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BOOK REVIEWS

THE TRIAL OF PETER ZENGER. By Vincent Buranelli. New York, N. Y., Washington Square, New York University Press, 1957. Pp. 150. $3.75.

"The liberty of the press is a subject of the greatest importance, and in which every individual is as much concerned as he is in any other part of liberty."

These words appeared in the *New York Weekly Journal,* printed by Peter Zenger on November 12, 1733, and they are as true today as when they first appeared in print almost two and one half centuries ago.

James Alexander observed in those pre-revolutionary days that

"Freedom of expression is a principal pillar in a free government. When this support is taken away, the Constitution is dissolved, and tyranny is erected on its ruins. Republics and limited monarchies derive their strength and vigor from a popular examination into the actions of the magistrates."

We pay homage today to these observations, and we need look no further than our own State Constitution and statutes to demonstrate how determined our own society is to maintain and preserve the concept and belief that a free press is indispensable to a free people.

In the New York State Constitution, Article 1, Section 8, appear the following simple, yet eloquent words which unfortunately are too little read, studied or discussed by students or laymen:

"Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous 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."

Our Legislature has implemented this constitutional guarantee of freedom of speech and of the press by incorporating in the Code of Criminal Procedure, section 418, the provision that

"On the trial of an indictment for libel, the jury have the right to determine the law and the fact."

In addition, the Legislature has included in our Penal Law, section 1342, with reference to the crime of libel, the following words:

"The publication is justified when the matter charged as libelous is true, and was published with good motives and for justifiable ends.

"The publication is excused when it is honestly made, in the belief of its truth and upon reasonable grounds for this belief, and consists of fair comments upon the conduct of a person in respect of public affairs, or upon a thing which the proprietor thereof offers or explains to the public."

Students of law should know that the roots of our constitutional and legislative provisions which guarantee freedom of speech and of the press can be directly traced to the trial of Peter Zenger for seditious libel in 1733. From the magnificent, persuasive, and brilliant defense interposed in his behalf by the famous advocate of the times, Andrew Hamilton, and the verdict of "not guilty" returned by an audacious jury, two great legal principles emerged and were preserved for all times in English speaking lands. They are—that truth may be used as defense in libel cases, and that a jury has the right to decide on both the "fact" and the "law."

The Trial of Peter Zenger, by Vincent Buranelli, though not of too many pages, is a very penetrating account of the background in which the German immigrant set up his shop and went into the printing business, and it contains a very dramatic presentation of the trial which loses little of its flavor in the retelling. It is also a historical account of political intrigue and chicanery for which British governors often and justly received the condemnation of history.

It is really amazing that a verdict of acquittal could be obtained in a court where the "aggrieved" Governor Cosby had handpicked the judges, and where, before the trial was 24 hours old, the handpicked judges had disbarred the lawyers whom the defendant had selected to represent him.

The only reasonable explanation which history affords and which the author supports is that the jurors, being men of the same community as the defendant, sympathetic to his plight, and ever mindful of the oppressive, harsh and intolerant rule of the governors, recognized that a democratic society, if it were to survive, should always permit truthful criticism of government. And so these jurors refused to be awed into submission by the judges presiding at the trial, who sought to deprive them of their power to render a just verdict by instruction that the sole question for the jury was merely whether Zenger had printed the "libel," and not whether the publication was "libelous."

This book is intelligently divided into two major divisions, the first, being the introduction where the background and events leading up to the trial are examined in great detail, and the second, being a report of the trial itself.

In considering the background of events, not only is the political division between the colonial Morris and Delancey factions presented from a political and economical point of view, but the intensive rivalry between the New York *Gazette,* the official publication of Governor Cosby, printed by William Bradford, and the opposition paper, the New York *Weekly Journal,* printed by the defendant Zenger, is also excitingly developed.

We are informed that Peter Zenger never learned to write English, and that he printed the articles written and edited by James Alexander and some anonymous correspondents who proved to be constant and harsh critics of the British government. In addition, this colonial newspaper published poetry, some foreign news when obtainable, and some advertising, when procurable.

Mr. Buranelli tells us that Cosby had been a British governor in Ireland, and while there had ruled the peasantry with a ruthless hand. Though he later became governor of the island of Minorca, he was compelled to leave that post because certain reprehensible conduct and skulduggery came to light, which even his British superiors in London could not condone. However, with characteristic disdain, the British colonial officials thereafter shifted Cosby to the post of Governor of the colony of New York.

