

REVIEWS

THE COLLECTED WORKS OF ABRAHAM LINCOLN. Roy P. Basler, ed. New Brunswick, N.J.: Rutgers University Press, 1953. 9 vols. \$115.00.

THIS stupendous work is the definitive collection of Lincoln papers. It is superbly edited and handsomely published. It has been widely reviewed, and has already become a commercial success, fully vindicating the daring of the press which published it and the patience of the editors who created it.

A review of any collected works of this kind is likely to develop into a catalog of treasures. The treasures are here. Each volume necessarily contains much minutia of no great significance, but the deep-seated Lincoln enthusiast will want to know about *everything*, and the casual browser will find a good deal to interest him which is not in the shorter collections.

Though the *Works* omit most of the exclusively legal writings by Lincoln, as for example his pleadings, what is here can be seen by a lawyer with the eye of a fellow craftsman, which makes it look a little different than it does to others. If Lincoln is read with a professional eye, any lawyer can learn from his reading.

I

Abraham Lincoln was President of the United States from 1861 to 1865. He romanced with Ann Rutledge (if he did at all) for only a few months. He pulled a puppy out of a river, rescued a pig, went down the Mississippi on a flatboat, and ran a store, unsuccessfully, for a year. He gave the Gettysburg Address in something under five minutes, asked a particularly probing question of Stephen A. Douglas at Freeport, Illinois, and struck off what is to many the noblest sentence of an American, "With malice toward none; with charity for all; with firmness in the right as God gives us to see the right. . . ."

All these, and heaven knows how many fragments more, are parts of the Lincoln legend that America knows and cherishes. And yet they are but fragments, salient moments which formed or displayed character and still are only a small part of Lincoln's life. Basically, Lincoln's was the life of a man who from 1836 to 1861 was a practicing lawyer. In these twenty-five years he passed from storekeeper and rural legislator to the Presidency of the United States. At the law he earned the living that supported Mary and the three boys, and it was from his one big fee in the practice (\$5000) that he earned enough to sustain his campaign against Douglas in 1858. As a lawyer he made the friends, developed the judgment, accumulated the stories, and polished and controlled the prose of our most eloquent President.

History has not paid exhaustive attention to Lincoln as a lawyer, though there are books on the subject, including an excellent biography of his law

partner.¹ Perhaps this is because Lincoln was not very self-conscious himself about practice. In other aspects of his life, he was singularly introversive, occupied much with thoughts on the motivations of human conduct. Yet to this one activity which, time-wise, occupied the bulk of his adult life, his mind moved from case to case, with no pause for abstract thought.

This superb collection of Lincoln papers has one allusion to the methods of law practice. It is a five paragraph squib entitled "Notes for a Law Lecture," set down in 1850. In this one effort at law teaching, Lincoln revealed himself as a man like the rest of us, better able to tell what should be done than he ever was to do it. He began with an admonition to diligence, "Never let your correspondence fall behind."² This from a man who carried his letters about in a stove pipe hat until he lost them, or mislaid them on his desk before they could find their way into the hat!

For Lincoln was no more a neat and orderly lawyer than he was a neat and orderly man. The little law office above the harness store in Springfield, Illinois, with its cut-up desk, its few books, and its saggy couch on which Lincoln, reclining, read the papers aloud to the distraction of his partner Herndon, was never cleaned. Seeds which had fallen off a desk actually sprouted in one corner of the room. On Sundays, he sometimes brought the children to the office while he worked, and Herndon described the chaos thus:

"The children—spoiled ones to be sure—would tear up the office, scatter the books, smash up pens, spill the ink, and p—s all over the floor. I have felt many and many a time that I wanted to wring their little necks, and yet out of respect for Lincoln, I kept my mouth shut. Lincoln did not note what his children were doing or had done."³

II

Lincoln's own preparation for the law was skimpy, and he never particularly cherished formal requirements for others. The legend is that in later life, as a bar examiner, he quizzed orally a young aspirant who dropped in while Lincoln was shaving. After a few questions, Lincoln passed the beginner on to the next examiner with a note, "This young man is smarter than he looks."

