

## THREE FREEDOMS IN THE EIGHTEENTH CENTURY AND THE EFFECT OF PAPER SHOT

By ALBERT SMITH FAUGHT †

Within recent memory the late President of the United States and the former Prime Minister of England happily selected and emphasized four freedoms which illustrate fundamental principles embodied in Anglo-American History.

The first three freedoms are fundamental rights according to Anglo-American constitutional standards, and the year 1946 will probably witness their rapid dissemination throughout the world of the United Nations. The fourth freedom, with its distinctive preposition, "freedom *from* want," has appeared not as an ancient right, but in the form of a magnificent aspiration and goal.

In seeking the historical development in the Eighteenth Century of the concepts of freedoms *of* speech and *of* the press and the freedom *of* worship, the present generation may find in well established libraries a thin pamphlet in small type and vivid language recording the trial and acquittal of William Penn for preaching in Grace Church Street after he had been prevented from using the customary Quaker meeting house in London. Or another much larger pamphlet may be located recording the trial and acquittal of the Archbishop of Canterbury and six bishops who had declined to obey a royal order affecting ecclesiastical affairs and who dared to file a petition with the King in defense of the freedom of the Church of England from interference by King James the Second. Nor would it be difficult to find a printed account of the successful defense by an aged Philadelphia lawyer of a New York printer who had criticised the actions of the then colonial governor of New York.

Lest we should surmise that the cause of liberty ran smoothly in English and American courts prior to the close of the Eighteenth century it may be well to examine a brilliant and well reported defense by Thomas Erskine which, however, failed to secure the acquittal of his client, Thomas Paine, the author of *Common Sense* and of the *Rights of Man*.

It is the purpose of this article to refresh our memories of four such proceedings which are embedded in our constitutional history and which form part of the background of the first three freedoms. If in

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† A. B., 1903, LL. B., 1906, University of Pennsylvania; Chairman, Committee on Legal Biography and History, Pennsylvania Bar Association; former member of Board of Editors of the University of Pennsylvania Law Review.

any measure we may make easier of understanding the declaration as to three of the four freedoms, this purpose will have been accomplished.

Let us first consider the *Trial of William Penn and William Mead*.<sup>1</sup>

## I

The title page of a pamphlet, printed in the Year 1670, reads in part:

THE  
PEOPLES (ANCIENT) LIBERTIES  
(AND JUST)  
IN THE  
TRYAL  
OF  
WILLIAM PENN, AND WILLIAM MEAD,  
at the Session held at the Old Bailey in London,  
the first, third, fourth and fifth of Sept. 70,  
against the most Arbitrary procedure of  
that Court.

The court consisted of Samuel Starling, the Mayor, John Howel, the Recorder and five Aldermen. Twelve citizens of London served as jurors, and of their names we need remember only that of Edward Bushel. The offense charged was that William Penn "did take upon himself to preach and speak" in Grace Church Street, London on August 14, 1670, and "unlawfully and tumultuously did assemble and congregate" with about 300 persons after they had been prevented by the City authorities from preaching in the nearby Friends Meeting House.

The mayor and recorder did their best to secure a conviction and to coerce the jury into bringing in a verdict "that the Court will accept; and you shall be lockt up, without Meat, Drink, Fire, and Tobacco; you shall not think thus to abuse the Court."

William Penn protested, "My Jury, who are my Judges, ought not to be thus menaced, their Verdict should be free and not compelled; the Bench ought to wait upon them, but not forestaul them; I do desire that Justice may be done me, and that the arbitrary resolves of the Bench may not be made the measure of my Juries Verdict."

The altercation lasted some time. The wrath of the mayor became directed toward the juror, Edward Bushel: "Sir, you are the cause of this disturbance, and manifestly shew yourself an Abettor of

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1. 2 St. Tr. (3rd ed. 1742) 610 (O. B. 1670).

Friction. I shall set a mark upon you sir." Alderman John Robinson injected his abuse: "Mr. Bushel, I have known you near this fourteen years; you have thrust yourself upon this Jury, because you think there is some service for you; I tell you, you deserve to be indicted more than any man that hath been brought to the Bar this day." Bushel replied: "No, Sir John, there were three score before me, and I would willingly have got off, but could not."

The verdict of the jury was not guilty as to both defendants. Yet the Recorder was not satisfied: "I am sorry, gentlemen, you have followed your own judgments and opinions, rather than the good and wholesome advice which was given you, . . . but for this the Court fines you forty Marks a man, and imprisonment till paid." So the twelve jurors were led off to Newgate prison.

