JOHN GORELL BARNES

FIRST LORD GORELL

(1848-1913)

J. Russell & Sons, photographers

Emery Walker ph. sc

1906: The President at work

JOHN GORELL BARNES

FIRST LORD GORELL

(1848–1913)

A MEMOIR

BY J. E. G. DE MONTMORENCY

WITH AN INTRODUCTION BY

RONALD, THIRD LORD GORELL

WITH PORTRAIT

LONDON
JOHN MURRAY, ALBEMARLE STREET, W. 1
1920

CONTENTS

JOHN GORELL BARNES
FIRST LORD GORELL
(1848–1913)

INTRODUCTION

By RONALD, THIRD LORD GORELL

It was my mother's wish that some account of my father's life and work should be placed on record in a more concrete form than could be gathered from the volumes of the Law Reports or scattered notices in the Press; and it is in fulfilment of that wish that the following memoir is now published. In the first instance my mother asked me whether I could not undertake it myself, but, even if the war had not made that impossible, we agreed after discussion that the cases are rare in which a son can successfully gain that detachment of mind and impartiality of view over a subject so close and so dear to him as his father, and that in this case it was eminently desirable that the task should be undertaken by one professionally qualified to review and express an opinion upon a life so unremittingly devoted to the enunciation of legal principles. It was accordingly entrusted by my mother to Mr. de Montmorency, not only a practising barrister, but also an indefatigable and most learned fellow-worker over the Divorce Commission, which crowned

and in some degree shortened my father's life. Mr. de Montmorency had many opportunities during my father's lifetime of forming a personal estimate of him, both as a man and as a lawyer, and all the material available has since been placed at his disposal. The early chapters of this memoir were written in time for my mother to have the pleasure of them before her death in November, 1918, and my sister and I have given such little later assistance as was required.

As regards my own part, that, however difficult, is constricted in its aim—to try to the best of my ability to present my father as he appeared to us at home—a matter of special importance to any estimate of his character because few men of eminence can ever have been so concentrated in their affections or so completely happy in their home life. Two things, reacting to some extent upon each other, stand out pre-eminent in all the latter half of his life, of which alone I can write with any degree of personal knowledge: the first is the beautiful idyll of his married life, and the second is the long and bitter struggle with the results of continued overwork, which first became manifest in 1892 and ended only with his death in April, 1913. The effort of rising from the position of an entirely unknown barrister in London to that of the youngest Judge on the Bench led to a serious breakdown, from the effects of which he was never afterwards entirely free. Had he been able on his elevation to the peerage to have taken a real rest he might have been spared for many years, but he accepted his peerage, reluctantly, at a big financial sacrifice, and in reference to the earnest wishes of Lord Loreburn,

then Lord Chancellor, only to plunge into wider and harder work. He used to say that he had never worked so hard in his life as in the months after he quitted the Bench, and to comment humorously on the amount of unpaid work England had the special knack of extracting from her sons. On a single day in March, 1910, he delivered a judgment in the House of Lords, gave lengthy evidence before the Pilotage Committee, presided over the Prize Committee, and spent the evening studying evidence on divorce. He was mentally unable to be idle, and threw himself always into whatever lay to his hand with energy: throughout his life he retained to a marked degree those qualities of youth which make it distasteful to be half-hearted, and he believed tremendously in doing things for himself, often quoting to us boys a saying of his own father: "If you want a thing done, go; if you don't want it done, send." This trait was always coming out in big and little things alike. It was most publicly apparent in his work on the Divorce Commission, when he personally pursued investigation even into the remotest corners of his vast subject. It came out strongly for those who lived with him at Stratford Hills, where he superintended personally with the same concentrated energy all the ramifications of a small farm.

Looking back with older knowledge now it is a real and touching surprise to me that the burden of overwork was so little allowed to affect the sweetness of his temper or the boyishness of his sense of fun. The courtesy and patience for which he was noted in court were not laid aside when he came home: we children saw little of the weariness of brain

which was, I know now, often intense. Sleep was his greatest enemy, and often he took no part in the family talk, but, though he was the centre around which my mother moved her world, we were seldom checked for the natural exuberance of children, and whenever he was not too tired or too busy—rare times unfortunately—he shared our fun. He could outdo us all in stories of his own boyhood, tales of digging carefully concealed pits in the garden of his old home at Anfield into which unsuspecting visitors were led; of fastening a loaded musket with a string from a door-handle to the trigger, and of the retribution which fell next day on him and his brother, Allen, when their father came home late at night and set it off unexpectedly; of another musket loaded with stones and fixed with a string to the trigger and its butt against a tree, and the bursting thereof; of their uncle Charles who looked out of an adjoining window just as they fired at some pigeons beyond and nearly had his nose blown off, and who could hardly be persuaded that they had not deliberately fired at him; of the making of fireworks and the terrible day when a damp one stuck to and burnt itself out on Allen's hand—with these and many other tales of his boyhood in the sixties he would cap our quite mild accounts of escapades, adding at the same time with laughter in his eyes the parental caution that we must not take him for our model as he and his brother had lived in a stone house detached from others, and even so he never knew how they had escaped killing each other and other people.

He had been a boy of boys, and preserved so large a boyhood in his heart that it rose above toil and

weariness and, in addition to adding to the humour of our lives, helped him to an understanding of our youthful points of view. He was invariably gentle with us even when we must have tried him most, and hardly in the whole course of my youth did I see him in anger. I remember one incident characteristic both of his outward sense of dignity and internal enjoyment of a joke; he came back from Court one evening chuckling, and told us what he described as the funniest thing he'd ever seen on the Bench. A lady giving evidence had turned rather faint, and been given a glass of water; she had just sipped it and put it down still practically full. Her successor in the witness-box, moving his hand excitedly, knocked the glass over. "The whole contents," went on my father, "shot like an avalanche straight down the neck of the reporter sitting below: the unhappy wretch bounded from his seat with a yell as if he'd been shot. I sat quite solemn, but the Court simply roared"; and, as he finished, he threw himself back and laughed till the tears ran down his cheeks, as he had wished to do, but had refrained from doing, on the Bench.

This power of repression, when he deemed repression necessary, stood him in good stead both on the Bench and in private life. He did not suffer fools gladly by nature, but only by the exercise of patience and courtesy, so that none knew how profoundly he was often bored except we of the household who noted the tell-tale sign of his slowly moving foot. Similarly at the Bar he had been so frequently vexed by talkative Judges that when he ascended the Bench he never spoke to ask unnecessary questions, to put suppositions, or to make jokes.

In this last he was wont to contrast the lightning of Lord Justice Mathew's wit with the laboured jocularity of certain brother Judges. "You can see their jokes coming, but Mathew's were entirely spontaneous," he would say, and tell this story to prove it: Mathew was walking along one day when he was accosted by a tramp with a strangely painted bird which the tramp declared he had found and wished to sell, ending with the question: "And what kind of bird would your Honour say it was?" Mathew gave him one look, murmured "Gaol-bird," and passed on. My father, in whom the sense of humour was far stronger than the power of wit, never courted laughter in public: he was too intent on the work he was there to do. In private he was humorous often, witty seldom, so that memory gathers rather around the loved impression than hangs upon single sentences. A few such, however, I remember. Once as schoolboys we were talking of our work, and one of us expressed surprise that he had found no word for "yes" in the Latin language: "I expect," said my father, "the old Romans said 'Um,' like everybody else." On another occasion he broke silence at dinner to comment on a frivolous discussion going on round him; "Marriage," he said, smiling, "is very like being on a desert island—except that there is always the chance of being rescued from a desert island."

It is of him sitting in his old oak-chair in the dining-room at Stratford Hills in September listening to our chatter that the memory grows most vivid. He would be on holiday then; law or divorce would be upstairs in the room we called "the cabin"—even on holiday, work would claim many of his

mornings—but downstairs he would be all our own. If he had had one of his bad nights he would content himself with listening and letting talk roam at will, but when his holiday had begun to take effect, he entered into all the little topics of the hour. He was an early practiser of the difficult art of being friends with his children, and we never were the least in awe of him, though he had unrivalled power to turn us quietly in upon ourselves and make us ashamed of anything unworthy. One cannot help recalling that one of many definitions of a gentleman which states that he is one who never willingly gives pain to anyone: that is a maxim on which my father unconsciously modelled all his actions. I remember with what characteristic gentleness he counselled us once to tone down a little satire one of us had written fearing it might rankle rather than amuse, a far more effective method in his hands than any direct order could have been. Stratford gave him the chance to be a boy again: he originally bought it to let us children learn the life of the English country, but it wove a deep spell about him too. No account of the later years of his life could be complete without something more than a cursory mention of that place. It was a small Elizabethan farmhouse lying just within Suffolk, close to the Essex border, and it became the holiday home. My mother beautified it with old furniture within, and had the garden for her province: my father found an engrossing hobby in the farm. After he bought it, those travels in which he had indulged with such regularity were undertaken only for reasons of health, and he went there regularly. He identified himself to an unusual degree with the

agricultural life of the place, always finding, he said, something that wanted doing whenever he went out. We made a small golf links there, and he took up again the game of which he had at one time been fondest, but his chief enjoyment was supervising the actual work and stocking of the farm. He was justly proud of his Suffolk mares and their foals, and found a constant interest in attending sales. This country life brought him in February, 1909, what he described as the most delicious letter he had ever received. It ran as follows:

"My Lord,

"Allow me to congratulate your Lordship on your elevation to the Peerage.

"In to-day's *Standard*, of which I send you an extract, I notice that you are said only '*to keep hens.*'

"I and my wife run a large poultry farm, and we shall only be too glad to supply you with a few cockerels; we find it a great advantage to keep both sexes, and would like to suggest this plan to your consideration. At present we only have Buff Orpingtons, White Orpingtons, White Wyandottes, and Black Wyandottes. If, however, you prefer not to upset your hens' quiet mode of life, we shall only be too pleased to supply you with sittings of eggs. I may say we have won a number of prizes at leading shows, and you may see our advertisement in the *Feathered World*. But we have invariably tried to keep both sexes, finding it more profitable. I beg to remain with all good wishes,

"Yours obediently,

"The Rev. ——."

At first he thought it too good to be genuine and was inclined, I think, to suspect my brother and myself of a hoax, but a reference to Crockford

satisfied him, and I can see him now sitting back and repeating to himself in laughter-broken ecstasy, "quiet mode of life!"

At Stratford also he took up shooting again, and few who knew only the grave and dignified Judge would readily have recognized him by the covert side: his left was the dominant eye, and he shot from his right shoulder with a straight stock; consequently, to block out the vision of the left eye for the act of shooting, he stuck a piece of stamp paper diagonally over the left spectacle. Often we begged him to have a pair of spectacles specially made, but no; the piece of stamp paper was effective, and I think he rather enjoyed the comical appearance he presented.

But with all his unfailing interest in English country life, his work was never really out of his mind, either in London or at Stratford. As my brother grew up, and, to my father's great delight, showed a mind in common with his own in interest on legal things, discussions at home tended always to come round to the law. This was inevitable, for my father's interest was given almost wholly to the practical side of life. He liked good literature, but with a limitation: I remember his exhortation to us boys to lay aside the works of the late G. A. Henty and turn to the novels of Scott, which he himself continued to read with pleasure all his life. He loved "Don Quixote," but for the most part imaginative literature held little attraction for him. Once long ago when we were discussing poetry he said he had "read all the poets, but did not care for them," and it struck me even at the time as revealing an unusual mind that anyone should take the trouble to read "all the poets" if he did not care for poetry. As

for literature as a profession his judgment was given succinctly in his cordial approval of Sir Theodore Martin's view that "literature is a good stick, but a bad crutch." Art he had studied, as many do, on visits to Italy and elsewhere, but it played no real part in his life; whilst he pronounced a definite judgment against music, perhaps because he had seen the worse results of emotion for so long in the Divorce Court, as being in his opinion responsible for a good deal of the evil in the world. And yet his artistic perceptions were naturally of the finest: my mother specialized in old furniture, but I have known my father, who made no speciality of it, correct where she was mistaken over an individual piece.

His capacious mind, whilst persisting all his life through in seeing general humour and feeling a wide sympathy, was confined to a dual interest—in his home life and surroundings and in his work. It was his peculiar happiness that the two were always in harmony. He went on his way loved and encouraged as few have been at home, and giving himself in his fullness only to very few. It was his pride that he owed no tithe of his success either to interest or to favour. Unlike so many, his advancement to the Bench was for law alone and not in any way a reward for service in the field of politics. It would have been his pride to have been beholden to no outside influence in any event, but the concentration of his mind rendered this inevitable. He lived in and for the law, not being content with the elucidation of facts, but delving through them to discover the legal principle upon which judgment could be founded with most profit to the future. For this reason he

took but scant interest in criminal work, declaring "there was no law in it," and he used to explain his unrivalled mastery over Admiralty work by saying that there was a great sameness and simplicity about it.

My father is best known to the general public for his work over the reform of our divorce law, but he was drawn into this field of labour by no action of his own. His family connections with Liverpool and with shipping led him naturally into commercial and Admiralty work; with the elevation of Sir Francis Jeune to the Presidency of the Probate, Admiralty and Divorce Division of the High Court of Justice, there was occasion to strengthen the Division on its Admiralty side, and so on appointment to the Bench my father came in contact for the first time with the divorce law. The years through which he sat in that Court as Judge and President could not but profoundly affect one who in addition to his gift of sympathy possessed also a zeal for reform. Gradually the anomalies and injustices of the law of 1857 sank deeper and deeper into his heart until to remedy them when a fitting opportunity was afforded him became his fixed determination. It was not, he knew well, a question to be hastily decided, and he held too strongly that it was the imperative duty of members of the Judicial Bench to keep themselves clear of all controversy to act upon his determination prematurely. It was not until 1906 that of set intent and after most anxious deliberation he delivered the noted judgment in *Dodd* v. *Dodd* which revealed his grave sense of the deficiencies of the law he was called upon to administer. This was the first blow, which did all

that he had intended it to do by arousing attention and focussing discussion. He followed this up on July 15, 1909—as soon, that is, as he was no longer a Judge and free therefore to act—by a motion in the House of Lords to give jurisdiction in divorce to the County Courts, which he withdrew on receiving a practical promise from the Government of the day to concede the real objective he had in his mind, namely, the appointment of a Royal Commission to inquire into the whole subject. It was characteristic of that desire for impartial fairness which was so abundantly his that before bringing forward his motion he went to the Archbishop of Canterbury and discussed the whole question with him: they were unable to agree one with the other, but my father was particularly anxious, in view of the grave issues he knew were foreshadowed, to give the leaders of the Church every opportunity of replying to the facts and arguments he intended to use.