Lincoln himself was admitted to the bar before Illinois had any requirements other than a certificate of good character. Between his birth in 1809, and his first interest in law in the 1830's, he had less than a year of education. The

1. The basic biographies contain excellent material. See SANDBURG, ABRAHAM LINCOLN, *THE PRAIRIE YEARS passim* (1925); or, for a more professional judgment, BEVERIDGE, ABRAHAM LINCOLN (2 vols. 1928).

Half of Chapter V., THOMAS, ABRAHAM LINCOLN (1953) is on the subject of his law partner, and is excellent. More exclusively on the law practice are RICHARDS, ABRAHAM LINCOLN, *THE LAWYER-STATESMAN* (1916); and WOLDMAN, *LAWYER LINCOLN* (1936), which is good. Particularly valuable is DONALD, *LINCOLN'S HERNDON* (1948).

2. II, p. 81.

3. HERTZ, *THE HIDDEN LINCOLN* 105 (1938).

common story is that he found his first law book, a *Blackstone*, in the bottom of a barrel which, as a country store keeper, he bought contents unknown for 50 cents. The probability is that he obtained the book somewhat less by chance, but in any case, it was the right book. A reading of it and a few other works made him as familiar with the law as many of his lawyer contemporaries.

While Lincoln brought almost no legal training to the bar, he did bring four invaluable qualities. First, was a personality which attracted clients and gave juries confidence. Second, was a marvelous capacity for the logical, concise organization of material. Closely tied to this was a third quality, peculiarly rare in the era of florid oratory in which he lived, of restrained and effective verbal expression. Fourth was a retentive mind.

Of these four qualities, the most remarkable was Lincoln's incredible talent with words. There were other homespun humorists, other men of logical or retentive minds, but no one to combine with those attributes a similar ability to express himself effectively. This was no merely mechanical skill on Lincoln's part, though he had that: in later years purists might scoff at his spoken but never at his written grammar. It was, rather, the quality of simple eloquence.

Foreign to Lincoln from his earliest years was the wandering discursion and the purple prose so common to his time. There are exceptions; a fair candidate for the honor of being the most complicated metaphor Lincoln ever devised was this from a speech in 1839 describing "the great volcano at Washington, aroused and directed by the evil spirit that reigns there . . . belching forth the lava of political corruption, in a current broad and deep, which is sweeping with frightful velocity over the whole length and breadth of the land, bidding fair to leave unscathed no green spot or living thing, while on its bosom are riding like demons on the waves of hell, the imps of that evil spirit, and fiendishly taunting all those who dare to resist its destroying course," and so on, for far too long.⁴

The point of that prose is its rarity, even in the early years. Far more typical is a passage in a letter in 1840 to someone who thought Lincoln had insulted him: "I entertain no unkind feeling to you, and none of any sort upon the subject, except a sincere regret that I permitted myself to get into such an altercation."⁵ Lincoln was a state legislator even before he became a lawyer. The bills and resolutions he offered there show a born draftsman. The simple penetration to substance which marks the Gettysburg Address or the Second Inaugural were beginning to appear in the 1830's.

This simple capacity to strike swiftly to the heart of a matter was his great asset before juries, as it was later to be time after time when he appealed to the American people. Every account of Lincoln the jury lawyer makes simplicity his strong point. He regularly yielded points which other lawyers thought he should defend, not because of any excessive legal charity on his

4. I, p. 178. This passage becomes, if possible, more picturesque as it goes on.

5. I, p. 211.

part, but because he preferred to pin his case to simple, understandable points rather than risk losing it in refinement. In one case, a widow of a Revolutionary War veteran retained a claim agent to collect a \$500 pension. He did, but kept half the amount as a fee. Lincoln sued the claim agent for the widow on the ground that the fee was excessive. His handwritten memorandum for summing up to the jury is:

"No contract. Not professional services. Unreasonable charge. Money retained by defendant—not given by plaintiff. Revolutionary War. Describe Valley Forge privation. Ice. Soldier leaving home for army. Soldier's bleeding feet. Plaintiff's husband. SKIN DEFENDANT. Close."⁶

The widow got her money, and Lincoln charged her nothing.