Edward Bushel refused to pay his fine and procured a writ of habeas corpus to test the legality of the imprisonment. The writ in the same year, 1670, came before the Court of Common Pleas in *Bushel's case*.<sup>2</sup>

Chief Justice Vaughan, in a long opinion decided that the return of the sheriffs to the writ of habeas corpus was insufficient, and he ordered that the jurors be discharged. The Court took the position that if a criminal court could order the jury to convict or could impose fines for "finding against the direction of the Court" it would simply mean:

"the jury is but a troublesome delay, great charge and of no use in determining right and wrong, and therefore the tryals by them may be better abolished than continued; which were a strange new-found conclusion, after a tryal so celebrated for many hundreds of years."<sup>3</sup>

These proceedings of 1670, and the distinguished and courageous services rendered by William Penn, Edward Bushel and Chief Justice Vaughan establish a definite milestone in the development of the freedom to speak and to preach. It then became an established principle that in criminal proceedings the jurors may not be coerced and that they may themselves decide the facts and bring in a verdict of acquittal.

## II

Another trial which had an important effect on the freedom of the individual was the *Case of the Seven Bishops*,<sup>4</sup> wherein the Archbishop

2. Vaughan's Reports 135, 124 E. R. 1006 (C. P. 1670).

3. *Id.* at 143, 124 E. R. at 1010.

4. 3 Mod. 212, 87 E. R. 136, 12 How. St. Tr. 183 (K. B. 1688). Cited with approval in *Shipworth's Case*, L. R. 9 Q. B. 230, 236 (1873). A full account of the trial

of Canterbury and six bishops were tried for libel, in that they had signed a petition and had given it privately to the King protesting against a royal proclamation issued by King James the Second ordering the bishops of the Church of England to distribute and publish in all of the Churches of England a "Declaration for Liberty of Conscience." These seven bishops refused to obey the proclamation, since they disapproved of any royal interference in matters ecclesiastical. Their petition explained that their refusal was "because that Declaration is founded upon such a dispensing Power, as hath been often declared illegal in Parliament."

When the seven bishops were in court under the writ of habeas corpus the Attorney General obtained leave to file an information against them for criminal libel, and upon the filing of a plea of not guilty a delay of two weeks was granted. On June 9, 1688, only about a year before the "glorious Revolution of 1689" the same four judges and a jury proceeded to try the Archbishop of Canterbury and his six co-defendants. The trial lasted a full day, the jurors were locked up for the night, and at ten o'clock the next morning they brought in their verdict of "not guilty," "at which there were several great Shouts in the Court, and throughout the Hall." The Lord Chief Justice gently reprimanded the noisy ones including a "Gentleman of Gray's Inn" whom he recognized but did not name:

"Sir, I am as glad as you can be that my Lords, the Bishops are acquitted, but your Manner of rejoicing here in Court is indecent; you might rejoice in your Chambers or elsewhere, and not here."

Those who have loved liberty in church affairs or who have opposed the use by a king or other autocrat of a power to "dispense" with law, or who have valued the exercise by a jury of the power to decide the facts in criminal libel cases, have through the centuries echoed the joy of the anonymous gentleman from Gray's Inn.

But there is more to the story than any modern court reporter would venture to transcribe, for in an ancient pamphlet<sup>5</sup> the side remarks and colloquies of the judges have been meticulously set down:

"Here Mr. Justice Powel spake aside to the Lord Chief Justice, thus:

"Mr. Justice Powel: My Lord, this is strange Doctrine (that of the Solicitor General); Shall not the Subject have liberty to peti-

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may also be found in *THE PROCEEDINGS AND TRYAL IN THE CASE OF THE SEVEN BISHOPS* (London 1689). The case was heard at Westminster by Sir Robert Wright, the Lord Chief Justice, and Justices Holloway, Powell, and Allybone. The Churchmen involved were the Archbishop of Canterbury and the Bishops of St. Asaph, Ely, Chichester, Bath and Wells, Peterborough, and Bristol.

5. *THE PROCEEDINGS AND TRYAL IN THE CASE OF THE SEVEN BISHOPS* (London 1689).

tion the King but in Parliament? If that be law, the Subject is in a miserable Case.