The Royal Commission, which was appointed at the end of October, 1909, was thus the immediate and direct outcome of my father's action; he was appointed Chairman and my brother secretary, and, as he had particularly desired, there were women members in the persons of Lady Frances Balfour and Mrs. H. J. Tennant. This personal introduction is not the place in which to trace the history or record the results of the great investigation which the Royal Commission conducted for nearly three years: that is done by Mr. de Montmorency. But there is one aspect the paramount importance of which became clearly recognized during the debates in the House of Lords this summer (1920) on Lord Buckmaster's Matrimonial Causes

Bill; and on my father's mind as to this it is possible for me by personal remembrance to throw some light. It was frequently said during these debates by those in opposition to Lord Buckmaster's Bill (which follows generally the recommendations of the Majority Report) that an issue had been raised by that Bill far exceeding in gravity anything in the contemplation of its supporters when it was introduced—namely, the whole relation of the Established Church to the State. The fact was persistently overlooked that, from the earliest moment when my father raised the question of the revision of the law of 1857, he had foreseen the gravity of this ultimate issue, and done everything in his power to compose the violence of different opinions on divorce. He was resolved that the subject should be investigated from every side for the first time, and he recognized at once that the religious difficulties demanded the very closest attention and consideration. Before the Royal Commission was appointed he had, therefore, begun to study, with his characteristic concentration of mind, the basis on which the ordinary religious opposition to divorce rested. He studied this deeply, going with personal application into all the textual criticism of the relevant Biblical passages, and reading the masses of literature, ancient and modern, upon them; he also studied it as impartially as his long occupation of a seat on the Judicial Bench enabled him to do. He came to this side of the subject without previous opinions; but the more he studied it the more convinced he became, first, of its fundamental bearing on the future and, secondly, of the extraordinary ignorance about it of the majority of those opposed to divorce. It

is worthy of record in this connection that he made a particular point of holding the sittings of the Commission in public in order that the evidence might be duly considered and discussed—a point on which he succeeded, not without much opposition, in carrying the Commission with him. As the sittings of the Royal Commission proceeded he was frequently the recipient of resolutions passed by ruridecanal and similar meetings protesting against "tampering with the word of God." He invariably replied to these, asking courteously to be furnished with some more detailed reference to the Scriptures than this; he received few answers which even referred to the well-known passage in St. Matthew, and none from anyone who had the least knowledge of the controversy surrounding that passage.

Sanguine as such hope may now seem, my father began the Commission with strong hope of securing a unanimous report, and he laboured exhaustively to that end: with this object be prepared for the information of the Commission the memorandum on the principles which should govern divorce legislation, which is printed as Appendix I., a memorandum which, it is safe to say, subjected the religious attitude towards divorce to a closer examination than had ever previously been the case. It failed to bring conviction to the three members who signed the Minority Report—at any rate the Minority Report attempts no answer to its reasoned argument, and, though published with the evidence given before the Commission, it has been almost wholly ignored ever since. But it remains as the considered judgment given on this most difficult question by the one mind trained by special ex-

perience to sift evidence and pronounce judgment which has devoted its whole strength to it over a long space of time. It was a disappointment to my father, none the less real because to many it had been obvious from the first, when he learnt that it had been definitely decided that there was to be a Minority Report. The concluding paragraphs of his memorandum were the sincerest expression not only of his attitude but of his fears for the great cleavage so plainly brought to light by the debates on Lord Buckmaster's Bill. Throughout the sittings the desire to take advantage of the great opportunity presented by such an inquiry for the reconsideration of views founded on tradition was ever present to his mind: within his family he dwelt continually on the immense importance of this; he made special efforts in private conversations with the Archbishop of York and others to see if it was not possible to harmonize for the first time the conflicting views. It was not possible, but at any rate he was able to secure a much greater degree of unanimity than before the Commission had been thought possible, and with this he was forced to rest content.

The Archbishop of York has very kindly sent to me for inclusion in this introduction the following words of appreciation, sent, as he writes, with "very real goodwill and a sincere reverence for the memory of your father":

"For three years (1909-1912) I was closely associated with Lord Gorell as a member of the Royal Commission on Divorce and Matrimonial Causes, over which he presided. He was an admirable Chairman, masterful, as his clear mind and unique

knowledge entitled him to be, yet ever courteous and considerate, and conspicuously fair to his colleagues who differed from him. He gave himself unstintedly to this his last great public work. He put the whole energy of his mind and will into it; and at the last it broke his strength. In the very midst of it he resolved to undertake for himself an exhaustive inquiry into the religious history of his subject. I remember he told me that it was about the hardest bit of work he had ever done. The result remains in the long, elaborate, and learned memorandum which he submitted to the Commission. Whatever views may be taken as to its value, historical or theological, it is a striking proof of the power of his mind that he could at his age address himself to and master an intricate theme foreign to all his previous studies. I mention this because it was a proof not only of the power of his mind but also of the power of his conscience. For the motive which led him to undertake this exacting task was a sincere desire to understand for himself the position of those who, on religious grounds, differed from the conclusions which his own mind had reached. All his work as Chairman was marked by the same thoroughness and the same deep sense of responsibility. Although to me personally the inquiry was in many ways a painful and thankless task, I shall always be glad to think that it brought me the friendship of a man of singular strength of intellect and generosity of heart, guided by a noble standard of public duty, single-minded and sincere."

My father set the greatest store by the friendly relations which were maintained throughout with all the Commissioners. In one respect only, as regards the work, did he feel he had been unfairly treated: *The Times* summarized both the Majority and Minority Reports, but in addition printed the Minority Report *in extenso* and circulated it as a

free supplement to all its readers, in my father's view obscuring in this way and by the warm partisanship of its leading articles the remarkable results which had been achieved.

The issue of the Reports was the culmination of my father's public life: he did not live to see legislative effect given to any portion of either Report. What course he would have pursued had he lived remains a matter for argument: he had come to no decision—at any rate he spoke of none—before he was seized with his last illness. My brother, who probably knew his mind better than anyone else after years of work with and for him, first as his private secretary, whilst he was President, and later as secretary to the Commission, inclined to the view that he would, in the first instance at any rate, have sought to pass into law all the recommendations on which both Reports were agreed, both because these, establishing equality between man and woman and equality between rich and poor, went so far towards removing the defects of the law of 1857, and because this course avoided raising the gravest controversial issues. Acting on that view, my brother introduced a Bill to this effect on July 28, 1914, in the House of Lords, which he withdrew only since it was then so late in the session, with the definite intention of reintroducing it. The outbreak of war, immediately following, first delayed, and then with his death near Ypres in January, 1917, frustrated his intention. It will be revived should Lord Buckmaster's Bill fail to pass into law.

It was my mother's wish that in some way or other a brief record of my brother's life should be associated with that of my father, and it is peculiarly

fitting that some reference should be made, for father and son can seldom have been more closely unified in their outlook and interests. My brother loved the law, and had never wavered in his choice of it as a profession. After Winchester and Trinity College, Oxford—my father twitted both of us with our preference for Oxford—my brother had the unusual and broadening experience of going at my father's desire for a year's study at the Harvard Law School, and then, after a spell in a solicitor's office, to the Bar. In listening to his stories of life on the Northern Circuit, my father revived stories of his own youth and in the discussion of cases both were perpetually happy. Even my brother's entrance into the Territorials, at first a hobby, then a tremendous interest, and finally a living reality, had its origin in the law, for my father, meeting Lord Haldane on legal work just as the latter's plans for the Territorial Force had taken shape, and learning his anxiety to secure the co-operation of young men of influence, pledged Lord Haldane that both his sons would join immediately. I was at that time rejected for eyesight, but my brother, who in unregenerate school and University days had found it impossible to take volunteering seriously, took a commission in a battery, to the command of which he had just succeeded in August, 1914. He took it to France in March, 1915, and commanded it until his death in action twenty-two months later.

It is in one way not to be regretted that my father did not live to see the war. Great as his services unquestionably would have been in all those questions of prize and maritime law over which he had

so complete a mastery, the anxieties, public and private, of the years of war would have been a real torture to him. Even in the South African War he confessed he often lay awake whole nights wondering how Buller was going to get across the Tugela. He was spared much: in his life death, except for the inevitable loss of his parents, touched him closely but once, when his brother-in-law, Mr. Augustus Warr, of Liverpool, died suddenly on his way home from work. This was a grievous blow, for Mr. Warr was the one really intimate friend of his life; he told me once he did not believe in great intimacy with anybody, thinking it tended to loss of individuality. With all his geniality and sympathy there was in him a rather unusual measure of reserve, and this was perhaps accentuated by the completeness of his happiness in his wife and family. I have referred to the unity of mind between him and my brother, but it is difficult to find words in which to express the unity, four-square and absolute, between him and my mother. It can only be said that it is impossible to see how two people could mean more to one another, and how much of his success he owed to her for her years of unfailing devotion and tending he alone could tell. Apart from the one great cross of ill-health which he was called upon to bear for so many years, his was a very happy life. He moved by steady steps to high honour; his path was never darkened by envy or roughened by hostility; in the words of one who knew him long and loved him well he " never, in the struggles of a strenuous life, made an enemy or lost a friend," and he was sweetened and ennobled by the possession and the gift of a truly great love.

CHAPTER I

FORERUNNERS

JOHN GORELL BARNES, the first Lord Gorell, was born at Anfield Cottage, in the parish of Walton-on-the-Hill, near Liverpool, on May 16, 1848. He was descended from David Barnes, a member of a Derbyshire family settled in the neighbourhood of Chesterfield. David was born in 1741, the eldest son and third child of John Barnes and Elizabeth Alison, and grandson of Edmund Barnes, who died in 1725. David Barnes married Eleanor, daughter of Edward Gorell of Hazel Hall, Yorkshire.* They had three daughters and one son, John Gorell Barnes, the grandfather of the subject of this memoir. David Barnes died in 1805. John Gorell Barnes married Elizabeth Taylor Clay, a member of an old Derbyshire family living near Chesterfield, and they settled at Ashgate House, near that town. John Gorell Barnes also owned properties at Grassmore and Grasshill, at Barnes (near Dronfield), at Stretton Hall and Handley Lodge. There were eight children of this marriage, six sons and two daughters. Henry, the son and the father of a John Gorell Barnes, was the fourth child and the third son. The eldest son, John David, died at an early age while in business in London. Ellen,

* The origin of the name Gorell is unknown. It is supposed by the family to be a corruption of the name Goring.

the second child, lived to the great age of ninety-five, and was the fairy spinster aunt of the next generation. William and Henry, the third and fourth children, went into business. It was the policy of John Gorell Barnes to put his sons early out into business life. Henry was placed with Messrs. W. Cater and Nephew, of Liverpool. The two sisters of Mrs. Barnes married two brothers named Baxter of Dundee, and the Baxter family, proving successful in business, lent a hand to young Henry. His elder brother William had gone to Australia, and had built up in Melbourne, before the days of the gold fever, a large store for supplying the needs of farmers. Henry, with the help of the Baxters, started a forwarding agency in Liverpool, and joined hands with his Australian brother, working together under the firm name of "William and Henry Barnes." They also worked with their younger brother Charles, who was for a time in Australia. The forwarding agency prospered, and Henry became a shipowner, and his ships—such as the *Leichardt* (named after the famous Australian explorer), the *Chipica*, the *Adam Sedgwick*, the *Eivir*, the *Vanda*—ran to the West Coast of South America, San Francisco, the Brazils, and so forth. The development of a large shipping firm seemed likely at the date of his sudden death on February 15, 1865.

Charles was in Australia during the gold rush of 1851, and might have made a great fortune; but he would not remain in Melbourne, and set up a separate and fairly successful business in Liverpool. The other sons, Edmund and Alfred, also received business training, and after the death of their father took shares in the colliery on the family property at Grassmore, and,

after great efforts, developed a substantial business. Henry married Georgiana, daughter of the Rev. Richard Smith of Edensor, Rector of Staveley, in July, 1847. The remaining child, Emily, had already married Courtney Smith, Georgiana's brother. In the family pedigree, drawn up by Lord Gorell, full particulars as to the various descendants of the original Edmund Barnes were set down.

From notes supplied by Lord Gorell's sister, Mrs. Morgan, and from manuscript reminiscences left by Lord Gorell himself, some facts as to some of his ancestors may usefully be put together. Edward Gorell, the great-great-grandfather of the Judge, belonged to the religious sect named after Sandeman in England and after Glass in Scotland. It is believed that the Barnes family adhered to this sect, for when they went to Liverpool the Judge's father and some of his uncles were said to have attended the meeting-place of the sect there and to have been offended by the worldly outlook of the minister. Whatever the cause, the family then joined the Church of England. The brothers of the grandmother, Elizabeth Clay, were wealthy unmarried men, and it was thought that a substantial part of their fortune would pass to the father of the Judge; but in fact the valuable landed estates appear to have gone to the eldest uncle, William Barnes. John Gorell Barnes, the grandfather, had a substantial estate at Ashgate and a rent roll of perhaps £2,000 a year. He was a bluff squire of the old hunting days, and a fine horseman. There is an amusing family story of his rescue of a stranger who had hunted and dined too well, and was found lying one night in a ditch outside Ashgate, while

the riderless horse waited patiently at the neighbouring toll-gate. The stranger rose early in the morning and departed unseen, but years after John Gorell Barnes received from an unknown source a magnificent hunter, and later, it is said, a bequest. Such were the virtues and rewards of hospitality in the boisterous deep-drinking days before the Reform Act. In the agitation in favour of reform old Mr. Barnes and his daughter Ellen (who survived to the year 1904), took an active part, for, like his grandson, he was liberal in politics as well as in hospitality. The Judge recalled vividly his early days at Ashgate during the last ten years of the lives of his grandfather and grandmother, who both died in 1858. "It was a great place for children to go to with its farmyard and deer park." Old Mrs. Barnes was to "us children an ideal housekeeper, for we used to have from her donations of pork-pies and other good things. It used to be told of her daughter Emily, who married Courtney Smith, then a poor curate at Baslow, I think, that she used to ascend a hill near her house to see in the distance the Ashgate smoke ascending, and try to judge from it what sort of a dinner she would get if she and Courtney dropped in!" These grandparents were buried in Old Brampton Churchyard, where their tombstones are to be seen and tablets to their memories in the church itself. "I have always had a curious sensation in that church," wrote Lord Gorell, "when I read 'Sacred to the Memory of John Gorell Barnes,' for I am the only descendant who has exactly the same name."

Of a not altogether different type (despite his Toryism and his fashionable scorn for "trade")

was the other grandfather, Richard Smith, Rector of Staveley, sometime Fellow and Dean of Trinity College, Cambridge. "He was," we are told, "a splendid man and was also a fine singer—could sing a good song at a Hunt Ball—a great fisherman, full of life and fun, and an excellent parson of the old style." He was chaplain to the Duke of Devonshire, and travelled with him in Belgium, France, and Russia. The children were much at Chatsworth, but Georgiana, we are assured, was not named after the famous Duchess. Richard Smith was dead when Georgiana married Henry Barnes. She was then living with her brother at the Old Brampton Parsonage, near Ashgate. The Parsonage has disappeared, but Lord Gorell notes the fact that there is still to be distinguished on a tree in the grounds of the present Parsonage his mother's maiden name cut by her when she was a child. The grandmother was a Londoner, Charlotte Hyde, a descendant of a brother of the great Lord Clarendon. Of her children, Courtney, as has been said, married Emily Barnes, and Richarda married George Biddell Airy (afterwards the Astronomer-Royal) on his appointment as astronomer at Cambridge.

Henry Barnes and his wife, after a honeymoon in Scotland, settled at Anfield Cottage in the parish of Walton-on-the-Hill, near Liverpool, where John Gorell Barnes was born on May 16, 1848, "the year," he notes, "of revolutions." He was christened at Walton Church. "It used to be said that my parents were anxious to have the first son in the family in order to secure the name of Gorell, and they had their wish, for I was the eldest boy of the

second generation from my grandfather." There were three other children, Alan Sedgwick, born October 9, 1850; Charlotte Linda, born September 22, 1852; and Henrietta Georgina, born May 4,1854; the second son was named after Adam Sedgwick the geologist, who was a great friend of Mrs. Henry Barnes. Of his mother, Lord Gorell writes with natural enthusiasm:

" The union was most happy. My mother was a beautiful woman, with a fine figure and voice. Her voice was very sweet, and she knew numbers of old songs and ballads. Well-known songs were not got out by the shoal as now, and many persons had their written music and songs peculiar to themselves and their family. She was a charming companion, an admirable story-teller, a good hostess, and had the accomplishments of playing the piano, singing, dancing and drawing, driving and skating, which was not common for ladies in her day. My father's time was so much occupied that we children saw little of him, but we worshipped both parents."