Lincoln regarded his memory as a real asset. He did not think himself a man of quick intelligence, once describing his own mind as like a piece of steel, extraordinarily hard to mark but which once marked kept the scratch permanently. Both his legal and his political stock in trade were a few very simple, if important, ideas. He was as devoid of scholarly and intellectual embellishments as he was of prose flourishes. What he had was an extraordinary instinct for the basic issue, for that point at which the human mind confronted with alternatives makes its ultimate choice of Yes or No. When that issue was properly identified, and he had said a little about it, he was done.

III

Of Lincoln's series of three Springfield partners, his longest association was that from 1844 to 1861 with William Herndon. Why Lincoln took Herndon is unknown. By that time, Lincoln had a little local prestige, while Herndon, like Lincoln, an ex-grocery store clerk, was just starting in the law. The relations of the two were very much that of a senior and junior partner, Herndon always addressing his partner as "Mr. Lincoln," and the senior partner addressing the junior as "Billy." Most of the library work, such as there was, Herndon did.

Herndon stayed largely in Springfield, while Lincoln tried cases around the circuit. They divided fees equally. When Lincoln received money from a client, he put half in his pocket and wrapped the other half in a piece of paper with Herndon's name on it. Lincoln's peculiar preoccupation with death⁷ made him particularly anxious that Herndon's money should be separated from his so that if he should die away from Springfield, Herndon could easily collect from his estate.

6. 2 HERNDON & WEIK, LINCOLN 340 (1888).

7. As an example of Lincoln's peculiar emphasis on the prospect of death, consider one of his first political announcements, in 1836, when he was 27, which concluded: "If alive on the first Monday in November, I shall vote for Hugh L. White for President." I, p. 48.

Lincoln had very little office business. Handling real estate transactions, probating estates, organizing corporations, drafting and pushing legislation, or giving business advice were seldom for him. First and foremost, he was a trial and appellate lawyer. His actual trials must number in the *thousands*. He probably tried or argued more cases than will all the graduates of any given class of the Yale Law School in the combined courses of their professional careers. At times Lincoln and Herndon were in a quarter to a third of all the trial business in Springfield. His 178 cases in the state supreme court were more than any other lawyer of his time.

This means that Lincoln was a successful business getter. When there was important litigation, he saw to it that he was not left out, as when, with a big case in view, he wrote one side broadly suggesting that if he were not retained by it, he probably would be by its opponent. Some of his business was for corporations; occasionally the Illinois Central Railroad retained him. But the bulk of his practice came from individuals and from other lawyers. Because his was a frontier, rural law practice, most of it involved small matters. Sample cases in the state Supreme Court were over the death of a horse carelessly kept by a stableman; the theft of a pig; a trespass causing \$90 damage. A big case was the foreclosure of a \$6,000 mortgage, or an assault and battery case for \$650, or a dispute over whether or not the legislature could create one county where two had been before.

A modern lawyer may spend days or weeks or even longer preparing a big case for argument. If he is one of the high-priced gentry who charges a thousand dollars a day or more for court room appearances, he can afford to do so. But Lincoln's was a quantity practice, and he could scarcely be expected to spend a week earning a \$10 fee on a case in which the whole recovery would be only \$90. Hence his arguments, and the handwritten briefs which supported them, consisted of simple, almost elemental propositions, supported by citations of a very few cases thought to be directly in point. Once in a while, the arguments might be elaborated with numerous citations; Herndon doubtless worked those up. But the line was always simple; there was no subtle logic, no argument by analogy, nothing of what would in the East, even in his own generation, have been regarded as scholarship. It is doubtful that, except on the rarest occasions, he ever spent more than a day, or at most two, in preparing an appeal.