Lord Chief Justice: Brother, let him go, we will hear him out, though I approve not of his position."<sup>6</sup>

Later the same two colleagues whispered to each other:

"Mr. Justice Powel: *My Lord, this is wide. Mr. Solicitor would impose upon us; let him make out, if he can, that the King has such a (dispensing) Power, and answer the Objections made by the defendant Council.*

Lord Chief Justice: *Brother, impose upon us, he shall not impose upon me, I know not what he may upon you, for my part, I do not believe one Word he says."*<sup>7</sup>

The argument of Serjent Levintz summarizes the position of the defendant bishops:

"They are under a Distress, being commanded to do a thing which they take not to be legal, and they with all humility, by way of Petition, acquaint the King with this Distress of theirs, and pray him, that he will please to give Relief."<sup>8</sup>

But the substantial contribution made by defense counsel to the freedom of speech and the power of the jury in libel cases is found in the argument of Sir Robert Sawyer:

"May it please your Lordships and you Gentlemen of the Jury, you have heard this charge which Mr. Attorney (General) has been pleased to make against my Lords the Bishops, that is this, That they did conspire to diminish the Royal Authority and Royal Prerogative, Power, and Government of the King, and to avoid the Order of Council, and in prosecution of this, they did falsely, maliciously, and seditiously make a Libel against the King, under pretence of a Petition, and did publish the same in the King's Presence. . . . But the falsity of it, and that it was malicious and seditious are all Mattars of Fact, [which] with submission, they have offered to the Jury no Proof of."<sup>9</sup>

The parallel account of this trial,<sup>10</sup> contains some "extracts" from Tanner's MSS, in the Bodleian Library at Oxford, including the warrant for the commitment to the Tower of London, and a letter from John Ince to the Archbishop concerning surveillance of the jurors during the night of deliberation. This letter indicates the rough treatment which was accorded to the jury:

6. *Id.* at 388.

7. *Id.* at 397 (italics supplied).

8. *Id.* at 371.

9. *Id.* at 292.

10. 12 How St. Tr. 183.

"We have watched the jury all night carefully, attending without the door on the stairhead. They have by order been kept all night without fire or candle, bread, drink, tobacco or any other refreshment whatever, save only some basins of water and towels this morning about four. . . . I am informed by my servant and Mr. Grange's, that about midnight they were very loud one among another. . . .

Jo. Ince

Six o'clock in the morning, June 30, 1688, at the Bell Tavern, Kingstreet."<sup>11</sup>

The honor roll of those who have labored for the first three freedoms may now be lengthened. Judge Powel may be placed next to Chief Justice Vaughan, while Dr. William Sancroft, who was the Archbishop of Canterbury, may occupy a seat next to William Penn. One lawyer may join them, Sir Robert Sawyer, chief of the array of counsel for the seven bishops. And we must remember the juror, Edward Bushel.

### III

About fifty years later there occurred one of the few American cases which found their way into T. B. Howell's *Complete Collection of State Trials*. It was the trial of John Peter Zenger, a New York printer, for printing and publishing a libel against the government.<sup>12</sup>

The stir in the world created by Andrew Hamilton's achievement of securing an acquittal,<sup>13</sup> after he had been summoned to take the place of able New York counsel, who had been arbitrarily disbarred by Judge de Lancey for challenging the jurisdiction of the court, has not yet subsided.<sup>14</sup>

11. *Id.* at 473 *et seq.* The same letter explains the then prevalent custom in accordance with which successful defendants would furnish to the jurors a free dinner together with an honorarium of many guineas. The custom arose because jurors were not compensated and often had to travel great distances to attend the trial.

12. A partial account of this trial will be found in 17 How. St. Tr. 676. The case was tried at New York on August 4, 1735, before the Hon. James de Lancey, Esq., the Chief Justice of the Province of New York, and the Hon. Frederick Phillipse, Esq., Second Judge.

13. The importance of the case is made clear by the English editor of 12 How. St. Tr. in a note at p. 676: "This trial . . . published by Mr. Zenger himself, having made a great noise in the world, is here inserted; though the doctrines advanced by Mr. Hamilton in his speeches are not allowed in the courts here [England] to be law."

14. See, *e. g.*, *THE LIBERTY OF THE PRESS*, a brochure published in 1934 by the Oriole Press, Berkeley Heights, N. J., in which two addresses by Harry Weinberger, Esq., of the New York Bar, are printed. These addresses, one delivered before the Philadelphia Law Association and the other before the New York County Lawyers' Association, tell admirably the story of the *Zenger* case.