Henry Barnes and his family kept in close touch with the old home at Ashgate, where Edmund Barnes lived after his father's death. Alfred settled at Ashgate Lodge. He was Member for some time for East Derbyshire, and Chairman of the Mining Association.

" He was a very active, busy man, good sportsman, and excellent man of business, much liked by his men. His energy developed the colliery into the great affair it became, and his four sons continued that development. I used to see a great deal of Uncle Alfred, who, I think, had an affection for me. The little nest of houses composed of Ashgate Lodge, Ashgate House and the Cottage inhabited by Aunt

Ellen used to be a great centre, especially at Christmas, for all the cousins, and many a pleasant holiday we spent there."

It is possible now to estimate something of the forces of heredity that went to the making of the distinguished lawyer, the subject of these pages. The sturdy, shrewd North-country stock had in the Gorell blood that element of religious and therefore political revolt which has always distinguished the various forms of dissent, and certainly not least in the North. The Gorell and Barnes families were not content to be merely of the prosperous well-to-do squire class who combined fox-hunting with intolerant conservatism. John Gorell Barnes stood, and it was rare in his class, for political reform in the drastic sense. He foresaw the year of revolutions that was approaching, and he lived in the part of England where revolution was not least likely. So he threw himself into reform movements with the same zest as was later to distinguish his grandson and namesake. But all the same he was conservative in the sense that he intended to build up for his family a place in the new age which he saw coming. The "trade" which his Cambridge father-in-law scorned was the thing of the future. The shrewd business minds of the Barnes family were determined not to miss any opportunities, and other sides of their heredity gave them special power to take advantage of all opportunities. The intellectual gift of Richard Smith could be applied in another generation to ends that he despised without loss to that humanistic side of life which came from the Hyde as well as the Smith family. The descendants of John Gorell Barnes and Richard

Smith have included not only business people of capacity, but students and artists, of whom perhaps Miss Anna Airy is the most notable. But probably the various possibilities were realized in their most balanced form in Lord Gorell, who was a keen and even profound thinker, a shrewd and penetrating lawyer, a lover of life in all its more pleasing aspects, including art, a social reformer, and not least a man who revelled in the domestic side of things. He once told the present writer: "I never worry about attending functions that bore me. I can always plead that I have a previous engagement, which is in fact 'dining at home.'" Lord Gorell loved life, and lived it as strenuously as either of his grandfathers; his spirit was always in revolt against injustice or social sorrows; a profound seriousness, approaching gloom, derived perhaps from the Gorell stock, underlay his happier moods; and side by side between these extremes lay a capacity for work, a grasp of business, a solidity of judgment which drew its effectiveness as much perhaps from his appreciation of the pleasures of life as from his ultimately serious outlook on it. It will be interesting to see how the course of his life's work tended to bring to an effective unity of purpose the characteristics and powers that he inherited.

CHAPTER II

BEGINNINGS

MIDDLE-CLASS education was not a cheerful subject in the early sixties. Lord Brougham's last political breath had been spent, in the summer of 1864, in abusing it and suggesting remedies for the deplorable case of the children of the well-to-do. So young Gorell Barnes and his brother were not likely to be in very good case so far as education was concerned, and he leaves it on record that he did not consider his "experience of small private schools at all satisfactory." His father was too absorbed by business fully to supply the educational needs of the children: "He never seems to have considered the wider life given in big schools and at the University." It may have been, of course, the roughness of the Public Schools that weighed with Mr. Barnes, but in any event his son Gorell bitterly regretted the loss of a Public School education. Yet on the whole, after considering his school work and life from the letters and other documents that are extant, it is probable that Barnes did at least as well at his private schools as he would have done in the Public Schools of his time. Certainly his home life was a great contrast to his school life, but that would have been true in any event. Anfield Cottage, with its large, pleasant garden, offered to the rather self-centred Barnes

children many opportunities in the holidays for wild adventures with a gun, with flintlock muskets (intended for the natives of Central Africa, but commandeered by the natives of Anfield Cottage: "I wonder now how we came to be allowed such weapons"), immense stilts, "huts with underground passages, a tool and lathe house." Most of the surrounding land was in fields, "which on Sundays were largely used for the sheep which came over to the Liverpool market, and the sound of the sheep and the singing of the birds are among my earliest and most vivid recollections. . . . When I was young I bathed in the river where the docks now are. We could walk by the fields to Everton Church." Before Lord Gorell's death Liverpool and workmen's dwellings had covered this old haunt of rural beauty. These early days were a permanent influence, and Lord Gorell to the last found his chief relaxation in the beauties of Nature.

The children were at first taught at home, chiefly by their mother. Gorell went in 1856 to a small school at Birkenhead kept by the three Misses Mason, Derbyshire friends of his mother's family.

"I remember a small field as playground, but don't recollect any cricket or other games. I next went to a school kept by the Rev. Dr. Molleneux at Waterloo, near Liverpool, and was there for three years. It was on the whole healthy, but with nothing special to mark it by. Then I was sent to a Mr. Ramsay at West Derby. Here I recall the sons of Robertson Gladstone (a brother of William Ewart Gladstone). Then to a queer school kept by a Dr. Waymouth at Llanfigoel, near Holyhead. This, I suppose, was for health, for it was a very rough place and with some rough boys. Then

to a Mr. Thompson at Old Swan, near Liverpool. He had a number of boys from the neighbourhood. I recall some of the Gladstones and Alfred Calshaw. We used—for my brother was at the same school—to go into Liverpool every Saturday to bathe in the St. George's Baths and have lunch with our father. The result of such bathing was that we both became good swimmers. I was the fastest swimmer at Cambridge in my day, winning the 50 yards race in 1867 (I think, or 1866) and the long distance diving in one of these years. In the 50 yards race I won against J. K. Esdaile, who was an exceedingly powerful man. Thompson's was a pleasant place enough . . . but there was little or no stimulus to work, and my school-days ended without any really elevating work and competition."

From a school account dated June 19, 1856, and a letter from Gorell dated " Claughton, Sept. 11, 1856," it would seem that he started school alone there in the spring of 1856. The letter contains a demand for house shoes, boots, " and a pair of trousers for the cold weather because the white ones are too cold for the winter. On the Wednesday before last we went to New Brighton. Nevill's mama came to see him and brought him two beautiful cakes, and we had each of us (had) some." This seems to be the earliest letter extant, in a substantial round hand. On June 3, 1857, from Claughton, he writes in a much improved hand:

" On Sunday we had a nice walk and some of us got a bunch of flowers. In Latin I am learning the verb *audio* to hear, and in French I am learning the verb *dire*, to say. I hope Alan is improved in his writing, and I hope he is more attentive in his lessons. I like French and Latin and English

Grammar very much, they seem very easy to me. Give my love to Papa and Alan, and a kiss for Linda.

"I am your affectionate and dutiful son,

"GORELL BARNES."

Truly a desperate letter. The hand may have been the hand of Gorell Barnes, but the voice is more certainly that of the Misses Mason, perhaps eager to bring the recalcitrant and unfortunate Alan into the Claughton fold. On March 11, 1857, Gorell had indeed endeavoured to wrestle with the wretched Alan's delinquencies by a personal appeal. He wrote:

"MY DEAR BROTHER,

"When I come home at Easter Papa will bring me to you at Brampton, and we will have some fun, and perhaps we may go to Chatsworth. Mind and be kind to Henrietta and Linda, and never make then (them) cry. I hope I shall see you all quite well when I come home. I hope you will improve in your lessons. Give my love to Papa and Mama and baby and Linda. Ask Mama whether Jane's finger is better. I hope you will keep the garden in order.

"I am your affectionate brother,

"GORELL BARNES."

The reading of old letters is not a cheerful business as a rule; the dead cares and woes, the vanished joys and hopes of dead men and women are sad enough. But the earliest letters of the future Judge of the Probate and Divorce Division are a joy to read, and this last letter, since it contains one error and is not a model of caligraphy, seems to show that he was anxious about the sins of Alan revelling in the pleasures of Brampton. He was certainly

full of cares as a child, and Miss Mason, in a letter written in his first days at school, gives the impression of a nervous child: "He has one of those rare tempers that require more *hope giving* than *conceit daunting*." A mark sheet from July to December, 1856, shows that Gorell was then learning scripture, Latin and English grammar, spelling, tables, Mangnall's Questions, geography, poetry, writing, arithmetic, and French and reading. It is not certain that his complaints as to his school life were altogether justified. He was at Mr. William Molleneux's school, Sandfield, Waterloo, from 1858 (when his name appears in a printed prize list), to 1861, and seemed very happy from a letter dated April 20, 1860. In the autumn of 1860 he went to Mr. A. Ramsay's school at Eaton Road, West Derby. There are extant many letters from Llanfigoel in 1862 and 1863, and the chief complaint is the great pressure of the school work. Dr. Waymouth's school was rough, and neither the accommodation nor the food too good. The boys had to work in bed to get their preparation finished, and had lamps under the bed-clothes for this purpose, and burnt the sheets, for which they were punished. But apparently they were expected to work in their dormitory.

"Tell Papa we only do a little Sallust, an exercise, some grammar, etc., in Latin, but we do it awfully exactly, and in Greek we do some delectus, some grammar, and some Greek testament. I am getting to like the school better. We play at marbles and I am a pretty good shot. On Sunday we have a good deal of scripture work to learn. Hull is always getting turned. I do copies nearly every

day. I have never been turned yet. If a boy speaks in class or in school he has five marks taken off and if he gets twenty taken off he gets the cane, and if you do not lose eighty in a quarter you get a half-holiday. Tell Alan I have got a Cape of Good Hope stamp. Dr. Waymouth has put me out of the second-class French into the first."

These early letters are really valuable as giving a picture of a boy's boarding school in the North sixty years ago. The boys were rather brutal. A story of a mouse tied by the tail to a trap is very vivid (May 4, 1862), and draws the comment: "I do so hate to see any boys cruel to animals." In the same letter Gorell writes anxiously: "I hope Papa is well, and is the business all right?" The letters give the idea of an anxious nature, very industrious, very desirous to excel, fond of sport and enjoyment, and very adaptable. Dr. Waymouth's school, with all its roughness and faults, gave the boy a good grounding and a tradition of hard continuous work. By 1862 his handwriting was formed; but he never acquired the beautiful script that Alan's letters, which are not less interesting, show. Gorell's schooldays came to an end in the spring of 1865. The children's holidays had been spent at Buxton, where the family often went in the winter, and Mr. Henry Barnes went on to London to see after his ship, the *Leichardt*. There he contracted what proved to be typhus fever, and came at once to Liverpool and was joined by his wife, who left the children at the Quadrant, Buxton. A letter of February 10, 1865, from Mrs. Barnes to Gorell at Buxton describes the patient as insisting that he was perfectly well and intent to get up, but with

"all sorts of uneasy fancies and that things are not right."

The letter is valuable, as are earlier letters from Mrs. Barnes, as showing the great reliance she placed on her son Gorell even when he was a boy. Mr. Barnes became rapidly worse and died on February 15.

"He was only forty-seven years old, at the commencement of the time of success he had looked forward to; with a great life in front of him, he was swept away. It was to all of us a terrible time. My poor mother was overwhelmed; she could not rest, and walked about somewhat like a caged lioness. We boys went from Buxton to the school at Old Swan; my sister went to Major and Mrs. Johnson. We met at the funeral."

So Lord Gorell wrote not long before his own death, looking back on the dark days which were to prove the beginning of his own career. In the letter of February 20 Mrs. Barnes had asked Gorell to return to be with her; but events moved too fast. The boys were in Henry Gorell's mind to the last. In a brief rally he told his wife that he feared all his plans for the boys' education would fall through. There had already been correspondence with Adam Sedgwick as to Gorell going to Cambridge, and immediately after Henry's death Mrs. Barnes strove to carry out her husband's wishes. The trustees of the will were Mr. Joseph Lyne and Edmund Barnes, and they had a difficult position to face, since the obvious necessity of the position was to carry on the business and get Gorell into it at the earliest possible moment. But the business was at the point when it needed a dominant mind, and though the managing clerk, Arrowsmith, could attend

to details and the trustees could control matters, it was clearly impossible to keep the firm up to the standard that Henry Barnes's continuous labour had seen was necessary. Clearly Gorell could not yet take his place. He would be seventeen on May 16, 1865, and was still at school. Under these circumstances the trustees agreed to a foolish compromise, that Gorell should go to Cambridge for a year, so as to get something of the atmosphere of University life. Old Mr. Adam Sedgwick, then eighty years of age, took infinite pains to secure Gorell's entrance at Trinity, and it was hoped that Dr. Whewell, who was a friend of various members of the family, would agree. But Whewell was like adamant and would have no by-term men. Under these circumstances it was decided to enter Gorell at Peterhouse, the college of the famous coach Dr. E. J. Routh, who had married Gorell's first cousin, Hilda Airy. And so it happened that towards the end of April, 1865, a week or two before Gorell was seventeen, he went into residence at Peterhouse. The letters in which this arrangement is described from Adam Sedgwick to Mrs. Barnes are extant and give a wonderful picture both of himself—certainly the most tender-hearted of men—and of his old friend, Mrs. Barnes. He recalls to her mind the moment when he first saw, at the Royal Observatory, Greenwich, "her sweet face" in 1833. A letter from Gorell dated March 8, 1865, while still at school, shows that his headmaster, Mr. Thompson, saw the foolishness of the compromise of one year's residence, and bluntly condemned it, recommending instead a year's travel or immediate entrance into business. Poor Gorell plaintively writes:

"I think Mr. Airy ought to know better than he does. . . . Mr. Thompson told me that private tutors were never thought of for the first year, but I could have one if you wished, as I am sure I would do my best to get as much knowledge as I could during my stay there. . . . Here I am amongst a lot of molly-coddles younger than myself. . . . If I went I'm sure you should never have reason to complain of me."

Mrs. Barnes fully trusted her son and pressed for the compromise, the best she could get out of the trustees, who saw in Gorell at eighteen the only chance of saving the business. But the business was in fact unsavable without its energetic head. One by one the ships had to be sold. "Even the *Adam Sedgwick* went in the end," wrote Lord Gorell in his brief autobiography, "and there remained only the forwarding business, which dwindled under the influence of through rates." The original Adam Sedgwick had, however, come to the rescue, and at Cambridge Gorell secured something of that larger intellectual and social life for which he was yearning, which, indeed, he was so entirely competent to enter.

CHAPTER III

CAMBRIDGE

PETERHOUSE, or St. Peter's College, Cambridge, where, in the Combination Room, Miss Anna Airy's portrait of Lord Gorell now hangs, and where Lord Gorell in later years was destined to be regarded as "one of its most distinguished members,"* is the eldest of the Cambridge colleges. The University of Cambridge was in full life early in the thirteenth century. The King, Edward I., in 1284 assented to the proposal of Hugo de Balsham, Bishop of Ely, to introduce, in the place of the secular brethren of his Hospital of St. John at Cambridge, scholars who were to dwell together in the University according to the rule of the Merton scholars at Oxford. Thus the scholars were removed to Peterhouse in 1284, from a hospital which had been founded in 1210, and the Cambridge collegiate system began. Despite the low opinion of the college held by Mr. Thompson, Gorell's schoolmaster, it was in fact a foundation of great and continuous distinction. From the earliest days of the recorded honours lists, the famous *Ordo Senioritatis*, Peterhouse figures well. Chore, in 1512-13, was the first of her great line of Senior Wranglers; Cecil, in 1540-41, was the second;

* *Vide* the letter dated May 16, 1917, from the Master, Sir Augustus Ward, to Lady Gorell.