Like every lawyer, Lincoln had good cases and bad cases, cases in which justice and common sense were on his side, and cases in which they were not. For one horrible example of a technicality, a lower court gave a judgment for two items of \$851.55 and \$57.86. The higher Court affirmed, correctly adding the two items together and stating the amount as \$909.41. Lincoln contended that the higher court order was invalid because the amounts were combined instead of being listed separately. His effort failed, as he must have known it should.⁸

8. Pearl v. Wellman, 11 Ill. 352 (1849).

While Lincoln sometimes made bad arguments and sustained weak causes, he needed the moral stimulus of a sense of the right to do his best. This is more or less true of most lawyers; Lincoln carried it to the point of professional oddity. At times he almost confessed his weakness; in one hopeless state supreme court case he observed that if upon examination of the authorities the Court should go against him, "we should cheerfully submit."⁹

Most of Lincoln's professional work was in the trial court which circulated about the sprawling Eighth Circuit, a sparsely populated area in central Illinois, half again as big as the State of Massachusetts. Here he developed the political strength which made him a state leader in Illinois. The judge, David Davis, managed his campaign for the Presidential nomination, and his fellow lawyers made up much of his most effective support.

There is a touch of minor mystery as to Lincoln's relations with Davis. Davis was a good judge, his personality marred a little by a touch of arrogance and pride.¹⁰ Lincoln, who never bowed and scraped to him, had Davis' complete respect, and when Davis had to be off the bench, he usually asked Lincoln to substitute as judge for him.

By modern political standards, as Lincoln's pre-nomination manager, Davis should have been entitled to some high political preferment in 1861. Instead, he was left on the vine in considerable doubt until 1862. Then, when a Supreme Court vacancy occurred, it took a special trip to Washington by Lincoln's fellow circuit rider, Leonard Swett, to get the appointment for Davis. Swett said bluntly, "If Judge Davis, with his tact and force, had not lived, and all other things had been as they were, I believe you would not be sitting where you are now sitting." Lincoln replied, "I guess that is so." But not until Swett pledged that the appointment would pay off any political debt to himself as well as to Davis, "one half for me and one half for the Judge," did Lincoln make the appointment. Davis proved an excellent choice.

In the Circuit days, Judge Davis and the lawyers moved on horseback from town to town through this enormous region. Whenever they arrived, individuals or local lawyers brought their business to lawyers of the travelling company. Pleadings were immediately prepared, witnesses might be interviewed, and the cases went quickly to trial. A familiar tale is that of a young lawyer enlisting Lincoln's aid as Lincoln sat whittling a plug of wood to substitute for a button to hold his suspenders to his pants. Lincoln heard the story as he whittled, said, "Wait until I fix this plug for my 'gallis,'" finished his whittling, and immediately went in to try the case.¹¹ In these circumstances with the "law library" consisting at most of a book or two which could be carried about in the saddle bags, there was no possibility of legal refinement.

9. *Ross v. Nesbit*, 7 Ill. 252 (1845).

10. This interpretation follows WHITNEY, *LIFE ON THE CIRCUIT WITH LINCOLN* (1892), particularly p. 55 *et seq.*, and has no independent basis.

11. 1 BEVERIDGE, *ABRAHAM LINCOLN* 528 (1928).

During the evenings, the lawyers swapped jokes in the saloon. Here Lincoln was pre-eminent, and here he accumulated much of that fund of stories which made him the outstanding humorist President. It was at one of these bibulous sessions that he, as a non-drinker probably the soberest man present, was "tried" by the other lawyers for charging too small fees.

The Circuit was Lincoln's life for from six to eight months of each year. On the weekends, the lawyers who could, went home. Lincoln frequently did not—Herndon, who disliked Mary Lincoln, attributed this to her ill-temper.