From the time he assumed office, he displayed complete political ineptitude. He insulted the assembly. He deprived Quakers of the right to vote because they would not take the oath. He summarily discharged the chief justice of the colonial court. He sought to obtain, without justification, from his Dutch predecessor in office, one half of the latter's salary. And with it all he succeeded in placing his friends in certain political positions where they could reap enormous financial benefit.

The New York *Journal* through its editor, James Alexander, sought to bring these excesses to the notice of the public and succeeded in doing so.

As Mr. Buranelli points out:

"Cosby's cries of rage and anguish are understandable enough. From the date of the Journal's appearance (November 5, 1733) until his death more than two years later it constituted itself his most alert censor, critic and judge. Every Monday the

lash fell across his shoulders, the attacks varying through the gamut from airy satire to thundering condemnation. The opposition writers called him everything from an 'idiot' to a 'Nero,' and pointedly suggested that his London superiors should do something to alleviate the affliction they had imposed on their Colony."

It is little wonder that Cosby wrote to friends that

"Mr. James Alexander is the person whom I have too much occasion to mention. . . . I found Mr. Alexander to be at the head of a scheme to give all imaginable uneasiness to the government by infusing into, and making the worst impression on, the minds of the people. A press supported by him and his party began to swarm with the most virulent libels."

And so the issue began to form, and the lines for the ensuing battle began to tighten. Cosby then considered the matter of legal strategy and directed his attention toward Zenger, the printer, rather than Alexander, the editor. He was advised and he believed that in English courts juries were obliged to determine merely that the articles in question had in fact been printed by the defendant. The determination of any alleged seditious libel was for the court.

Cosby then made two attempts to have Zenger indicted by the grand jury, but these inquisitorial bodies refused to act. He then attempted to have the Journal burned in public by the public hangman, but the local magistrates frustrated that attempt by ordering the hangman not to comply with Cosby's directions.

In desperation, Cosby secured a warrant from his own council for Zenger's arrest, and thereupon Zenger was imprisoned and virtually held without bail for trial upon an information drawn up by Cosby's attorney-general, which charged Zenger with the crime of seditious libel.

As the author points out, Cosby believed that his actions were correct and proper. Colonial governors had always enjoyed the power to censor the press, and had the same discretion to exercise as did the king. He could censor and obliterate as libelous any report that caused him uneasiness, and impugn it as tending to excite sedition among the governed.

Since the cases had held that the question of truth was beside the point, and veracity might only aggravate the charge, inasmuch as unrest would follow from a story of criminality or stupidity in government if the news happened to be true, the legal theory developed "The greater the truth, the greater the libel."

And so Mr. Zenger, the crusading journalist, was caught between the devil and the deep blue sea.

After the disbarment of Zenger's attorneys, Andrew Hamilton, apparently then in his seventies, was retained. His defense was founded on the premise that freedom of the press represented a basic need of society. He insisted that people had a right to know what their government was doing, and that the people had the right to make complaint against government if necessary. He submitted that a good easy method was to make the opinion of citizens known in the newspapers. However, Hamilton drew a sharp line between truth and falsity.

He admitted that no one had a right to lie in print, any more than in speech, and he inserted in the minds of the jurors the idea that an author should be allowed to plead the authenticity of a story as his justification for publishing it.

In this volume the reader may follow the proceedings of the trial and the arguments of counsel. The speeches by the prosecutor and by the defense attorney are reprinted from James Alexander's "A Brief Narrative of the Case and Tryal of Peter Zenger, Printer of the New York Weekly Journal." The record of the trial so reproduced presents the issues with clarity.

The mounting conflict between the court and the prosecution banded together on

one side, and the ancient and valiant Hamilton standing resolutely alone on the other, will continue to hold the reader's interest as if he were present in the jury box.

This review will not attempt to recount the strategy and resourcefulness attempted by both sides during the course of the trial, nor attempt to present the legal arguments advanced by each side, or Hamilton's adroitness in persuading the jury to accept truth as a defense to the crime charged, in complete disregard of the court's admonition that the jury was not concerned with that issue.

It may be well to end this review with the concluding remarks of Hamilton in his summation where, with words whose echoes still resound in brave and heroic tones, he said:

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

HAROLD BIRNS

ASSISTANT PROFESSOR OF LAW
NEW YORK LAW SCHOOL

BRIEF WRITING AND ORAL ARGUMENT. By Edward D. Re. Second edition. Oceana Publications, New York 3. Pp. 192. $4.50.