Butler, in 1558-9, the third. The next year Collen was second, and in 1560-61 Vaugham of Peterhouse was Senior, Davy of Peterhouse second, and Butler sixth. Thus when the University was entering into the glories of the Elizabethan period, Peterhouse was playing a great part. In 1564-5 and the following year Peterhouse men (James and Messynger) were successively second, and these high places were steadily maintained. In 1578-9 Heidon of Peterhouse was Senior; in 1581-2 Cleere and Greene, both of Peterhouse, were Senior and fourth respectively. Astell was Senior in 1583-4 and Amery second. In 1590-91 and the following year Binge and Mawe were successively second. In 1612, when there were 3,000 undergraduates at Cambridge and the University had reached a height that has only been equalled in modern times, Paulet of Peterhouse was second, and again Skipp in 1617-18. These names have been noted as indicating the great place of Peterhouse in perhaps the noblest period of English University life; that achievement was being repeated in and about the period when Gorell Barnes became a member of the college. In 1845, Thomson, who became Lord Kelvin, was Second Wrangler; in 1849 Porter was third; in 1852 the great P. G. Tait was Senior, and Steele was second; in 1854 Routh was Senior; in 1858 C. A. Smith was second; in 1866 Morton was Senior; in 1875 Chrystal was third. In Gorell Barnes's year, 1868, Peterhouse had only two wranglers, Stevelly and Harvey. The other Peterhouse men in the list were, in the Senior Optimes, Barnes (bracketed fifty-sixth in the list with Watts of Trinity), and O'Connor; and in the Junior Optimes, Sams, Wingate, and Esdaile, the

powerful fellow whom Barnes beat in the swimming competition as well as in the Tripos. But if it was a somewhat indifferent year for the college it was a great year for the professions, and especially the legal profession. The Senior Wrangler was Moulton, the present Law Lord; the Second Wrangler was Sir George Darwin, the astronomer; the fourth, William Christie, became Astronomer-Royal; the ninth, Henry Burton Buckley, who became a Lord Justice of Appeal, is the present Baron Wrenbury. Henry Sutton of Christ's, who was a Senior Optime four places above Barnes, became a Judge of the High Court; Barnes became President of the Admiralty Division; Browne of Emmanuel, two places below Barnes, became Chancellor of the Diocese of Winchester; the Hon. A. R. D. Elliot of Trinity, who was a Junior Optime, became Financial Secretary to the Treasury in 1903; while Stubbs, a few places lower, became Dean of Ely and died Bishop of Truro. It was a great legal year. Sir Frederick Pollock, of Trinity, had been classed in the previous year.

John Gorell Barnes went up to Peterhouse in the latter part of April, 1865, some three weeks before his seventeenth birthday. He stayed with Dr. Routh (who married Hilda Airy) for a night or two before going to his rooms. Lord Gorell's autobiography gives the idea of little work done in the first year, but as a matter of fact he worked hard, for in a letter written to him by an old schoolfellow, Robert L. Gladstone, in the late autumn of the year 1865, he not only refers to Gorell boating, but says (in answer to a letter just received): "You seem to be reading very hard, but you have never told me whether you have passed your Little-go. I now

go to Mr. Thompson only for a short time in the morning. I dare say Sedgewick has told you that Herbert has gone into an office in Liverpool." The elegancies of life were not forgotten: "the garnet ring engraved with crest" was despatched to the cheerful undergraduate in November, 1865. That there were amusements and rags going on is plain from Sedgewick's letters, in which he enviously refers to Gorell's stories of multitudinous breakfasts and dinners, of a four-oar boat capsizing, of "Joe Lyne carrying his bedclothes about the court." Gorell took his "previous examination" or "Little-go" between December 5 and 11, 1866. From the papers extant, he seems to have cleared the decks: almost all the questions in Paley, Euclid, arithmetic, mechanics, algebra, trigonometry, the "Anabasis," the *pro Milone*, Greek testament (St. Mark); and Greek and Latin accidence are ticked off. It was just the examination for a well-prepared schoolboy. He "passed with credit" in the first class, and he also passed in the additional subjects. But it is to be noted that this was a year and a half after he went up to Cambridge. He appears to have gone in for the college scholarship examination in June, 1866, and again in June, 1867, but only a few of the questions are marked and the papers were beyond his standard of achievement at that date. His Mathematical Tripos examination began on December 31, 1867. From marginal marks he seems to have done well in Newton's "Principia," hydrostatics and optics, mechanics, dynamics, Euclid (other than problems), algebra, and trigonometry. In the problem paper three attempts were made. He had obviously done very well in "the first three days,"

as the first part of the Tripos was called. Mrs. Morgan, his sister, in a note on the subject, writes: "In the subjects he had studied he did so well that the examiner thought he was going to be in the first ten. I imagine he had not read the last days' subjects at all." This examination took place on December 31, 1867, January 1 and 2, 1868. The advanced subjects were taken from January 13 to January 17, 1868, a most searching examination. The papers show that a considerable number of the questions were attempted on the first day, but that in the very advanced work few questions, and in some papers none, were attempted. Gorell was more than satisfied with his second class. It was far better than he expected, and he wrote home in tones of triumph.

The memory of those days survives in innumerable letters which reveal the untiring love and thought of Mrs. Barnes, who plainly felt that Gorell needed continual attention in matters of health and general advice on life at large, and also show us the affection of the high-spirited brother, and the strong family ties binding the mother, brothers and sisters, together. Cambridge was a great adventure, though really rather a schoolboy adventure, and these letters reveal the fact very plainly. But Cambridge left its mark, as the vivid recollections left by Lord Gorell show. Writing in later years he regrets that the University had not meant more to him, that he had not mixed more with the reading men and taken better advantage of the unusual opportunities afforded by his strong family connection with Cambridge. But it would be wrong to suppose that he did not work there. His work was hampered in the first year by illness and by the foolish proposal that

it should be a play-year, but later he put his back into his work and left Cambridge with quite a good general education and that excellent training of the mind which a careful study of the basis of mathematics involves. His basis was thoroughly sound, and he probably gained as much from his training as many men who took high degrees through a special facility for the higher ranges of mathematical analysis. He had acquired the broad principles, and it was the acquisition of principles underlying work that was one of Lord Gorell's secrets of success: that and the power of intensive application when necessity demanded. Some extracts from his own account of University life will show how vividly the Cambridge memories survived:

"Peterhouse was, and still is, one of the small colleges. We used to call it Pothouse or Barber's Family Boarding House, because old Barber, the porter, looked so closely after it and us. Dismal Jimmy, as Dr. Cookson the Master was called, was at the head. I don't think I ever spoke to him or he to me. Taylor was tutor, but was soon succeeded by James Porter, who ultimately became Master and was a great friend to me after I came to know him. I had much hospitality and many a kindness from him then and in after years, and to him I believe I owe it that the University gave me an honorary degree of LL.D. (1898), and certainly to him I expect I owe the fact that I was elected an honorary Fellow of the college. Richmond was Dean. We had Martin for a Senior Wrangler, and R. R. Miller would have been Senior too in his year but for a carriage accident. He was (First) Smith's Prizeman. I believe both these men and others were sent up to Peterhouse from Glasgow by Sir William Thomson, afterwards Lord Kelvin, who had been at Peterhouse.

"I had unfortunately an old sprained knee which soon after I came up developed a loose cartilage, now, I believe, in a bottle at the Addenbrooke Hospital. I believe that it was at the time a most dangerous operation, for a cut had to be made into the knee-joint and the time was before Lister's discovery, so there was great risk of inflammation and even of death. I understood death was as likely as not, but I was considered a healthy subject. Forty to fifty years afterwards I was told by a doctor that he would come some day and call for me to exhibit me at the Royal College of Surgeons as a very interesting specimen of pre-Lister treatment. I was laid up for weeks after the operation, and finally got home long after term was over. . . . My first term was not therefore a success. My mother and sisters came up for a bit, but went home before I did."

The next year he swam successfully; he rowed two years in the college boat: won the college sculls against Ebsworth and Waltham (who put the weight for Cambridge), "played in the college Eleven and enjoyed myself hugely with many friends," including F. W. Raikes ("a fellow commoner well known for his huge dog"), a brother of the Post-master-General, Jim O'Connor, Little (an athlete), J. K. Esdaile, Wingate, Ebsworth (Canon), V. R. Smith (Q.C.), Fortescue, Spilling, Joe Lyne (who ran about the court with his bedclothes), Wren, Charles Barr (a clergyman), Smelter, Cadman, and many others. "In Trinity I had my cousin Osmond Airy, and James Stuart, who was at one time in the Gladstone Government" and later the head of Messrs. Colman at Norwich. Lord Gorell says that he passed the Little-go in his first year, but that is not so. The papers show that he passed at the

Michaelmas examination, 1866. The uncertainty as to his continued residence told on his work. At the end of the first year he persuaded his trustees to let him stay another year, "and at the end of the second got a third (year) and thus a degree, but I was not really reading, as the conditions were not conducive to that end. However, at the beginning of the third year I began to read for a degree. I read hard for two terms with R. K. Miller, and came out in the first half of the Senior Optimes—very good, I think. When first I saw the degree list (January 25, 1868), I looked at the Junior Ops. but could not find my name. I thought I must have been ploughed, but at last to my overwhelming joy found it in the first half of the Senior Ops. and danced excitedly along King's Parade, to the great amusement of some ladies." Cambridge gave him "a delightful time," but he felt that he had been too much of a boy:

"One does not get the best out of the University either in work or in friends. One does not get to know the leading young men, and everything is looked at too much from the schoolboy point of view. However, I got great good out of my time, and was very loth to leave. I felt the advantages now when I got into professional life and was able to enjoy my privileges as a Fellow and as LL.D. of the University. For instance, one of the occasions in which I took a particular interest and felt hugely honoured was when the college gave a dinner to Lord Kelvin, the Archbishop of York (Maclagan), and myself, who were then its honorary Fellows, and probably on no occasion in my life have I felt more highly honoured."

Gorell Barnes kept in touch with the college and the University and their interests, and knew some-

thing of the later Fellows, and especially "one who became Master after dear old Porter, I mean Dr. Ward, for whom I acquired a great affection."

In fact, Cambridge meant much to the life of Gorell Barnes. He steadied his own ambitions with the practical Cambridge view of things, and this was a great asset in after life to a man who rather enjoyed the idlenesses of society and who, in many ways, was an idealist full of large impulses which needed and secured such a school and college training as, with all the faults and deficiencies of that training, was just the environment that enabled him to develop and concentrate his best powers.

CHAPTER IV

THE BAR

Barnes came down from Cambridge to the business of Henry Barnes and Co., and on becoming twenty-one in 1869, entered into partnership with Mr. Arrowsmith, the head clerk, in what had dwindled to a small forwarding and export business. That the work was not oppressive may be judged from the fact that in 1870 Barnes went with his mother and sisters to Naples and on for a further expedition to Egypt and Palestine, described elsewhere. On his return he was dissatisfied with the business outlook and began to look around. He was greatly tempted to accept an offer to go abroad from a Liverpool and South American firm, but the proposal was stoutly opposed by his mother and declined with regret. He was next tempted to take Holy orders, saw Chancellor Esplin on the subject, but eventually decided against it. He next thought of the Bar, but saw no opening. Lastly he read a novel, the name of which is unrecorded, which drew a charming picture of a solicitor, and this set him on inquiry and eventually led him to the office of the leading firm of Bateson, Robinson, and Morris, of Liverpool, in search of a career which would combine business and law. His mother again opposed the proposal. "She could not bear the idea of a son of hers being

an 'attorney.' She was full of views that had come down from old times," and did not appreciate the high position of a man such as Mr. W. G. Bateson, whose successor in the firm, Mr. Augustus F. Warr, was destined to become a member for a Liverpool division, and whose moral influence in the North was so great that he became known as "The Conscience of Liverpool." For nearly thirty years he was one of Barnes's closest friends and married one of his sisters. Barnes saw a career at last and felt bound to overrule his mother. He cancelled his existing partnership, and was fortunate enough to be articled to Mr. Bateson in order to become "an attorney and solicitor and a notary public." So Barnes left his old office at No. 5, Rumford Place, and took his seat in one of the partners' rooms at 21, Castle Street.

"The business was of the highest character and was largely concerned with mercantile difficulties, with a very large Admiralty branch. It was a splendid place to see good work and learn one's profession. To me there were great attractions in that: besides getting up in law of real and personal property I saw much of company law, and I had seen sufficient in business to make me familiar with many shipping and other documents and to cause me to engage in my new work with much more knowledge than usually is possessed by a young student entering the profession of solicitor, and this stood me in good stead in leading the members of the new firm and others to think well of the new pupil."

He became great friends with Mr. Alfred Bright and Mr. A. F. Warr, the managing clerks. The first person he saw on his first day was Warr, who

told him that he was going for six months to read with Arthur Cohen. Barnes learnt shorthand and became really useful to Mr. Bateson, in whose room he eventually worked: "I worked very hard first at the law of real property, then of contracts and on the subject of charters and bills of lading and also of sale, and read the law reports diligently, and discovered I had found my vocation." In 1871 the family moved from Anfield Cottage to a house called "Oakenholme," near Chester, for the sake of Mrs. Barnes's health. There was plenty of military and other society, balls, rowing and hunting, and Barnes fitted these in with his work by taking a very early morning train into Liverpool. His pony and trap and morning and evening drive to the station were a delight to the much occupied young man. "I rowed a good deal for Chester, once against Liverpool in eights, once at Shrewsbury in fours, where we had a magnificent win, once at Bangor, where we were swamped going to the start and on starting. Our boat was suited to the Dee, but not to the Menai Straits." But a great change was at hand. He was urged in the office to go to the Bar and avoid the worries of a solicitor's life. He began to see the possibilities of the change; and, despite the remonstrance of Mr. Frank Lowndes, the Registrar, "Do you think you will ever be as good as Cohen? A solicitor can always make his bread and butter," he cancelled his articles, and left the lower branch.

In the beginning of 1873 Barnes entered at the Inner Temple and kept his first term. He was entirely unknown in London and had difficulty in finding the customary sureties. He stayed at

Wimbledon for the dining term, and returned to his mother and sisters at Matlock. His mother died on May 16, 1873, and Barnes, with his two sisters, came to London and settled down at 80, Kensington Park Road. They were able to keep a couple of horses.

Barnes first read for a year at 19, Old Square, Lincoln's Inn, with Thompson, who acted as Equity Counsel to Messrs. Bateson. He did not work very hard, but obtained a fairly good foundation of principles. "Thompson was an admirable lawyer, and had a wide acquaintance with law. He taught me how to read a reported case and understand it—a most important matter and essential if one is to become a good lawyer." Of an evening Barnes used to meet Arthur Cohen, who was a great friend of Thompson's.

"Many evenings we used to go down to Cohen's chambers in the Temple, where a number of Cohen's old pupils and devils collected, and he discussed his cases with them. He used to smoke a long churchwarden and wear a velvet smoking jacket, and these evenings were most interesting, for Cohen, who had been junior in the Alabama Case, was in a very large and prominent practice as a junior, and the discussions were of great interest, though possibly of some waste of time to him.

"From Thompson's I used to wander into the Vice-Chancellor's Courts and often sat watching Malins, V.C., having his daily converse with Mr. Glasse; also I would look in on Bacon, V.C., and Hall, V.C., but was not sorry I was to go to the Common Law Bar."

Cohen introduced Barnes to J. C. Mathew, and he became his pupil in the October term, 1874.