Lincoln was at his best as a jury lawyer. He had the feel of the common man. The warning he frequently gave Herndon against shooting over the heads of the audience was seldom necessary for himself. As he arose to address a jury, he stood six feet, four inches tall. His hands were behind him, but as he warmed up, he brought them together in front of him, his fingers interlaced. Later in his remarks he might gesture a little with his right hand, sometimes, as Herndon said, "shooting out that long bony forefinger to dot an idea." He did not walk about or gesture much, using his massive height and appearance of awkward strength to get his effect. In moments of real feeling, he clenched his fists and stretched out both arms in what must have been a prodigiously impressive manner. His voice was peculiarly high for a big man, though it deepened as he spoke.¹²

Lincoln earned two permanent nicknames during his law practice days. One was "Old Abe," a description given him from about his 35th year. The other was "Honest Abe," and is a tribute to his unusually high reputation for ethical practice. In twenty-five years, there must occasionally have been a temptation to a slick trick, but Lincoln seems never to have attempted any.

The only publicly made charge against him arose from the familiar Armstrong murder case in 1875, in which Lincoln defended William, son of his old friends, Jack and Hannah Armstrong. One of the witnesses claimed to have seen the murder by the light of the moon. Lincoln produced an almanac showing that the moon was not where the witness said it was. Several years later political adversaries apparently made up out of whole cloth a story that Lincoln had misled the court by displaying an almanac for a year different from the year in question, and that to insure that his fraud would not be discovered, he had surreptitiously caused all other almanacs to be removed from the court house.

This story was a hoax. It was on its face unlikely, since the episode occurred between Lincoln's first and second campaigns for the Senate, and to believe it one would have to believe that a man prominent in public life would risk his career by handing a fake document to a witness, to opposing counsel, to twelve jurymen, and to a judge, any one of whom might have discovered the fraud and thus done him serious public damage. Much more to the point,

12. This description follows Herndon. HERTZ, *op. cit. supra* note 3, at 191. All other sources are in full accord.

inspection of unquestionably genuine almanacs for the year in question shows that the moon was not where the witness said it was, so that if Lincoln had used an almanac for the wrong year, he would have weakened his case instead of improving it.¹³

Lincoln's practice was almost entirely in the state and federal courts of Illinois. He made one appearance in the United States Supreme Court, where Chief Justice Taney handed down an opinion against him. One big patent case took him over to the federal trial court in Cincinnati, Supreme Court Justice John McLean presiding, where he was associated with two prominent eastern lawyers, Edwin M. Stanton and George Harding. This trial was first scheduled for Illinois, and Lincoln was retained as local Illinois counsel. He conscientiously prepared, and when the case was unexpectedly transferred to Ohio, he went over to participate. Stanton took one look at this country bumpkin and refused even to walk to the courthouse with what he described in a loud voice as that "long-armed ape." Harding threw Lincoln's notes away, and his exclusion was so complete that he was omitted from the dinner for counsel which Justice McLean gave during the trial.¹⁴

Lincoln defeated McLean for the Republican nomination for the Presidency in 1860, though he would have supported McLean if others had not, quite rightly, thought the Justice too old to run.¹⁵ Stanton he made Secretary of War. He offered Harding the post of Commissioner of Patents. "Whosoever shall smite thee on thy right cheek, turn to him the other also." Lincoln was brought up on the Bible, and he knew the Sermon, though sometimes he paraphrased the thought in a lawyer's way: he believed in a short statute of limitations in politics.

Lincoln's income was not large. In his entire practice he had two large fees, one the \$5000, mentioned earlier, for an important railroad case, and one of \$2000 for that Ohio patent case on which he had earned a fee whether or not his work was used. No other fee ever remotely approached those, and charges of \$5.00 and \$10.00 were common. During the 1840's, his income was regularly under \$2000 a year, and it never reached great heights in the 1850's. He was neither grasping nor extravagant; as Herndon put it, he had a little of the avarice of *the keep*, but none of *the get*.

How good a lawyer was Lincoln? Some of the appraisals of his skill rest on numerical analysis of the number of cases he "won" in the Illinois Supreme Court. But this is an unsophisticated approach. Quantitatively he won slight-

13. For a full account, including a report of an examination of the relevant almanacs, see RICHARDS, *op. cit. supra* note 1, at 49-51. It is a miserable thing to do with a good story, but Beveridge demonstrates that, upon a consideration of the whole trial, the almanac had very little to do with the result. 1 BEVERIDGE, ABRAHAM LINCOLN 567 (1928).