PROFESSOR RE'S well known manual was first published in 1951. The book reviews at that time, while largely acclaiming it, suggested a few improvements which the present edition puts into effect. As proposed by Alison Reppy,[1] Dean of New York Law School, and in line with their natural sequence, the Trial Brief is now discussed before the Appellate Brief, although more lengthy treatment is reserved for the latter. The basic rules of literary writing, previously given under "Statement of Facts," are more prominently displayed in the front of the book. Procedural changes, notably the Supreme Court Rules effective July 1, 1954, are considered, and recent bibliographical developments are shown in the enlarged list of treatises and articles.

In the preparation of an appellate brief, the scope of the appellate review is of foremost concern. In order to deal with the pertinent issues raised by such a review, a new section has been inserted in the book. This section summarizes the doctrine of judicial notice, the problem of raising new issues, the need for pointing out errors, and the general limitations imposed on the brief by the record.

In all other respects, the original text has been preserved. The material is divided into four major parts: Introduction to writing; Trial briefs and Memoranda of Law; Appellate Brief writing; Oral argument. The various situations in which legal writing is required are explained. The purposes of an office memorandum, a court memorandum, an actual brief and its supplementation, are defined; the differences between briefs sent to the court and those drawn for private use are pointed out. The

[1] Reppy, *Book Review*, 26 St. John's L. Rev. 213 (1951).

book gives more than the paraphernalia of speaking and writing. It puts the "why" on an equal basis with the "how." Further, it brings home the lesson that persuasiveness, the lawyer's most precious tool, does not simply derive from a "gift of gab," but is a genuine art, to be cultivated with zeal and mental discipline. In recurring passages of his book, Professor Re shows that, without analysis of facts, concentration on essentials and a basic feeling for precision and stylistic neatness, self expression will degenerate into shallow oratory. These didactic features, together with the many practical instructions, charts and sample forms, make the book a very effective teaching aid. During the first six years of its existence, it has proved itself a valuable guide to forensic skills. The revised edition confirms and enhances its value.

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BIBLIOGRAPHY, NEW YORK LAW SCHOOL

LEGAL IMMUNITIES OF LABOR UNIONS. By Roscoe Pound. Washington, D. C. Published and distributed by the American Enterprise Association, Inc. May, 1957. Pp. vi, 47, 9 (notes) and 2. $1.00.

THE attention of the readers of the NEW YORK LAW FORUM is herewith drawn to a publication in pamphlet form—which will undoubtedly become one of the most significant contemporary contributions to the field of labor law—by the eminent and revered American legal scholar, Roscoe Pound. The tremendous amount of research and evaluation of materials which is imprinted upon its pages invites the examination and study of all serious legislators, lawyers, labor and management officials, and public-spirited citizens.

Dean Pound divides his work into three parts: first, the history of legal immunities; secondly, labor union immunities; and thirdly, summary and recommendations.

The first of the foregoing categories constitutes an historical essay on the inception, growth, and nature of the various immunities extended by the law during the course of its existence. As illustrative thereof, one may single out those attaching to the marital and parental status, soldiers, occupiers of land, sovereigns, officials, and legislators. The second of the studies is directed to labor unions specifically, with stress upon torts, contracts, and restraint of trade. The remaining headings treat duties of public service, the right to work, racketeering, and central power and irresponsibility.

The summary and recommendations of Dean Pound may well be utilized in determining the direction of the weathervane in the immediate years ahead for government, management, and labor. There is a full documentation of textual materials which run the gamut from early English law to the current term pronouncements of the United States Supreme Court. Dean Pound's writing bears the mark of a classical contribution to labor law. He has made a significant and substantial contribution to the commonweal; in short, a public service of first magnitude.

FRANKLYN C. SETARO

PROFESSOR OF LAW
NEW YORK LAW SCHOOL

THE LAW OF ACCOUNTING AND FINANCIAL STATEMENTS. By George S. Hill. Boston: Little Brown and Company. Pp. 338. $10.00.

IN the development of our professional life, society has travelled a great distance from the time when all a lawyer needed to practice was a second-hand copy of Blackstone, a working knowledge of deeds and easements together with some skill in drafting legal instruments. Today, as a consequence of the complexities of modern living, the lawyer must be prepared for constant encounter, not only with purely legal problems, but with the myriad accounting questions which naturally flow from our highly involved economic system.