"With Mathew I worked till 1881, when he was made a Judge, and in his Chambers I found my chance and my work. He was in Chambers at 2, Dr. Johnson's Buildings. The principal tenant was R. J. Biron, his brother-in-law, for he had married Biron's sister, but Mathew had all the rooms except one. He had been one of the juniors in the Tichborne Case, but this was over, and he succeeded to a large share of Cohen's practice. He was a Roman Catholic, nephew of the great Father Mathew. He was one of the wittiest, if not the wittiest, men I ever met, and Mathew's good sayings were well known. He was a most rapid worker, had a wonderful insight into cases, and was reckoned an extraordinarily good lawyer, a reputation which he maintained as a Judge and Lord Justice. I think myself that his insight into facts was marvellous. I think he was too quick for the ordinary lawyer, and that his tendency to dispose of cases on the facts placed a check in some cases on the framing of great legal judgments as some great lawyers have produced. It was an honour and a pleasure to work with him, but it involved very hard work. . . .

"Mathew was overworked, and there were great chances for a devil. I had had more business and other experience, than these two (other pupils), and I saw my chance. In a short time I had learnt to be a fair pleader, and I gradually worked into Mathew's style and really went through practically all his Chamber work till, at the end of my first year, he asked me to stay on, and let me put my name on his door. Shortly afterwards the Judicature Acts came into force, and the Chamber work under the new system became for a time very heavy. He had an enormous number of summonses, and frequently I used to do them, or some of them, for him, for the Courts were still at Westminster and summonses were at the Old Judges' Chambers off Chancery Lane. The great time for the commercial junior then was the Guildhall Sittings, where Mathew

had an enormous business. So many cases were on at or about the same time that one frequently had chances of helping in Court and getting known. The principal leaders were Henry James, who was at one time Attorney-General and became Lord James of Hereford, but, if I recollect aright, a split in the Liberal party on the Home Rule question kept him from the Chancellorship, Watkin Williams, and Charles Butt, who both became Judges, and Arthur Cohen. I doubt whether so much good work was ever got through so excellently and so quickly as in these Guildhall Sittings, which it interests me greatly to recall. They have gone under the Judicature Acts. An attempt was made later to revive them, but it did not succeed. I think Mathew was *facile princeps* as junior. His leaders had immense confidence in him, and the more difficult the case the more he seemed to be in his element. Not the least interesting part of the day at Westminster or at Guildhall was the walk home to Chambers at the end of the day, when everything of the day could be discussed. I can never forget the interest of this association with one of the cleverest men I have ever met.

"After some years of work in his room, he suggested I had better have Chambers of my own, so that I should be more free to take work than I was when so closely associated with him. Accordingly I went into Lamb's Buildings, taking Holloway's Chambers, and started a clerk of my own, George Tait, who remained with me till I was President of the Probate, Divorce, and Admiralty Division, and soon I had a pupil, Colonel Colquhoun Reade, who wanted to work up some law, and I began to have a few cases of my own.

"The first brief I ever had came soon after my call from Bateson's. It was more, I expect, as a compliment than anything else. It was in Bankruptcy, and I think required some commercial knowledge, but the brief had a bad accident by being

dropped in the mud in Fleet Street. This ought to have been a bad omen, but it was not.

"While I was at work with Mathew I did a great many summonses for him, and gradually got known to some of those very important persons, the chamber clerks of solicitors. But it was not for some time that I had any work from the firms who employed Mathew. I think Hill and Dickenson sent me on a small commission to Paris, but my recollection is that the first brief that I had in London from my work with Mathew was from Walters, Bubb, and Johnson, who gave me a small one to represent some party to a case. However, I was obviously in the running for work if Mathew became a Judge. I worked for seven years with him, buoyed up with hope of the future, and becoming a well-trained lawyer and good pleader, but earning little for myself. For earnings I had to wait. But Bateson's were very kind and some other Liverpool firms. I went on the Northern Circuit to Liverpool, but only went once to Manchester to see it. In fact time was too valuable in London, and the opening on the Northern Circuit was difficult if one did not localize, which I was very averse to doing. I preferred the practice of a barrister in London to that of a barrister in Liverpool. To me it has always seemed that in a country city or town it would be preferable to be a solicitor, and that that profession led to a position of more importance locally than that of the barrister. Perhaps that was because the barrister usually moves to London when he has acquired a certain position, so that the local Bars were usually composed of younger men. Nowadays it seems to me that it is more difficult to move to London, and to localize may mean to be always local, but London is a huge egg to open and it may be much longer to get on there than to localize. If, however, one can break the shell I think there is no question about the advantage of being and remaining in London both for the class of work, the con-

stant seeing of work in the Appeal Courts and before a number of Courts of the High Court, and generally being in the centre of the profession.

"As I have said, I remained working for Mathew for about seven years, for the greater part of the time in his room. My life was one hard grind every day, and my whole thoughts were given to pleadings, briefs, and other papers. The cases themselves would not be interesting to my readers as we were not engaged in *causes célèbres*, though the mercantile cases were often of great magnitude, and Mathew had for clients many of the great firms engaged in these cases."

It will be of interest to see, from a less personal point of view, Barnes at work in Mathew's chambers and elsewhere. The following remarks are from the pen of one who had special opportunities of knowing the facts. He writes:

"Mathew, when Barnes went to his Chambers as a pupil, was the principal 'commercial' junior in the Temple. The large business which he had been doing for some years had just become an enormous one by the removal to the front row of Watkin Williams and Cohen. Bruce and A. L. Smith were also prominent stuffgownsmen, but Mathew enjoyed to an exceptional degree the confidence of the City solicitors. There were few shipping or insurance cases of any importance in which he was not briefed on one side or the other.

"The conditions under which a junior carried on his practice were very different from those of to-day. The Courts met at Westminster; Judges' Chambers were at Serjeant's Inn; the Vice-Chancellor's was in Lincoln's Inn; there were periodical sittings at the Guildhall. Circumstances might require a practitioner to be in all places at once; and it was possible for a junior to spend no incon-

siderable part of the day in a four-wheeler on the Surrey side of the Thames in an endeavour to get from the Guildhall to Westminster, and *vice versâ*. These difficulties were increased by the fact that the work in Judge's Chambers was conducted with little order or regularity.

"Those who had summonses to attend—and interlocutary proceedings were then multitudinous—seethed outside the Judge's room and, assisted by the presence of those in the rear, waited for a favourable opportunity to squeeze through the half-open door. There was no list, and it was a chance whether an opponent would be present. Persons whose services were much in request would wait till the summonses had accumulated with a view of getting rid of them at one *séance*. Mathew was said to have had in one year no less than 600 Judge and Master summonses. This figure may possibly have been passed in modern times, but in the seventies was regarded as a record.

"A capable 'devil' was a vital necessity to Mathew, and Barnes appeared at the very moment. He had not been in chambers for many weeks when his absolute fitness for the position was recognized.

"He had all the necessary qualities—industry, knowledge of case-law, familiarity with commercial methods, and complete self-confidence. When his days of pupildom were over he was invited to stay on at 2, Dr. Johnson's Buildings in the other capacity, and was glad to fall in with the suggestion.

"A year after his first arrival he found himself installed in the chambers with a chair in Mathew's room. So began a long intimate and unruffled friendship between the two men. To some it seemed strange that they should be so closely allied. Mathew was a quick-witted Irishman abounding in humour; the other had an essentially British mind and temperament. Truth to tell, their only common ground was commercial law; but each appreciated to the full the opposite endowments of the other.

"Barnes was at once placed in control of the pupil-room, where there was then, as always, a considerable group of neophytes. Amongst others who learned the secrets of the profession from Mathew and his ex-pupil were—to name only a few—Sir Charles Tyser, now Chief Justice of Cyprus, Mr. Walter Sichel, Mr. H. F. Manisty, K.C., and Mr. Sims-Williams, K.C. An earlier generation of pupils had included Sir John Kennaway, Mr. Justice Wright, Sir Charles Young (who gained fame as the author of the incomparable play "Jim the Penman"), and Sir Thomas Snagge.

"Barnes, who shone as a draftsman, revised the efforts of the pupils and submitted them to Mathew for final settlement. An example of a statement of defence which passed through this double ordeal some forty years ago is extant. It shows the original attempt of the apprentice, subsequently polished into shape by the master hands.

"By holding briefs in Court for Mathew, Barnes speedily became known to solicitors, and before long he began to have some clients of his own. By breaking away from Dr. Johnson's Buildings and setting up in chambers of his own he might speedily have increased their number, but Mathew's election to the Bench was regarded as a certainty, and he was content to wait patiently for that event.

"It was only on the urgent advice of Mathew, who, in a characteristic phrase, warned him of the peril of 'clinging to the old hen-roost," that he at last took independent chambers in Lamb's Buildings. Not long afterwards—in March, 1881—the prophecies were fulfilled and Mathew became a Judge; the first non-official junior so honoured since Lord Campbell had raised another Irishman, James Shaw Willes, to the Bench. Barnes succeeded at once to the heritage. The papers which covered Mathew's table were forthwith transferred to Barnes, and his income leaped from a few hundreds to some thousands a year. He became, as Mathew had

been, the leading junior of the firms now known as Coward and Hawksley, Sons and Chance; Waltons and Co.; and W. A. Crump and Son. And the propriety of the succession was recognized. After he had argued a case in the Court of Appeal, which had been in Mathew's hands in the Court below, Lord Justice Bramwell passed down a note in the following terms: 'Cohen—Mathew—Barnes.'

"Then followed for him seven fat years of practice behind the Bar. Mathew had not figured prominently in the Admiralty Court, but Barnes soon acquired an Admiralty business in addition to the purely commercial practice which Mathew had left behind. He had also a great deal of work on the Northern Circuit, where mercantile cases have always been plentiful.

"Like others, he took part, from time to time, in the revels of the Circuit Mess, and on festive occasions was ready to unbend. There survives a tradition of an 'Ode to General Average, by J. G. Barnes,' the composition of Mr. R. Henn Collins, Q.C. (afterwards Judge, Lord Justice of Appeal, Master of the Rolls, and a Lord of Appeal), which was sung or recited in the presence of the alleged author at a circuit dinner. The poem, which dealt lyrically with the niceties of the law of marine insurance, began with the lines:

> 'The sails are set: the anchor's weighed;
> Hurrah! the risk's attached.'

"Barnes enjoyed the tribute to his learning as much as anybody.

"Professional earnings are difficult to estimate correctly, but by common report Barnes rivalled the financial achievements of any junior of his day.

"The mental and physical strain of a hard-working junior's life is considerable, and Barnes perhaps overtaxed his strength during this period of his career. Though of powerful frame, he was never

really a robust man; and a serious breakdown in health soon after he became a Judge may well have been due to his incessant toil between 1881 and 1888. It was certainly with the hope of an easier life that he applied in the latter year for the honour of a silk gown. He was then of some thirteen years' standing at the Bar, and just under forty years of age.

"His friends had no misgivings as to the wisdom of this step, nor, indeed, had Barnes himself. If commercial work had lessened, commercial leaders were few, and in the Admiralty Court there was room for one so well versed in its affairs. The venture was immediately justified by the results, and Barnes had no reason to repent his change of *status*. The clients who had patronized him as a junior clung to him as a leader, and his income probably increased rather than diminished. The front row suited him. Eloquence he had none, but eloquence was not needed in the class of case in which he was supreme. He had a good presence, a pleasing voice, a well-stocked and well-ordered mind, and an unruffled temper.

"In 1892 the death of Sir Charles Butt made a vacancy in the office of President of the Probate, Divorce, and Admiralty Division, which was bestowed upon Mr. F. Jeune, whose appointment as a Judge of the Division had only recently been made. The new President had had little or no experience of Admiralty work, and it was important that an expert should be appointed to the Judgeship which Jeune had held. Two names suggested themselves to the profession—Phillimore and Gainsford Bruce. Both were Admiralty practitioners, and Gainsford Bruce had served his party in Parliament. It was thought that the former would not care to accept a Judgeship which involved sitting in the Divorce Court; and the finger of Fate seemed to point placidly to Gainsford Bruce. His political services, it was felt, need not be counted against him by Lord Halsbury.

"Barnes was not thought of as a candidate for

preferment, and his appointment came as a surprise to the Temple. But all applauded it."

Some further details of the growth of his practice is supplied by Barnes himself. Bateson sent him to Portugal on a commission to represent a Portuguese nobleman who had been engaged in wine shipment. The ship and wine were lost and a claim was made on the underwriters. It was a hard piece of work which never came to anything, but it was in the line of development that his work was to take after Mathew's elevation to the Bench. The following account of his life in this busy period confirms most of what has been said above by another witness. Barnes's description of his crowded pupil's room and his account of and advice to pupils is full of professional interest, while the account of his work at Judge's Chambers has historical value.

"On circuit I had some little work. I never attempted the criminal work except a few 'soup' prosecutions, and I only went to the Liverpool Sessions (once I got as far as Kirkdale). I had a certain amount of mercantile work, and, of course, I got to know nearly everyone who went to the Liverpool Assizes. The leaders about this time were Charles Russell, the most famous advocate of my day, who was leading the circuit, and Farrer Herschell. These two became respectively Attorney-General and Solicitor-General when Gladstone came in. Later the former was a Law Lord for a short time and Chief Justice, and the latter Lord Chancellor. Jack Holker, who became a Lord Justice, Sam Pope, the great railway counsel, J. B. Aspinall, Recorder of Liverpool, and others, and later we had Gully, Bigham, Myburgh, Kennedy, before I came out of touch with the circuit. I suppose no practical legal

school ever equalled that when Russell and Herschell were opposed to each other. I was once with one or other of them in two or three cases. At the Assizes, I think in 1879, where eleven special jury cases were tried in the day, this was really done by each discarding all superfluity and merely reducing the case to its real point, which was generally capable of statement very shortly.

"It was a school for anyone to be proud to learn in, and the (Great) Northern Circuit never shone more brilliantly than when I first saw it from behind such advocates as I have spoken of.

"My course of work led me gradually away from it. One could not attend to Liverpool and always be on call in London, so that although I made a struggle to do something in Liverpool while still a junior, when I took Silk in 1888 I went to Liverpool only for two years more, and never after 1890. My time was wholly taken up in Town. In fact long before I took Silk I found the greatest difficulty in trying to do anything properly in Liverpool while my thoughts were really centred in London.

"In March, 1881, Mathew was appointed a Judge. I came down to Chambers and heard what had happened. Of course all his current work had to be returned, and I shall never forget the excitement with which I found in the evening of the day of the news of his appointment that a large number of papers had been left at my Chambers. They were, if I recollect rightly, numbers of small cases; clients had, of course, to reflect a little before the big cases were handed on. But of small papers the fees for the day were, I think, 130 guineas. I may here say that in the course of the following year about one-half of Mathew's work came in to me, and while I recollect if I am right that in the year previous to his appointment I made some £500 or £600. I made in the next year, speaking from recollection, somewhere about five times as much. I soon began to have more applications for pupils, and during

my junior time had a large number; I had at one time no less than nine pupils and two devils. Among my pupils I had F. Sims-Williams; J. Priestly, who became a Q.C. and leader of the Probate and Divorce Court; Coll, who became Attorney-General at Gibraltar; Charles Russell's eldest son, who became a County Court Judge; Fitzjames Stephen's son, Sir Herbert Stephen, so well known to all who attend the Northern Circuit; Younger, who became a Q.C. at the Chancery side; Lauriston Batten who became a Q.C. practising in the Admiralty Court and on his circuit, and a number of others. After I took Silk, Lord Robert Cecil, who had intended to come to me as a junior, but could not come while I was a junior, had the run of my Chambers while I was a Q.C. I may add the names of F. Praed, who devilled for me for a time in Admiralty, and Joseph Hurst, who had been a well-known shorthand writer and came to me as a pupil and then stayed on in Chambers with me for a considerable time; Russell and Batten also stayed on in Chambers with me after I took Silk.