14. HERTZ, *op. cit. supra* note 3, at 153, gives Herndon's account as obtained from Lincoln; it is confirmed in all important details by Harding's own account. 1 BEVERIDGE, ABRAHAM LINCOLN 567 (1928).

15. IV, p. 46.

ly more than he lost, though sometimes an appellate court so compromises the issues that defeat and victory merge. The real test for an appellate lawyer is how he does with what can reasonably be expected from the cases he handles. Lincoln won about as many cases as he should have won.

He was as good a lawyer as native wit and long experience can produce. Lincoln was unlearned to a point where, even in that unlearned bar, he occasionally jeopardized the interest of his clients. Nothing in his training gave him any great breadth of legal information, and the saddle bag library limited his resources. There are cases which he lost because he did not early enough understand what the issues were; for one trifling example, in a suit in which the issue was whether Lincoln's client was slandered as an adulteress by someone who said she "had children by a Negro," he failed to make clear that she was not a Negro herself.¹⁶ In the patent case mentioned earlier, Stanton's decision not to let Lincoln argue so technical a case was reasonable even though his manners were abominable.

Where learning was not of great importance, Lincoln was extraordinarily able. His own contemporaries regarded him as an outstanding lawyer, though by no means *the* great lawyer of the day. It is impossible to make any sensible comparison between him and the really famous eastern lawyers of the time. Rufus Choate or David Dudley Field, to list two great names, or Stanton for that matter, were dealing with matters of so much greater complexity than Lincoln as to be in a wholly different legal world.

Without comparisons, then, Lincoln was an outstandingly able and successful lawyer for his own time and place. He was one of the best products of a frontier legal system. Whether he could have been equally successful in a different legal system cannot be known, any more than one can know whether a Choate or a Field could have won a case before a frontier jury.

IV

Lincoln's greatest successes as a lawyer—and here he outstrips the field—were in the field of public law and public service. Oddly enough, he started extremely badly.

One of Lincoln's bad habits was a tendency occasionally to slip from his own standard of verbal simplicity and to talk like a lawyer. Occasionally this was helpful to an audience, where the legal phraseology was simple enough; for example, in his great speech at the Cooper Union in New York in 1860 he said, addressing his opponents, "You say we are sectional. We deny it. That makes an issue, and the burden of proof is on you."¹⁷

That is intelligible to anyone. Far less intelligible was what he said to his county audience in the debate with Douglas at Ottawa, in reply to a certain assertion by Douglas: "I demur to that plea. I waive all objections that it was not filed till after default was taken, and demur to it upon the merits. [It is]

16. Patterson v. Edwards, 7 Ill. 720 (1845).

17. III, p. 536.

like an answer in chancery, that he neither had any knowledge, information, nor belief," and so on.¹⁸

As an occasional flourish, this method was harmless. At worse, he lost his audience for a moment.¹⁹ But in the case of the Spot Resolutions, concerning the cause of the Mexican War, the consequences were more substantial. Congress had declared that War because of the assertion by President Polk that the Mexicans had shed the blood of American troops on American soil. The Whigs, of whom Lincoln was one, opposed the War. Many of them felt that Polk had precipitated it by putting American troops where they had no business being. By the time Lincoln reached Congress, the War was well on toward victory. He introduced the Spot Resolutions, demanding to know "whether the particular spot on which the blood of our citizens was so shed was or was not at that time on our own soil," and then proceeded into a series of particular questions more appropriate for a village trespass action than a serious public discussion.²⁰

The Spot Resolutions blasted Lincoln so far out of public life that it took him almost ten years to come back. Partly this was because by the time he asked his questions, the public was no longer interested in finicky questions of cause; the whole inquiry had the flat quality of the post-World War II investigations of Pearl Harbor. But beyond this, the legalistic quality of the questions themselves helped to discredit him in his own District, where for a time he had to live down the nickname of "Spotty" Lincoln.