Andrew Hamilton's skill<sup>15</sup> gleams through the printed and faded record of the trial. With utmost fairness he referred to the *Case of the Seven Bishops*:<sup>16</sup>

"But here it may be said, Sir Robert (Sawyer) was one of the Bishops' counsel, and his argument is not to be allowed for law; but I offer it only to show that we are not the first who have insisted, that to make a writing a libel, it must also be false. . . .

"I mention the words of Justice Powel in the same trial where he says . . . that to make it a libel, it must be false and malicious, and tend to sedition; and declared, as he saw no falsehood or malice in it (the Petition of the bishops) he was of opinion that it was no libel. . . .

"If it is objected that the opinion of the other three judges were against him, I answer, that the censures the judgments of these men have undergone, and the approbation Justice Powel's opinion, his judgment and conduct upon that trial, has met with, and the honour he gained to himself for daring to speak truth at such a time, upon such an occasion, and in the reign of such a king, is more than sufficient, in my humble opinion, to warrant our insisting on his judgment as a full authority to our purpose."<sup>17</sup>

Hamilton also interpreted the action of the jury in the case of William Penn as deciding both the law and the fact. The jury accepted these precedents and, for the first time, not merely in America but in Great Britain and her colonies, asserted that in a case for criminal libel the jury were the judges not only of the facts but also of the law itself, thereby strengthening immeasurably the freedoms of the press and of speech.

#### IV

The name of Thomas Erskine the lawyer for the defendants in several English cases of criminal libel, must also be added to our projected honor roll. It will be sufficient to mention merely two of the cases in which Erskine aided in the development of the English law of libel and of the freedoms of speech and of the press.<sup>18</sup> The first of these was the *Case of the King, on the Prosecution of William Jones*

15. *Ibid.* At the time of the trial Hamilton had already enjoyed a distinguished career at the bar and in politics. In 1712 he became a bencher of Gray's Inn; in 1717 he was Attorney General of Pennsylvania; in 1727 he held the office of Recorder of Philadelphia; and in 1729 he was Speaker of the Pennsylvania Assembly. It is also interesting to note that Hamilton probated the will of William Penn in London in 1726.

16. 3 Mod. 212, 87 E. R. 136, 12 How. St. Tr. 183 (K. B. 1688).

17. 17 How. St. Tr. 676, 701.

18. Other illustrations of Erskine's contribution to the fight for individual freedom of expression may be found in *ERSKINE'S SPEECHES* (J. L. High's Am. ed. 1876).

against the Rev. William Davies Shipley, Dean of St. Asaph,<sup>19</sup> for a seditious libel.

The Dean was a mild mannered man, but he wrote and had printed a thin pamphlet in which a "gentleman" and a "farmer" discuss the "Principles of Government." He was indicted for "publishing a false, scandalous, and malicious libel . . . to raise seditions and tumults within the kingdom, and to excite his Majesty's subject to attempt, by armed rebellion and violence, to subvert the state and constitution of the nation."

The jury brought in a verdict of "guilty of publishing only." This the court did not like, particularly the addition of the word "only." A long colloquy among the Court and Mr. Erskine and individual jurors took place which concluded with the comment by the presiding judge: "The verdict was as clear as could be, they only wanted it to be confounded."<sup>20</sup>

"Confounded" it was, for Erskine moved that the verdict be set aside and a new trial granted because of the misdirection of the judge. Lord Mansfield in the King's Bench refused this motion. But Erskine's efforts were not wasted,<sup>21</sup> and on his motion in arrest of judgment the proceeding ended in victory for the defendant, for the King's Bench decided that the indictment was defective in that "there were no averments to point the application of the paper as a libel on the king and government, and the dean was therefore finally discharged from the prosecution."<sup>22</sup>

Nevertheless Erskine failed to establish in English law the results attained by Andrew Hamilton in America. The publicity of the case of the Dean of St. Asaph was, however, sufficient to help secure the passage of the Fox Libel law which, by legislative fiat promptly brought the English law into accord with the rule established in America in the *Zenger* case. Lord Erskine apparently did not mention this American precedent in any of his arguments.