"My pupil room was somewhat crowded, but there was enough work for all those who wanted to work, and it was a very delightful time to go in there and have a discussion about the cases and go over what was going on. I don't think the average pupil puts himself out much about work. He likes to see things and hear about cases, but I consider he does not care to apply himself deeply to the work going on and get at the core of a case. Where the pupil is of the nature that does this he goes ahead, and later on soon begins to be recognized and to make his way. I well remember one young man already called to the Bar, a very nice fellow, who was drifting along in a casual sort of way looking at papers, but not placing himself mentally to see through them and in a position to do what was required, who, I thought, might do better, and I determined

to give him a lesson. So one afternoon I handed to him a brief in the Court of Appeal with a request to read it and attend to it the next day, as I should not be there. He did so, and next day I found him, white and haggard, having sat up during the night to get up the brief, sitting in the Court of Appeal ready if necessary to make his effort, and with his tongue sticking to the roof of his mouth. I and my leader were both able to be there, but the youth realized, probably for the first time, what it really meant to do things oneself. Poor man, he died rather early without time to achieve any distinction. Many men will work in an indifferent way when they are looking at someone else's papers, but give them the least of cases of their own and they will give their whole energies to it. The man who looks upon his master's work as if it were his own and becomes responsible for it, gets the right training, and will soon show the results of it.

"Young men looking up the profession often think how hard it is to get on. Certainly in my day those busy men who wanted help often seemed to have great difficulty in finding anyone they could adequately trust to give it to them. As I have grown older I have become confirmed in this. My difficulty was to find out the man who was or could be useful to me. I remember also my brother-in-law, one of the best and ablest solicitors I have known, telling me he felt the same sort of difficulty. It is the difficulty felt by men at the head of affairs in finding younger men in whom they have the necessary confidence to place their trust in their sense and judgment. The young man thinks how difficult it is to get on, the older one thinks how difficult it is to find the right person to whom to hand over matters. I believe this is generally true, and certainly of the Bar. So that in my view the young man who has the right qualifications should never despair of getting on. I fancy that it is more difficult now to find opportunities for devilling than it was in my

day, but whenever a man is overworked, he is pretty sure to look out for adequate help, and I expect that opportunities for getting on will be found by the man who is in downright earnest.

"From 1881 to 1888 I had an extraordinarily busy life; I will deal with my private life later. The professional life I led was very hard. I have said how work began to pour in to me as soon as Mathew was made a Judge. It rapidly increased. I had cases in many of the Courts, a large number of commercial cases, cases in the Appeal Court, the Privy Council, and House of Lords. An early one which assisted my reputation very much was that of *Maspons* v. *Mildred*, where a large quantity of goods had been consigned to the defendants, who sought to hold the proceeds against debts due from the immediate consignors, whereas the plaintiffs claimed to be the original senders, of which they said the defendants had sufficient notice. The case was heard first before Manisty, J., and then went to the Court of Appeal, composed, if I remember rightly, of Jessel, M.R., Brett and Bowen, L.JJ. [Jessel, M.R., Lindley and Bowen, L.JJ.; Brett, L.J., was not sitting. The judgment was delivered by Lindley L.J.] sitting in the Court made out of the old Chancery Courts at Lincoln's Inn. Butt and I argued for the plaintiffs against Benjamin and Cohen [Arbuthnot with them]. Butt was absent during the arguments of the respondent's (defendants) counsel, and only came in as they finished. With some hesitation he asked me to reply, and I succeeded in carrying the Court with me, and won my case, to the great joy of old Bubb, one of the partners in Waltons' firm; and from then I felt pretty secure in the saddle. It would be wearisome to attempt to refer to the numerous cases I had which have long ceased to interest anyone. Most of the litigants and the men who fought their cases have passed away. It was a great time to me. Gradually I found the solicitors who had the Admiralty work

were desirous of having my services, and I began to have a very large Admiralty business; in fact, at the time I took Silk, I may say, I think that I had become recognized as the leading junior, but I had so much other work that it was a joke of this time when Sir Walter Phillimore was leading the Admiralty Bar for him to say: 'I appear with (*sotto voce* "without") my friend, Mr. Barnes.' This Admiralty work to all who know it is most interesting, clean, and important, but it requires the most devoted attention. One had to read the proofs of the witnesses with the utmost care to prepare a claim or defence, and this often involved reading proofs hurriedly but most carefully drawn in bad writing by most important clerks or heads of firms, and this had to be done with rapidity, as the cases in Admiralty came on so exceedingly quickly—sometimes being got through in as short a time as a week. I am sure my eyes suffered from the strain though I did not feel it till long afterwards. What with my pupil room, my work in the different Courts and at Liverpool, life was very hard but interesting during these years. I kept my health pretty well, though at one time I suffered a good deal from boils and carbuncles. I rode pretty hard in the mornings on my way to the Courts, and I usually had an off evening on Saturday when I went with my wife to the theatre, dining at a hotel, but resuming my hard work on the Sunday morning at home.

"I have mentioned already the amount of practice which Mathew had at Judge's Chambers after the Judicature Acts came into force. He had hundreds of summonses during the time the practice was settling itself and before the solicitors' chambers clerks had become experienced in the new system. Of course as matters settled down these numbers gradually tended to lessen, but even in 1881, when he became a Judge, the Chamber work was heavy, and I had a good deal of it from 1881 to 1888. Work at Judge's Chambers requires great

rapidity of thought, quickness of appreciation, and a good understanding of the case, the opponent, and the Judge or Master, and especially the lines on which the Judge likes to have work done before him. As an instance I may mention Lord Field, who was much at Chambers in my time. I found the best and quickest way with him was to hand in the summonses, refer to the paragraphs of the affidavits or pleadings by pointing to them, and almost say nothing. He was very quick, but liked to find matters and see the papers for himself. In the old days Judge's Chambers used to seem to me almost like a bear-garden, and it required some standing and a most experienced clerk to get on with one's cases. With a weak Judge it was almost possible to obtain an order by the pressure of the occasion, and carry it off in triumph. Times have probably changed as much if not more in this sort of work than in any other. This is, I think, mainly due to the establishment of regular lists for summonses for hearing in Chambers, which is an immense advantage as regards convenience in the proper disposition of work, though it militates against the position of those who by their seniority were able to get their cases on early, and tends to force them to attend at the proper time.

"The time had now come when the question of my taking Silk became a matter of practical consideration. I had done so well that friends were urging me to take Silk. Other members of the profession were coming on. One matter was becoming noticeable. When I first went to the Bar mutual insurance clubs had already begun to make their mark felt, but gradually they developed. Large numbers of steamers and other vessels were therein insured. Lloyds and the insurance companies were doing, of course, an immense business, and I was much engaged for the ordinary underwriters and companies, but as the clubs developed it became clear that a great deal of business at the law would

be done for the clubs, and it would be more difficult for those who had to rely on cases from a large number of separate underwriters to compete with those who were employed regularly by the clubs. There was a favourable opening on circuit if one chose to make one's career that way. There was some chance in the Admiralty Court and other Courts in London, though in the former there were then Charles Hall, Q.C., Sir Walter Phillimore, T. T. Bucknill, Q.C., P. Myburgh, Q.C., etc. It is, of course, always a risk to take Silk, but after much consideration I decided in 1888 to apply for it, and Lord Halsbury was pleased to make me a Q.C. that year."

The reference to the case of *Maspons y Hermano* v. *Mildred Goyensche and Co.* (19 Q.B.D. 530), decided on July 7, 1882, in the Court of Appeal (Jessel, M.R., Lindley and Bowen, L.JJ.), needs some further explanation, as Barnes evidently considered it the turning-point in his professional career. The facts were simple: The plaintiffs were merchants carrying on business in Havannah; the defendants were merchants in London. The plaintiffs employed an Havannah firm of shipping agents, bankers, and importers, to ship goods for them to the defendants for sale on the plaintiffs' account. The defendant knew the shipping firm well and had extensive dealings with them, but knew nothing of the plaintiffs, and when the plaintiffs sent goods to the defendants for sale the goods were sent in the name of the shipping firm, and the defendants accounted to that firm, which in turn accounted to the plaintiffs. In July, 1880, the shipping firm arranged with the plaintiffs to forward a cargo of tobacco to the defendants, and chartered for the purpose a ship in their

own names, the bills of lading being made out in the same names. The defendants did not know for whom the shipping firm were acting, but they effected an insurance in London on the ship in the name of themselves and for the benefit of all persons interested. The ship having been lost the policy money was paid to the defendants, and the shipping firm being insolvent, the plaintiffs claimed the whole of the insurance money, after deduction of the premiums and expenses. On the other hand, the defendants claimed a lieu for the balance of their general account due from the shipping firm. The case was heard by Mr. Justice Manisty and a special jury, who found that the goods were the property of the plaintiffs; that the defendants were not employed by the plaintiffs, but by the shipping firm, to sell the goods and account to them for the proceeds; that the defendants knew, or had reason to believe, that the shipping firm was acting for some unnamed person or persons; that the defendants received the insurance money for, and on account of the shipping agents, and the individuals interested, but were not employed by the plaintiffs for this purpose; that the plaintiffs authorized the shipping agents to ship and consign the goods to the defendants in their own names and that the goods were so shipped and consigned; that the insurances were affected on the behalf and for the benefit of all parties whom it might concern. The jury, however, declared that there was not sufficient evidence to decide whether there was a business custom enabling London merchants to set off the goods consigned or the insurance moneys against any balance due to them on their general account current with the consignors. Upon these findings

Mr. Justice Manisty entered a verdict and judgment for the defendants. This judgment was upset on appeal. Barnes in his reply, to which he refers in his notes, argued that the only contract was in the executed policies, and that the defendants knew that the shipping agents were only agents; that there were no cases in which a commission agent consigning goods to England had been held to be a principal. There was one contract only, namely, between the plaintiffs and defendants, which must be construed by English law. The shipping agents were not employed to sell the plaintiffs' goods, but to forward them for sale, and that therefore there was privity of contract between the plaintiffs and the defendants. The Court, having reserved judgment, decided on July 7, 1882, that this was the right view. This case is referred to somewhat fully as a good example of the type of large mercantile cases in which he was engaged. The decision in such a case was very doubtful, and there can be no doubt that it was so handled by Barnes in the absence of Butt as to secure a victory. The triumph, for it was no less, laid the foundation of a very large practice, but that practice was bound in any event to come, as Barnes's industry, thoroughness, common sense, self-assurance, power of making up his own as well as other people's mind, were brought to bear at a moment when this combination of qualities were in special demand. Mathew's Chambers gave him his chance, but the chance would have come in any event. There are always chances in life for those who are fit to see them and take them.

Some reference must be made to the general approval in the profession which followed Barnes's

call within the Bar in 1888, and here, perhaps, may be gathered together some reference to the appreciation which followed the successive stages of his career. Floods of congratulations followed each upward stride of Barnes's professional life. No doubt any man who succeeds in any profession receives an increasing measure of laudation as he moves up, but the note that seems to dominate the masses of letters that Barnes and his wife received is one of absolute sincerity and obvious pleasure. There was from the day he took Silk a recognition from all classes of friends and from all professional competitors, a recognition not only that the success was inevitable, but was one that was good for the community as well as for the runner in the race. There is not a touch of envy or insincerity in any one of the letters. The only people who groaned were the solicitors, who did not much care to see, from their business point of view, one of the most competent juniors of the time move within the Bar, and were sincerely sorry when one of the weightiest and most reliable of Silks in commercial and Admiralty work passed, after four years, to the Bench. When Barnes took Silk in February, 1888, a Northern Circuit man wrote: "Be gentle with the 'youngsters' in the second row, and slate those within the Bar, as the old Northern Circuit oath runs." A well-known solicitor wrote: "I congratulate the junior Bar on being quit of you," when the idea of Silk was taking shape in 1887. The leading solicitors had no doubt that the taking of Silk would lead rapidly to the Bench. There was a general recognition in both branches of the profession that Barnes with his balanced judgment as to the value of evidence

and his clear insight into legal principles would go very far. The Judges before whom he appeared were ready to welcome him, and welcomed him in the most generous terms when the appointment came in June, 1892. "You will be a good deal 'at sea' in your new Court," wrote one witty Judge, "but will, all the same, feel quite at home there." "I know of no Counsel who gained so well as you did the confidence of us, the lawyers and your clients too, therefore with very mixed feelings believe me," wrote one old client. One very eminent Chancery Judge begged him to have "due regard for the lives of your brother Judges." "And a good Judge too," wrote a Metropolitan magistrate. "No man ever won his success more fairly or more honourably than you have done, and your example will be an encouragement to honest men," wrote Henn Collins. One eminent member of the Court of Appeal hoped "you will use our Common Room for lunch. It is a great factor in creating harmony among the Judges." "The appointment," wrote another Judge, "has given great satisfaction to the Judges and to the profession."

It is a melancholy business in many ways going through the letters of nearly thirty years ago and reading the congratulations of so many famous lawyers dead and gone, but these letters on Barnes's appointment to the Bench are a valuable record, showing as they do the universal appreciation of him as a lawyer and a man. It is plain that he was recognized as something more than a successful and powerful lawyer. His honesty of purpose and his human loveableness had touched the hearts of every one of those who wrote.

When Barnes became President of the Division in February, 1905, letters once more poured in. One well-known Judge wished him "Wealth and happiness in the great office you are to fill—and strength to bear its great burden, for it has always seemed to me a most laborious office."

When in February, 1909, Barnes received his peerage, there was again a chorus of congratulations and regret, though those who were likely to practice before him in the Lords were clearly pleased at the prospect, and urged him to sit with regularity: "The House of Lords will gain much needed strength and the Law Courts will mourn." A famous law lord wrote: "I suppose you will sit on appeals both in the Lords and in the Privy Council, and in both of them I am sure you will be a welcome and valuable addition—and the work, though serious, is nothing like so wearing as that which as President you have had to bear." "This is a blow," wrote a well-known member of the Bar. "Your friends will have more opportunities of enjoying your company." These were two points of view that represented a whole truth. The letters on these various occasions of congratulation are multitudinous indeed, and no doubt in a full-dress biography many of them would be set out at length as testimonials of merit. It is not a pleasing practice, since it assumes that the subject of the biography needs such support. In the present case this is certainly unnecessary, but it is perhaps desirable to place on record the unanimity of appreciation with which both branches of the profession, as well as the Bench, received the news of his hard-won achievements. Those successes were the fruit of personal effort, and Barnes himself

frankly enjoyed his progress, and appreciated with a boyish delight all the nice things that were said to him and about him. All through life he had the heart of a boy, and took that pleasure in noteworthy achievement which is the note of boyhood.

The last reported case in which Barnes appeared was an Admiralty case, *The Dictator* ([1892] P. 304), in which he argued for the plaintiff on April 12, 1892. He was opposed by Sir Walter Phillimore. This was a salvage case of some importance and involved a great deal of historical research, which appears in Sir Francis Jeune's reserved judgment of May 10, 1892. The case was an action *in rem* for salvage services, and, the writ being indorsed with a claim for £5,000, the owners, who afterwards appeared as defendants, gave an undertaking to put in bail for £5,000. As a result of the undertaking the plaintiffs did not arrest the vessel or interfere with the discharge of cargo. In fact the Court made a salvage award of £7,500, and the plaintiffs were given leave to amend the endorsement on the writ by altering the sum named thereon to £8,500. The amount of the award was affirmed on appeal, but the defendants denied that they were liable in respect of the amount awarded beyond the £5,000, the amount of the undertaking to put in bail. Sir Francis Jeune held that the remedy was not limited by the amount of the undertaking to put in bail, and the plaintiffs were entitled to recover the full amount of the decree. Sir Francis showed that this decision was the result of the history of the action *in rem*. The arrest of the *Res* (the ship and cargo) has as its object the satisfaction of the creditor under the practice of the Old Court of Admiralty, and if the defendant, who

might himself have been arrested, appeared, the full amount of a judgment could be enforced. This in later times was the view of Lord Stowell, and though Baron Parke held a different view, he ignored the Admiralty jurisdiction *in personam*. The jurisdiction of the Court did not depend upon the existence of the ship, but, as Dr. Lushington declared, upon the origin of the question to be decided and the locality. The idea of personal liability was introduced not by grafting a personal action on an action *in rem*, but by the fact that in an early stage of the history of the action the defendant, by appearing personally, introduced his personal liability.