The Spot Resolutions were a mistake not made twice. When Lincoln came back to public life, it was to use over and over again those skills of simple, basic analysis perfected in thousands of cross examinations and jury summations. His most famous question was that one asked of Douglas in the Freeport debate in 1858. The question sharply focussed on the exact issue Douglas most needed to obscure, the issue of slavery in the Territories of the United States. Douglas could not answer the question to which Lincoln pushed him; Douglas lost the South, and with it his chance for the United Democratic nomination of 1860.²¹

In 1860, Lincoln carried his campaign for the nomination to New York, where he made the Cooper Union speech, his most famous pre-war address. That speech, which more than anything else prepared the Republicans of the East to accept the gawky stranger from the West, was a superb combination of a political argument and a legal brief. Polished with the exquisite care Lincoln reserved for great occasions, it squarely faced the constitutional question of whether the Government of the United States had the power to suppress

18. III, p. 22.

19. The *Works* at the point just cited report "vociferous cheering" at the end of the paragraph from which the text excerpt, "I demur, etc.," is taken, so he did not lose them for long.

20. I, p. 420.

21. III, p. 43.

slavery in the Territories. The Supreme Court of the United States, in the case of Dred Scott, had said No. Abraham Lincoln, a lawyer from Springfield, Illinois, said Yes. With a clarity greater than that which any of the justices had achieved, he explained their error, and added wryly, "When this obvious mistake of the judges shall be brought to their notice, is it not reasonable to expect that they will withdraw the mistaken statement, and reconsider the conclusion based upon it?"²²

The Civil War confronted the country lawyer with the greatest and most difficult legal problems ever to face a President. First, was the ultimate question of the War itself—whether under the American Constitution the Union could be broken up. To that question Lincoln addressed the First Inaugural: "I hold that, in contemplation of universal law of the Constitution, the Union of these states is perpetual." He argued his point as a matter of contract, as a matter of history, as a matter of logic.

He concluded as he would to a jury, with an appeal to the deepest emotions of those whom he sought to convince:

"I am loath to close. We are not enemies, but friends. We must not be enemies. Though passion may have strained, it must not break our bonds of affection. The mystic chords of memory, stretching from every battlefield and patriot grave to every living heart and hearth-stone all over the broad land, will yet swell the chorus of the Union when again touched, as surely they will be, by the better angels of our nature."²³

A second great legal question was that of the distribution of power within the Administration. Lincoln was surrounded, in the beginning, with a cabinet of names bigger than his own. He faced a powerful and unruly Congress. Some General might win victories which could, for a moment at least, capture a larger hold even than Lincoln's on the popular imagination. But Lincoln envisioned the American Presidency as a post of ultimate responsibility and leadership. Without ever trespassing on the fair prerogatives of others, he relentlessly maintained his own. When, near the beginning of the War, Secretary of State Seward subtly suggested that Lincoln might perhaps transfer most of the Presidential duties to him, Lincoln quietly replied, "I must do it."²⁴ When his own Party in Congress passed an unsatisfactory reconstruction bill, he vetoed it, and when some of them attempted to raise up another Presidential candidate against him, he outsmarted them. Near the end of the War, when it became apparent that Lee would soon surrender, Lincoln wrote out a note which he gave to Stanton to send to General Grant: "The President . . . instructs me to say that you are not to decide, discuss, or confer upon

22. III, p. 546.

23. IV, p. 271. Illustrative of the superiority of Lincoln's prose to Seward's (which was good but conventional), is their comparative treatment of this last paragraph. See footnotes, III, pp. 261-2.