Let us turn to the remaining case in the series which, prior to 1795, established with some firmness the freedom of speech and of the

19. 4 Doug. K. B. 73, 99 E. R. 774, 21 How St. Tr. 847 (K. B. 1784). The case was heard by Hon. Lloyd Kenyon, Chief Justice at Wrexham, in the County of Denbigh. See also I ERSKINE'S SPEECHES, *op. cit. supra* note 18, at 156.

20. 21 How St. Tr. 847, 955.

21. I ERSKINE'S SPEECHES, *op. cit. supra* note 18, at 404: "Although the Court was unanimous in discharging the rule, Mr. Justice Willes, in delivering his opinion sanctioned by his authority Mr. Erskine's argument, that upon a plea of not guilty, or upon the general issue on an indictment or information for a libel, the jury had not only the power, but a constitutional right, to examine, if they saw fit, the criminality or innocence of the paper charged as a libel; . . . the jury might upon such examination acquit the defendant generally, though in opposition to the directions of the judge, without rendering themselves liable either to attain, fine, or imprisonment, and that such verdict or deliverance could in no way be set aside by this court."

22. 21 How. St. Tr. 847, 1044.

press. It will be recalled that Thomas Paine was an American patriot who in the dark days of the Revolution stirred men's souls with his inspiring pamphlets, the best known of which was *Common Sense*. With the close of that War he played a minor role in the French Revolution. Then in England, he published the first part of *The Rights of Man*. It passed unnoticed by the public authorities. When the second part appeared the Attorney General filed an information against Paine, and Mr. Erskine was roundly criticized for undertaking his defense of the suspected American.

So Paine was tried by a special jury in the Court of King's Bench in the Guildhall on the 18th of December, 1792, before Lord Kenyon.<sup>23</sup>

This was the first important case to be tried after the passage of the Fox Libel law which clearly gave the jury the power to decide the law as well as the facts in a libel case. After quoting from Hume and Locke, Mr. Erskine, in his address to the jury, stated that even before the passage of this law he had maintained the right of a jury to pass on both facts and law in libel proceedings.

"Yet, I have lived to see it resolved, by an almost unanimous vote of the whole Parliament of England, that I had a long time been in the right."<sup>24</sup>

Two of Erskine's quotations are of lasting significance. He attributed to Lord Chesterfield the following profound observation:

"Let us consider, my Lords, that arbitrary power has seldom or never been introduced into a country at once. It must be introduced by slow degrees, and as it were step by step, lest the people should see it approach. The barriers and fences of the people's liberty must be plucked up one by one, and some plausible pretense must be found for removing or hoodwinking, one after another, those sentries who are posted by the constitution of a free country, for warning the people of their danger. . . . The stage, my Lords, and the press, are two of our sentries."<sup>25</sup>

After concluding that "the press must be free" Mr. Erskine adverted to the temporary suppression by Cromwell of Harrington's *Oceana*:

"The *Oceana* was afterwards restored on her petition (the daughter of Harrington); Cromwell answering with the sagacity of a sound politician: 'Let him have his book: if my government

23. For a full account of the trial see THE WHOLE PROCEEDINGS ON THE TRIAL OF AN INFORMATION AGAINST THOMAS PAINE (2d ed., London 1793). This record of the case is a reprint of the transcript of the trial taken in shorthand by one Joseph Gurney.

24. *Id.* at p. 154.

25. *Id.* at pp. 165, 166.

is made to stand, it has nothing to fear from PAPER SHOT.' He said true. No government will ever be battered by paper shot."<sup>26</sup>

But despite Erskine's efforts the case ended in a verdict of guilty.<sup>27</sup>

The struggle for liberty is one which is renewed in each generation. Our immediate task is to reinterpret for the United Nations the historic achievement of the three freedoms of speech, of the press and of religion, that they may more clearly understand meanings which are embodied in Anglo-American constitutional developments. Reluctance to extend widely such freedoms may be due to apprehension of that which Cromwell happily designated as mere "paper shot."

Our roll of honor now contains ten names:

*One juror:* Edward Bushel

*Two judges:* Vaughan and Powel

*Three lawyers:* Hamilton, Sawyer, Erskine

And *four citizens* who, when haled into court, resisted autocracy and strove for freedom: William Penn and William Mead, John Peter Senger and the Archbishop of Canterbury.

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<sup>26.</sup> *Id.* at p. 191.

<sup>27.</sup> *Id.* at pp. 195, 196. Although Erskine addressed the jury at great length and with much fervor, they reached their verdict without hearing the Attorney General's reply and without leaving the jury box.