Thus Barnes ended his career at the Bar with a success of the type that he most admired, a victory based on the fullest investigation of the sources and principles on which the law is based. It was a method of analysis that he followed in many judgments.

CHAPTER V

THE BENCH

THE first reported judgment by Mr. Justice Barnes was in the case of *The Saltburn* ([1892] P. 333), in which case the question was whether the successful party was entitled to costs in the High Court—that is to say, whether the plaintiffs acted properly and reasonably in bringing their action in that Court. That was the principle which the learned judge said should be applied in all such cases, and he gave his decision in favour of the plaintiffs represented by his old friend and opponent, Sir Walter Phillimore. On July 26, Barnes gave his judgment in the case of *The Wilhelm Tell.* Meantime, on July 12, he gave judgment in his first case dealing with divorce (*Moore* v. *Moore* [1892] P. 382), in which a new and difficult point as to condonation was decided. Though divorce was a new subject to the learned Judge, he at once began to apply his habitual practice of analysis to the facts for the purpose of ascertaining the principles underlying the case, and was clearly a Judge who would develop the existing law along sound and equitable lines. He was regarded as what has been called " A wife's judge," though whether this was true or not, it is impossible to say, but certainly in this reported case and in many cases he gave the wife the justice which she sought

without allowing possible technicalities to intervene. Various instances of his determination not to allow the letter of the case law to override the equities of the position will be shown in later references to more salient judgments. In the case of *Bonaparte* v. *Bonaparte* ([1892] P. 402), decided on August 1, 1892, Barnes had no hesitation in deciding against a wife defending a marriage alleged to be null and void when the principles underlying the question of the private international law involved were clearly against the validity of the marriage. These cases foreran the arrangement that when the new legal year began in October Barnes should take the divorce work. Meantime he had a busy Long Vacation as Vacation Judge.

The first reported case in the October term was a probate action in which a will was held to be invalid when the testator acknowledged it first in the presence of one witness who attested his signature, the other witness not being then present, the latter witness being afterwards called in and signing his name in presence of the testator and the other witness. On these facts it was clear that the will could not stand, but Mr. Justice Barnes was asked to uphold the will if he were not certain that the testimony of the attesting witnesses (who gave oral evidence) could be relied upon. If there was any doubt about the recollection of the attesting witnesses, the will would stand. But the learned Judge having heard the oral evidence and being satisfied that there was no hesitation and there being nothing on the face of the documents to show that the witnesses could not be quite accurate in their recollection, he was reluctantly compelled by the Wills Act to

pronounce against the will as invalid, though it was obvious that the testator wished it to be his last will. But the judge ordered the costs of all parties to come out of the estate.

This early case is noted as an example of Barnes's careful estimate of evidence. On November 18, 19, and 20, 1892, Barnes dealt with a notorious jactitation suit in which the petitioner claimed that the Court should restrain the defendant from boasting that he was the husband of the petitioner. The jury disagreed on the question put to them whether there was in fact a legal marriage, but found that the petitioner had allowed herself to be represented as the respondent's wife. Upon the finding, the Judge dismissed the petition. The action is very rare. There was a case in 1906 and the *cause célèbre* is the Duchess of Kingston's case. The suit of 1892 is a leading decision in this curious class of case, which was common enough in the days before Lord Hardwicke's Act of 1756.

Throughout the October term of 1892, Barnes was taking Probate, Divorce, and Admiralty cases. On December 9, the Court of Appeal upheld his decision in the case of *The Lancashire*, Sir Walter Phillimore and others opposing the appeal against Sir Richard Webster and others. A curious point as to the law of evidence arose on the same day in the case of *Roe* v. *Nix* ([1893] P. 58). It was sought to prove the will of a person who had died a lunatic, so found by inquisition. Probate was opposed on the ground of insanity at the date of the will. Reports by the Board of Chancery visitors as to the mental and bodily health of the testatrix were in existence, but the chairman refused to produce them,

since under Section 186 of the Lunacy Act, 1890, such reports were to be kept secret and destroyed on the death of the patient, and since in any event he could not produce the reports without an order from Lord Justice Bowen, who had special charge of the testatrix's affairs. By consent of all parties an application was made to Bowen, L.J., and Lindley, L.J., to allow the evidence which Mr. Justice Barnes regarded as the best evidence that could be given of the testatrix's condition at the date of the will to be produced. The application was refused, upon which the judge offered, if all parties consented, to consult the Lords Justices in question. This was agreed, and Mr. Justice Barnes saw the Lords Justices, who called in the Master of the Rolls, and Lopez and Kay, L.JJ., the matter being of such great importance. All five concurred in the view that the reports, though existing, must be treated as destroyed on the death of the patient, and that even on *sub-pœna* the witness would be bound by the Section to treat the reports as destroyed.

In the case of *Whitworth* v. *Whitworth* on January 31, 1893, Barnes based a judgment on the doctrine that though as a rule ignorance of the law is no excuse, yet when the Court has a discretion the petitioner's ignorance of the law may be properly excused, and that therefore a man who in entire ignorance had entered into a second marriage in the *bona fide* belief that the first marriage was dissolved, could secure a divorce by virtue of the discretion of the Court. On the same day, in *Green* v. *Green*, he held that when a woman (American by birth but English by marriage) obtained a divorce in America on grounds which would not have entitled the parties to a decree in

England and remarried, such re-marriage was a ground on which the English husband could obtain a divorce in England. The decision was a beginning of a line of cases in the private international law of marriage of great importance. Gorell Barnes worked very hard at all classes of cases throughout 1893 and on into the late spring of 1894. His last reported judgment in that year was the case of *The Huntsman* ([1894] P. 214), in which the powers of the managing owner of a vessel are fully discussed. A severe breakdown from overwork during twelve laborious years now threatened the Judge's future, and in fact he was away from the Courts for a period exceeding a year. He does not appear as giving a decision in a reported case until August 6, 1895. The long rest enabled him to resume his work with new and remarkable vigour.

At this point some reference may be made to Barnes's own recollections of the earlier stages of his work on the Bench. Sir Francis Jeune gave him the familiar Admiralty cases at first. Barnes found no difficulty, and took special pride in them, since "the English Admiralty Court has always been an International Court, and its decisions have had very great weight on the Continent and in other countries." Barnes attributed this to the benefit which the Court receives from the advice and assistance of the Assessors, the elder Brethren of the Trinity House, who are men of nautical training and experience and have so much legal experience from the continual hearing of cases "that they become in effect experienced as Judges." Barnes was singularly successful as an Admiralty Judge. In his notes he writes: "I do not for the moment recall ever having a salvage

award altered, though it may have occurred." In the case of the *Glengyle*, when he awarded no less than £19,000 on a value of £76,000, great efforts were made fruitlessly to have the sum varied. He was equally successful in collision cases. He was only reversed twice, and in one of these cases the House of Lords reversed the Court of Appeal. He writes as to the secret of his success, and the impression is worthy of record:

"These cases, though apparently difficult, are easy to one of experience because one has the factor of position at the start, not necessarily of bearings and distances but of course, and the factor of the nature of the damage at the finish, and the movement, meantime, must fit with these factors. The result is that the broad features require careful attention, and too much weight has not to be given to often mere positive assertions of details even if given apparently with great emphasis."

It is desirable to place on record Barnes's effort to carry out the idea which he and Mathew had had of a Commercial Court. Soon after his appointment he announced that he would take any case of an insurance character. "They came quickly, and, indeed, as soon as facilities were given, other cases came too, and the Court was soon in danger of being overcrowded. I had a number of very interesting insurance cases later, practically on the average statements." The new departure attracted the attention of Lord Esher and others, and the ultimate result of this sound effort on the part of the new Judge, seconded by Sir Francis Jeune, was the establishment of the Commercial Court with Mathew at the head of it. "Mathew made a great success of the Com-

mercial Court, and got it going in good shape." Barnes considered that his experiment showed "how work will come easily to a Court ready and willing to do it. . . . I think it better that Courts should always be ahead of their work and should, if necessary, remain idle for a time rather than that they should be in arrear, as they usually are in the High Court in England."

Barnes, during his first Long Vacation (when he sat as Vacation Judge), worked hard at the books on Probate and Divorce practice. The former he found full of difficulties and important and interesting points, but much of the practice in both cases is *ex parte*, which means that the Judge has to rely on himself and on the Registrars. Trials in divorce cases he found required something more than mere competence as a Judge with an adequate knowledge of the laws of evidence ("there is not much difficulty about the divorce law itself"), and needs—

"A really good insight into character and human nature generally. . . . I am sure the divorce tribunal is very difficult to preside over, and one in which there is often a heavy burden upon the Judge to deal with the facts, and yet I have always felt myself more at ease when trying a case of this kind without than with a jury, who are more ready than a Judge to respond to appeals to emotions and to points which do not weigh to the same extent with a legal as with a lay mind. My experience has led me to the conclusion that these cases should be tried by a judge alone, from whom there would of course be an appeal to the Court of Appeal. I think it is only rarely that any difference could result in the decision, and the saving in cost and time would be enormous. I have found as a rule that the Judge

and jury are in accord, though I have occasionally disagreed with the jury, but when I have disagreed I have perhaps not unnaturally considered, but not always held to the opinion, that I was right and they wrong."

Barnes found that the undefended cases, perhaps twenty to twenty-five in a day, required "close continued attention." It was a very hard-working Division. Once Sir Francis Jeune and Barnes got ahead of their work and for a reward were put on to Queen's Bench and Chancery cases. In this Division, with its three branches, some of the most eminent counsel of the time appeared: Sir Walter Phillimore and Sir Richard Webster, in private cases; Sir Charles Russell among those who appeared in admiralty, probate work, and divorce; and Sir Edward Clarke, Sir Frank Lockwood, Mr. Charles Gill, Sir Rufus Isaacs in important and sensational cases. It is interesting to quote the following remarks as to the Divorce Court, since they are closely related to the work of the Divorce Commission:

"It is interesting as one who had been so long connected with the Court to record that while very much that has to be listened to discloses often very unhappy lives and cases in which immorality, cruelty, drink, etc., occur, one has often to notice how the evidence discloses cases in which nobility of conduct, self-sacrifice, and other good qualities are displayed. Human nature is often shown on its good side, although the Court has to deal so much with cases in which the seamy side of life is prominent. I very soon came to the conclusion that there was much amendment required in the law and practice, but it was not until I became President that I felt I had the experience and position to begin to make some

definite efforts in the way of improvement. It was after I left the Bench that the Royal Commission on Divorce and Matrimonial Causes was appointed, with myself as Chairman, but during most of the time I was on the Bench I was in the habit of thinking out the lines on which improvement and changes should be made. One change I made while I was President. I succeeded, with the courteous co-operation of the Press, in putting an end to the practice of sketching in Court, which was often a source of trouble to those who did not wish to be pictorially represented, and whose evidence was liable to be affected by the consciousness of being sketched, and had the effect of drawing attention very prominently to divorce cases. I have always felt grateful to the Press for the manner in which they acted in this matter."

Barnes on the opening of the legal year in October, 1895, was hard at work. His decision in *Ford* v. *Stier*, a nullity suit, dealt with the remarkable case of a lady who went through the ceremony of marriage in the belief that it was merely a betrothal or an engagement to marry. She had never lived with her husband, and a decree of nullity was granted. The Judge held that the lady, a girl of seventeen, was not a free agent, and did not consent to the marriage. The decisions in divorce show a great and growing grasp of the practice. On April 25, 1896, Barnes held that in a suit for divorce a decree in a previous suit (in which the respondent to the suit before the Court was co-respondent) which found that the respondent had been guilty of adultery with this co-respondent was not of itself sufficient evidence in the suit before the Court of adultery against the respondent. The evidence in the previous trial had to be repeated. This is an instance of Barnes's almost

meticulous care in the matter of evidence. During the year, Barnes took all classes of cases in the Division and made up, as far as possible, for the burden that his illness had thrown on the President. On December 2, 1896, the Court of Appeal upheld Barnes's decision that declarations made by a testator after the date of an alleged will are not admissible to prove the execution of the will (*Atkinson* v. *Morris* [1897] P. 40).

The years 1898 and 1899 do not present any outstanding cases, though in many instances the careful student will see both law and practice growing under the hands of the Judge. An interesting point arose on February 17, 1899, in *Westmacott* v. *Westmacott* ([1899] P. 183). What is the evidence of a marriage between Christians in British India? It is proved by the production of a certificate of the marriage from the India Office. It appears that certificates of baptisms, burials, and marriages of all European subjects in India, dating from 1698, can be obtained at the India Office. In the case of the *Goods of Hannah Apted*—a case of a lost will—Barnes held, as a result of much close examination of such cases, that the Court of Probate would in clear cases entertain an application to prove upon motion the contents of a lost will without requiring as an absolute condition the consent of all parties interested in the estate. On July 26, 1899, in the case of *Sickert* v. *Sickert*, he delivered an important reserved judgment on the subject of desertion, in which he held that in order to constitute desertion there must be a cessation of cohabitation and an intention on the part of the accused party to desert the other; but it is not always or necessarily the guilty party

who leaves the matrimonial home: the party who intends to bring the cohabitation to an end, and whose conduct in reality causes its termination, commits the act of desertion. There is no substantial difference between the case of a husband who intends to put an end to a state of cohabitation and does so by leaving his wife and that of the husband who, with like intent, obliges his wife to separate from him. In the following year in the case of *Cowley* v. *Cowley* ([1900] P. 118, 305), Barnes had the somewhat unusual experience of reversal by the Court of Appeal. In a very lengthy reserved judgment, in which the history of the principle involved was analyzed, Barnes held that where a marriage with a peer is dissolved and the former wife marries a commoner, she loses any dignity or title of honour acquired by the first marriage, and that the continued use of such title would be restrained by injunction at the suit of the first husband. But Barnes was doubtful whether the dissolution of the marriage alone would determine the right to use the title. The Court of Appeal (Lord Alverstone, L.C.J., Rigby and Collins, L.JJ.) reversed this learned judgment, holding that a man had no such property in his name as to entitle him to prevent a woman, not his wife, claiming to be such unless she does so maliciously. The subject indirectly came before the Divorce Commission and Lord Gorell directed me to prepare a special memorandum on the history of the subject, which appeared as a last Appendix to the Report. In *Burdon* v. *Burdon* ([1901] P. 52), Barnes dealt with the terrible story of a woman who, utterly neglected in her childhood, eventually lived with and then married a man who drove her to wrong-doing, and when she was

compelled to leave him, continued this life as a means of support, but was eventually saved by a stranger. Under the new conditions she applied for and obtained a decree *nisi*, but the Queen's Proctor intervened. Barnes held that all her acts after she left her husband were the outcome of his conduct and that consequently she was entitled to have the decree made absolute.

"It seems to me that the true and the correct view to take of this woman's life, down to the time she was pulled out of the mire into which she had fallen, is that it was a continuing result of her husband's misconduct, and that therefore his misconduct conduced to all that took place from the time she left him, as it certainly did directly cause what took place while she remained with him. It is most difficult, to say the least of it, for a woman who has been sent down on the downward path to retrieve herself."