24. IV, pp. 316-17 (emphasis added).

any political questions. Such questions the President holds in his own hands; and will submit them to no military conferences or conventions."²⁵

A final legal problem was the Emancipation, the supreme exercise of Executive power in American history. Where did the President get the power? While lawyers the country over debated the issue, Lincoln hedged. The preliminary announcement of the Emancipation in 1862 carefully obscured just what powers were involved, and included a quotation of an Act of Congress which, in truth, had little to do with the subject.²⁶ But on January 1, 1863, the final Proclamation thrust aside all legal equivocation:

"Now, therefore, I, Abraham Lincoln, President of the United States, by virtue of the power in me vested as Commander-in-Chief of the Army and Navy of the United States, in time of actual armed rebellion against the authority and government of the United States, and as a fit and necessary war measure for suppressing said rebellion, do . . . order and declare that all persons held as slaves within said designated States and parts of States, are, and henceforward shall be, free."²⁷

V

It would be cheap sentimentality for lawyers to claim any special credit for Lincoln merely because he was once of our company, and because he knew our ways and used our tools. He was also a Republican, an American, a member of the human race; the classes which can claim credit for him grow so large that any person of humanity and good will can feel a sense of affiliation with him. He was a great constitutional theorist, but honest professional humility requires the confession that the law did more to polish than to create his native skills. The qualities which made Lincoln great were his humanity, his strength, his humility, and his capacity to inspire the American people. These are the qualities, not of a profession, but of a man.

In Lincoln's own view, if a heritage was to be more than a dusty possession, if it was to have living meaning, each generation must have the opportunity of earning it anew by aspiring to live up to it.²⁸ If there is a central theme of Lincoln's political philosophy, it is that of equality for all. "As I would not be a *slave*, I would not be a *master*. This expresses my idea of democracy."²⁹ Discrimination against religious minorities or the foreign born, he thought almost as bad as slavery. With him this was a stern faith; he once told his best friend that he would rather live under an unadulterated despotism, like that of Russia, than permit the alloy of hypocrisy to corrupt democracy.³⁰

25. VIII, p. 330.

26. The Act principally set forth by Lincoln is that of July 7, 1862, 12 STAT. 591 (1862), confiscating and freeing the slaves of persons actually in rebellion, and their aides, which is to say, slaves of persons in the Confederate Army.

27. VI, p. 28. On other legal problems, see RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN (Rev. ed. 1951).

28. See, e.g., his discussion of the meaning of the Fourth of July, II, p. 499.

29. IV, p. 532.

30. II, p. 323.

He was still a country lawyer when he said that American power does not lie in military strength. "Our defense is in the preservation of the spirit which prizes liberty as the heritage of all men, in all lands, everywhere." He continued soberly: When you become "accustomed to trample on the rights of those around you, you have lost the genius of your own independence, and become the fit subjects of the first cunning tyrant who arises."³¹

JOHN P. FRANK†

GOVERNMENTAL LIABILITY. By H. Street. Cambridge (Eng.): Cambridge University Press, 1953. Pp. 223. \$5.00.

PROFESSOR Street's volume considers the capacity of the individual to sue the State and other administrative bodies. This field is of growing importance, for the prevailing tendency is to grant additional functions and greater powers to government. Hence, there is an increasing need for legal remedies against possible wrongs and abuses of government. Strange as it may seem, this topic has not attracted sufficient attention from legal scholars in England and in this country. Despite recent statutory enactments of considerable importance, the majority of the scholars have perhaps failed adequately to explore the fundamental aspects of the problem and particularly the basic principles on which liability of a modern State should be predicated. This is probably one of the main reasons why, according to Professor Street, "English law has not yet made a full contribution to the reconciliation of the freedom of the individual and the authority of the State,"¹ and why "much reform is called for [in England] before the individual has adequate legal protection against the administration."²

Professor Street's book contains a very interesting and successful re-examination of the entire problem of governmental liability. For its solution he does not offer any magic formula; instead, he comes forward with a number of specific suggestions based on a close analysis of the historical development and the present status of the law in England and in this country, coupled with a comparative analysis of the legal remedies against the administration which have been devised in Western Europe, especially in France.

Following an historical introduction, which deals with the development of the law of State liability in England, the United States and Western Europe,³ the author analyzes the main problems relating to State liability in tort,⁴ in contract,⁵ in quasi-contract and as a result of expropriation.⁶ The author

31. III, p. 95.

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1. P. 186.

2. *Ibid.*

3. Pp. 1-24.

4. Pp. 25-80.

5. Pp. 81-119.

6. Pp. 120-131.