-15). Chief Justice Morgan Lewis, as has already been disclosed, was thereafter nominated and became Governor the first Monday of July, 1804.

tions to the bill. Suffice it here that the latter did not urge a minor objection, while his major one "was perhaps in Substance the same as the one the Chancellor produced and to which all the Council assented."<sup>135</sup> On November 6th, with Lewis, Lansing, and Spencer present, because now "it was a mere matter of Form,"<sup>136</sup> the Council returned the bill, with its objections, to the legislature.<sup>137</sup> As this was the last day of the session, the legislature could not take it up until the next session. On February 12, 1805,<sup>138</sup> the Assembly took up the objections and the bill "was lost by a large Majority."<sup>139</sup> Nevertheless, Croswell's former counsel, William W. Van Ness, then a member of the Assembly, by permission introduced a similar bill, which now passed unanimously in both houses of the legislature and became a law on April 6, 1805.<sup>140</sup> According to Kent, "it is therefore a full legislative Sanction of my preceding opinion."<sup>141</sup> "In consequence of this declaratory statute, the court, in August term, 1805, (no motion having been made for judgment on the verdict) unanimously awarded a new trial in the above cause."<sup>142</sup>

The new statute declared that a jury had the right, in libel cases, to judge law and fact under the direction of the court; that they were not required to find the defendant guilty merely on proof of publication and "of the sense ascribed thereto,"<sup>143</sup> and that truth could be offered by the defense as a justification.<sup>144</sup> Sixteen years later, at the constitutional convention of 1821, this creature of the legislature was put beyond the power of that body to modify. A provision was adopted as a constitutional guarantee to all of the freedom to speak, write, and publish, al-

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135. Kent's Notes 156.

136. *Id.* at 157.

137. Street, *op. cit.* supra note 131, at 328. "The principal objection is understood to have been, because the second section of the bill, which allowed the truth to be given in evidence, as a defence to an indictment for a libel, upon any person holding an office of honour, profit or trust, or being a candidate for any such office, made no discrimination [distinction] in respect to the nature, tendency or intent of the libel; and would, therefore, authorize, not only charges which were fit and proper for public information, but every delineation of private vices, defects or misfortunes, however indecent or offensive, and made no distinction between libels circulated from good motives and justifiable ends, and such as were circulated for seditious and wicked purposes, or to gratify individual malice or revenge." *Croswell's Case*, 3 Johns. Cas. at 411. See also note 97 supra.

138. 1 Goebel, *The Law Practice of Alexander Hamilton* 845 (1964), gives this as February 15, while February 12 is the date found in *Croswell's Case*, 3 Johns. Cas. at 411, and also in Kent's Notes 157.

139. Kent's Notes 157; *Croswell's Case*, 3 Johns. Cas. at 411.

140. N.Y. Sess. Laws 1805, ch. 90.

141. Kent's Notes 157.

142. *Croswell's case*, 3 Johns. Cas. at 413. (Italics omitted.) See also Kent's Notes 157.

143. N.Y. Sess. Laws 1805, ch. 90, § 1.

144. A proviso required that with the defense of truth there should also be shown publication "with good motives and for justifiable ends." N.Y. Sess. Laws 1805, ch. 90, § 2.

though a person was to be held responsible for abuses of that right. In all criminal libel proceedings the truth could be given in evidence, and if it appeared to the jury "that the matter charged as libellous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact."<sup>145</sup>

So the law of seditious libel, once an instrument for the suppression of all criticism of the existing government, was adjusted to meet the demands of a free people. The judicial views of Kent, supported by Hamilton and his co-workers, or, perhaps, the political views of Hamilton and his co-workers, supported by Kent, prevailed to a remarkable extent. In his opinion Kent wrote, "I am far from intending that these authorities mean by the Freedom of the Press, a Press wholly beyond the reach of the law, for this would be emphatically Pandora's Box, the source of every Evil. And yet the House of Delegates in Virginia by their Resolution of the 7th Jany. 1800, and which appears to have been intended for the Benefit and Instruction of the Union, came forward as the advocates of a Press totally unchecked, and declare in so many words that the baneful Tendency of the Sedition Act was but little diminished by the Privilege of giving in Evidence the Truth. Against such a commentary upon the Freedom of the American Press I beg leave to enter my Protest."<sup>146</sup>

The participants in this case, which had precipitated this statutory and constitutional change so essential to modern freedoms, went their separate ways. Croswell abandoned newspaper work and politics and became an Episcopalian clergyman in 1814; Chief Justice Lewis went on to become Governor of New York in 1804, and served as a Major General in the War of 1812; Brockholst Livingston, followed by Smith Thompson, became Associate Justices of the Supreme Court of the United States; and James Kent became Chancellor of New York and one of the country's leading jurists and the author of the famous *Commentaries*. Richard Harison continued his legal and ecclesiastical interests, becoming comp-troller of Trinity Church and, later, a leader in various canal projects in the State; William Van Ness went into the Assembly and was later chosen a judge of the State's Supreme Court, where former Attorney-General Spencer already sat, and of which Spencer later became Chief Justice in 1819; George Caines continued to publish legal reports. The greatest of them in stature, Alexander Hamilton, being forced into a duel, met his fate at the hands of Aaron Burr at Weehawken, New Jersey, early in the morning of July 11, 1804.

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145. N.Y. Const. art. VII, § 8 (1821). Today, the identical language is found in N.Y. Const. art. I, § 8. See also N.Y. Code Crim. Proc. § 418; N.Y. Pen. Law § 1345. For the Convention proceedings see Goebel, *op. cit.* supra note 138, at 847-48.

146. Kent's Notes 148-49.