"The Law of Accounting and Financial Statements" is an important addition to the practical lawyer's library. In our modern industrial age there are few lawyers who have not been confronted with problems requiring an understanding and appreciation of accounting, accounting concepts and the statutory and judicial interpretation of accounting practices. Although this work is limited in scope and hardly provides an answer to every question which might conceivably confront the practitioner, it does serve not only as an excellent reference guide and source for further research, but it affords some accounting answers or the paths to such answers which lawyers, of necessity, need in their everyday practice.

The author has developed this subject in a logical and scholarly manner. In the introductory chapter Mr. Hill has characterized his work as a study of the law of accounting which "considers the legal concepts which have derived from judicial decisions and statutory enactments concerning accounting principles and practices."[1] Within the span of seven chapters he has presented in an interesting and readable fashion the relationship between law and accounting, the requisites of a balance sheet and the make-up of an income statement. There is also included helpful reference to problems of tax accounting and regulatory accounting for public utilities.

The major headings of the book are concerned with the various definitions and classifications of assets and liabilities, gross income, deductions from gross income, and the determination of net income. A full chapter is devoted to an exposition of the elements that enter into proprietorship and the extent to which funds of a corporation may be distributed as dividends to stockholders.

"The Law of Accounting and Financial Statements" is copiously and exhaustively footnoted. Every element that enters into a financial statement is footnoted with pertinent cases and relevant literature so as to afford authoritative support for the author's statements. It is obvious that a great many years went into the writing and preparation of this volume. It is also obvious that thousands of decisions and S. E. C. reports have been examined. This book is the result of prodigious and painstaking labor.

A noteworthy asset of this study is its "Table of Cases"[2] which is arranged alphabetically with a cross-reference to the text. There is also a complete index of subject matter.[3] From the point of view of one who may require a speedy answer to a pressing problem, this book would serve as a useful aid.

Although a lawyer need not be an accountant, it is essential that he have some familiarity with the language of accounting and the legal interpretation of that language. Failure to comprehend the full legal significance of accounting terminology or the precise meaning of accounting terms written into legal instruments, may often result in expensive and protracted litigation, let alone embarrassment and the possible loss

1 Page 3.
2 Pages 253 through 304.
3 Pages 307 through 338.

of clients. These dangers are most likely to be present in the drafting of contracts for the purchase or sale of a business, lease agreements, employment and profit-sharing contracts, credit agreements, cost-type contracts, partnership agreements, stockholders agreements, and any other document which attempts to spell out the financial intent of the parties.

This problem is illustrated by the instance where parties to a contract intended a sales price to be predicated on "book value." The instrument used the terms "book value" and balance sheet prepared in accordance with accepted "accounting principles" as though the terms were synonymous. When the time ultimately came to apply the provisions of the contract, each side arrived at a different amount. The sellers made an effort to reconcile the difference by maintaining that "accepted accounting principles" meant those they accepted. There also have arisen disputes as to the meaning of the term "net profit" and the manner of arriving at that figure. The most common accounting pitfalls in the preparation of legal instruments involve "ambiguous definitions, unworkable provisions, formulas with unforeseen results, misinterpretation of financial statements and failure to provide for unforeseen expenses or operating results."[4]

"The Law of Accounting and Financial Statements" will not solve all of these problems; for many of them the aid of professional accountants will have to be enlisted, but it will enable the lawyer to more fully comprehend the significance of the accountant's analysis in the light of the law.

Mr. Hill's book will likewise be of value to the trial lawyer. With some understanding of the legal and factual significance of the accounting problems that may be inherent in the trial, he can more effectively present his case and deal more intelligently with the issues on cross-examination, particularly when an accountant is being interrogated.

In spite of the book's many virtues, there are some criticisms. One is that a lawyer reading it without a basic understanding of rudimentary accounting theory may find that some of the topics discussed are beyond his ken. The second is that "The Law of Accounting and Financial Statements" is too compact. It is suggested that the author would have been better advised had be provided two additional chapters devoted to an exposition of elementary accounting concepts, a description of the books of account commonly in use and the relationship between these books and the financial statements. This would have enhanced the significance and the value of this otherwise fine work.

This book, supplemented by a broader base of accounting theory, could be most effectively used as a text or as collateral reading in a law school on accounting for lawyers.

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[4] See "Accounting Pitfalls in Contract Preparation" by Peter Arnstein, Journal of Accountancy, May, 1957—pp. 51-55.