Taking the broadest view, the Judge was able to complete the work of rehabilitation. On March 4, 1901, a curious point was decided by Barnes. A missionary, his wife and children were believed to have been massacred on July 9, 1900, in Northern China, and the Court was moved to swear the deaths of the spouses and for grants of administration to the next-of-kin of each. The letters were duly granted, and the oath to lead the grants was varied so that it could be sworn that the spouses perished at the same time, and that there was no reason to believe that either survived the other. This decision solved a curious difficulty in the due distribution of the respective estates. A learned judgment in the case of *The Veritas* was delivered by Barnes on

July 29, 1901, on the question of the priority of a maritime lien and of a right to proceed *in rem* over salvage claims.

The years 1901 and 1902 were very busy, and many cases in Admiralty, Probate, and Divorce were reported, though they call for no further mention here. At the end of 1902 Barnes was again taken ill, and did not sit until after the Long Vacation of 1903. The legal year 1903–4 was specially full of technical Admiralty cases. On May 12, 1904, Barnes held that the Third Section of the Wills Act, 1861 (which is intituled " an Act to amend the law with respect to wills of personal estate made by British subjects "), is not limited in its operation to the wills of British subjects, but extends to the will of a foreign testatrix, made before her marriage and in strict conformity with the law of her foreign domicile at that date according to which marriage did not revoke a will. The learned Judge also held that the English domicile acquired by the testatrix after the date of the will and of the marriage did not affect the question of the validity of the will. On June 15, 1904, Barnes examined in detail the principles involved in *garnishee* proceedings arising out of decrees and orders in matrimonial suits. On January 23, 1905, he delivered his last reported judgment as a Judge of first instance (a probate motion), and, Sir Francis Jeune having retired, he succeeded him as President of the Division and delivered his first reported judgment as President on February 6, 1905. Sir Francis Jeune had recommended Barnes to his successor, and his great success as a Judge of first instance made the appointment very acceptable to the legal profession.

The work, however, proved exhausting even to such a giant for work as Gorell Barnes, since it extended far beyond the work of the Division. The Court of Appeal needed strengthening, and as the new President became automatically by the fact of the appointment a member of that Court, his services were requisitioned without much mercy. He writes on the subject as follows:

"Bargrave Deane and I settled down to steady work at our Division, and remained together until February, 1909. With him I had a very happy time: we got on most excellently. His friendship was very highly appreciated by me and everything moved smoothly, but the strain on me became heavy owing to the demands for my services in the Court of Appeal, I think considerably more then in consequence of the absence of Lord Justice Farwell on the Committee of Inquiry into certain matters connected with the late war (the South African War), and later as Lord Justice Vaughan Williams was appointed a Commissioner on an inquiry as to the Welsh Church. He was necessarily absent from the Court a great deal, and during most of this time I presided over the Court of Appeal. I often had Lord Justice Kennedy, the Senior Classic of my year, and Lord Justice Moulton, the Senior Wrangler of my year, sitting on either side of me, and it was a matter of some pride to feel that I was presiding over a Court with men who were in such high University positions at the time when, as I have already said, I took my humble place in my Tripos. The strain in the Court of Appeal is great in any circumstances, but it becomes very heavy for one who has also to keep in touch with his own Division which involves him in multifarious duties, and I certainly found it trying. I am happy, however, to say that I believe I accomplished my task well and earned the respect and

confidence of the Bar. It was probably owing to this work that later I was asked to come to the House of Lords to help with the work there, but it is also probable that the illness from which I am now [1912] suffering, due to overwork, has much of its foundation in Court of Appeal work."

Gorell Barnes, who became a Privy Councillor on becoming President, was qualified to sit with the Judicial Committee of the Privy Council, and was asked occasionally to sit on appeals to His Majesty in Admiralty cases. He sat on these appeals with Lord Macnaghten and other well-known lawyers. The five years from 1905 to 1909 were altogether too strenuous, for not only was the President doing an immense amount of judicial work, but in the latter part of the time was sitting on the Lord Chancellor's Committee for the consideration of improvements in the High Court, and was the Chairman of the County Courts Committee. He felt the burden of the County Court work very much. During the same period he visited America three times, and though the holidays were delightful, they were sufficiently strenuous. It will be of interest to refer to some of the more salient decisions during Gorell Barnes's period as President of his Division. On March 9, 1905, the President decided—in the estate of *Dianah Hubbuck* ([1905] P. 129)—that though a complete blank in a will cannot be filled up, a partial blank may be explained by extrinsic evidence. On May 19 the President decided an interesting question on the not very ordinary subject of mutual wills, affirming the old rule that where two persons have made an arrangement as to the disposal of their property and executed mutual wills in

pursuance of that arrangement, when the one of them who predeceases the other dies with the implied promise of the survivor that the arrangement shall hold good, the personal representative of the survivor must perform the contract if the survivor benefited under the first will; but the survivor cannot insist on the last will of the one who first dies being set aside in favour of the original will.

On May 17, 1905, the President had to decide a point of law in a case which came before the Court of Admiralty—a collision between a Spanish and a French vessel on the high seas, proceedings *in rem* being instituted before an English Court—a case which illustrates the international nature of our Admiralty Court. It was agreed that both vessels were to blame, and the question was whether in the amount of damage sustained by the Spanish ship could be included a claim for loss of life, being the amount due under Spanish law from the owners of the Spanish ship to the relatives of the five drowned Spanish seamen. The President held that the claim must be disallowed since it was not recognized by English law if it was in respect of a payment made by way of indemnity under a foreign statute, independent of any question of negligence, while if it was a claim for damages for loss of life, it did not come within the scope of the Admiralty rule of division of loss. This rule sprang from the ancient Laws of Oberon, and had been greatly developed to meet new cases, but it had never "so far as I am aware, been applied to claims which have been put forward by persons representing others who have been drowned or killed in a collision between two ships." In the case of *The Bearn* ([1906] P. 48), the President

sat in the Court of Appeal, and affirmed the judgment of Mr. Justice Bargrave Deane. On February 22, 1906, the President in *Evans* v. *Evans* ([1906] P. 124) delivered a lengthy judgment emphasizing the principle that the interests of society and public morality are to be considered by the Court in exercising the discretion conferred by Section 31 of the Matrimonial Causes Act, 1857, by which the Court is not bound to pronounce a decree of divorce if the petitioner has been guilty of any one or more of the matters (which include adultery), mentioned in the proviso to the Section. "Although . . . it may be to the interest of the petitioner to accede to his application in this case, in my judgment it would not be in the interests of society and public morality and purity to do so." The President finally suggested some amendments of the rules of practice to assist the Court in preventing the evil arising from petitioners withholding material facts from the Court. In *Armitage* v. *the Attorney-General* ([1906] P. 135), the President decided that the English Courts will recognize the validity of a divorce obtained in a state in which the husband is not domiciled if the Courts of the State in which he is domiciled recognize the validity of the decree, and that it must be recognized as valid all over the world.

On April 27, 1906, in the case of *Dodd* v. *Dodd* ([1906] P. 189), the President gave a written judgment which may be regarded—which Lord Gorell certainly regarded—as the forerunner of the Divorce Commission. The case itself decided that the period of two years' desertion which, coupled with adultery, entitles a wife to a divorce does not run during the operation of a separation order under the Summary

Jurisdiction (Married Women) Act, 1895. The President took the opportunity to show the evils caused by these separation orders, which were being obtained at the rate of over 7,000 in a year:

"The direct tendency of these orders appear to be to encourage immorality and to produce deplorable results. . . ."

He added: "That the present state of the English law of divorce and separation is not satisfactory cannot be doubted. The law is full of inconsistencies, anomalies, and inequalities amounting almost to absurdities; and it does not produce desirable results in many important respects. Whether any and what remedy should be applied raises extremely difficult questions, the importance of which can hardly be over-estimated, for they touch the basis on which society rests, the principle of marriage being the fundamental basis upon which this and other civilized nations have built up their social systems; it would be most detrimental to the best interests of family life, society, and the State to permit of divorces being lightly and easily obtained, or to allow any law which was wide enough to militate by its laxity against the principles of marriage. . . . This judgment brings prominently forward the question whether, assuming that divorce is to be allowed at all, as it has been in England by judicial decree for the past fifty years, and for a long time before that by Act of Parliament, any reform would be effective and adequate which did not abolish permanent separation, distinguished from divorce, place the sexes on an equality as regards offence and relief, and prevent a decree being obtained for such definite grave causes of offence as render future cohabitation impracticable and frustrate the object of marriage; and whether such reform would not largely tend to greater propriety and enhance that respect for the sanctity of the marriage tie which is so essential

in the best interests of society and the State. It is sufficient at present to say that, from what I have pointed out, there appears to be good reason for reform, and that probably it should be found to be in the direction above indicated."

This bold pronouncement started the demand for reform which was discussed and formulated in definite propositions by the Divorce Commission and is to-day again a subject of close consideration.

In *Bates* v. *Bates* ([1906] P. 209), the President held that if a country recognizes the right of a foreign tribunal to dissolve the marriage of two persons who were at the time domiciled in that foreign country, it must also recognize that their marriage may be dissolved according to the law of that foreign country, even though that law dissolves a marriage for a lesser cause than would dissolve it in this country. This view was affirmed by the Court of Appeal, which held that the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve the marriage.

In the case of *Kaiser Wilhelm der Grosse* ([1907] P. 118), the President drew attention to a point "of some public interest." The Elder Brethren assisting the Court were struck very forcibly by— "the great advantage in what I believe are correctly termed schooner bows, because this steamer, the *Orinoco*, struck the *Kaiser Wilhelm der Grosse* first with her bowsprit, then with her figure-head, and then with the overhang of the upper part of her stem, and yet the German vessel did not get a cut right down to the water's edge, which is what happens where vessels have straight stems. It is a matter which strikes the Elder Brethren, because

but for the *Orinoco's* schooner bows, the collision might possibly have been of a much more disastrous character."

This was an instance of the practical value of the advice that the Elder Brethren give to the Court, an advice to which, as we have seen, Barnes paid the greatest attention. In the case of *Kennedy* v. *Kennedy* ([1907] P. 49), the President drew attention with ironic force to the real nature of suits for the restitution of conjugal rights:

"It must be mentioned that the avowed object at the present time in the vast majority of cases of suits for restitution of conjugal rights by wives is not restitution at all, not even an allowance, but in the event of *non-compliance* with the decree on the part of the respondent (husband), and with the further offence on his part of adultery, to obtain a divorce."

It is not too much to say that the restitution portion of these proceedings is a farce, because their true object is not the object which appears on the face of them. The true object, as in *Tress* v. *Tress* (12 P.D., 128), is not to get an allowance, but to obtain a divorce.

The President's decision of March 18, 1907, in the case of *The University College of North Wales and University of Wales* v. *Taylor* ([1907] P. 228), was reversed, an unusual experience in any class of case, but perhaps more common in Probate than other suits. In this case the President admitted *parol* evidence to identify a document referred to in a will. The Court of Appeal ([1908] P. 140) held that, in order to admit *parol* evidence for the purpose of identifying a document referred to in a will

and intended to be incorporated, the description of the document in the will must definitely refer to an existing document. If the will can be construed (as it was in this case) as referring to an existing or *future* document, *parol* evidence is not admissible. In the will before the Court, the testator referred to a memorandum which, being the evidence which it was sought to bring in, showed that the testator did not intend it to be final but intended to alter it. Therefore the rule as to the exclusion of *parol* evidence was applied. Another instance of reversal may be mentioned. Mr. Justice Bargrave Dean in the case of *The Hopper* (1906, p. 34), held that charterers by demise are not "owners" within the meaning of Section 503 of the Merchant Shipping Act, 1894. The Court of Appeal, consisting of Sir Gorell Barnes and Lords Justices Fletcher Moulton and Kennedy, reversed the Judge of first instance ([1907] P. 254), but were themselves reversed, though they were a very strong Court, by the House of Lords (1908, A.C., 126).

On November 18, 1907, the President, sitting in the Court of Appeal with the Master of the Rolls and Lord Justice Kennedy, delivered the judgment in the well-known and important case of *Ogden* v. *Ogden* (otherwise Philip) ([1908] P. 46), which affirmed the decision of Mr. Justice Bargrave Deane. This case, the beginning of a new outlook on international marriage, was closely considered with kindred cases by the Divorce Commission. The facts were as follows: On September 14, 1898, Sarah Helen Williams, a domiciled Englishwoman, married at Prestwell, Lancashire, Leon Philip, a French subject with a French domicile, who was studying in England.

He was only nineteen, and he married without the knowledge of his own parents or his wife's parents. When the facts became known, the wife's father communicated with the husband's father, who came over and took his son back to France. A child was born on July 7, 1899. By a decree of the French Court on November 5, 1901, the marriage was annulled on the ground that the consent of the parents, as required by French law, had not been obtained. After the decree Leon Philip married again in France, and his English wife applied to the English Court for a divorce on the ground of desertion and adultery, and also that the marriage should be annulled. Sir Francis Jeune dismissed the petition on the ground of want of jurisdiction, and gave no decision as to the validity of the original marriage. On October 29, 1904, the lady married William Henry Ogden, describing herself as a widow. There was one child by this marriage. On July 28, 1906, W. H. Ogden instituted a suit for a decree of nullity on the ground that at the date of the marriage Leon Philip was alive and the original marriage had not been annulled or dissolved. On December 10, 1906, Mr. Justice Bargrave Deane pronounced a decree *nisi*, and it was from this decision that Mrs. Ogden (or Philip) appealed. The President delivered the judgment of the Court at great length, reviewed the cases with exhaustive learning, and concluded that the marriage between the appellant and Leon Philip must be declared valid in England. If a decree of dissolution had been made in France where the parties were domiciled, such a decree would have been universally binding and the marriage would have been dissolved. But suits in which a

declaration of nullity is claimed stand on a different footing since the question raised is whether a valid marriage ever took place at all. If it did not take place the woman did not acquire the man's domicile. If an English Court held that the marriage was valid it could not also adopt the view of the French Court that it was invalid. Therefore the French decree was held by the President to be inoperative in England, with the result that the petitioner remained the wife of Leon Philip and therefore could not be the wife of W. H. Ogden. The Court felt the hardship of the decision: "The right remedy to look forward to is a recognition by the agreement of civilized countries of the principle that the omission of formalities required by the law of one country, but not by the law of the country where a marriage is celebrated, ought not to be allowed to affect the validity of the marriage in the country requiring such formalities." The President felt that the position of a woman as a wife in England and not a wife in France was intolerable, and suggested that it would be reasonable "to treat her as having a domicile in her own country, which would be sufficient to support a suit. No general rule of law would then really be infringed. The necessities of the case would call for the intervention of the Courts of her own country in order to do her justice and relieve her from a tie recognized in the one country, though not in the other." In subsequent cases this method of solving an intolerable position was in effect adopted, as it might have been adopted in the first stages of the Ogden case.

Some reference must be made to the decisions of the President when sitting in the Court of Appeal.

In the case of *Logan* v. *Bank of Scotland and Others* ([1906] 1 K.B., 141), he delivered on December 21, 1905, the judgment, holding that the Court will stay an action, brought within the jurisdiction, in respect of a course of action arising out of the jurisdiction if satisfied that no injustice will be done thereby to the plaintiff, and that the defendant would be subject to such injustice in defending the action as would amount to vexation and oppression to which he could not be subjected if an action were brought in another and accessible Court, where the case of action arose. On May 21, he gave a brief judgment on a complicated question on the Licensing Act, 1902, Section 11 (4). On June 26, he delivered a judgment on a case turning on the ultimate responsibility for compensation to the widow of a workman killed while working a defective machine; on July 5, on a case arising out of a tenancy agreement; on July 7, on an interesting problem as to the assignability of the benefits of a contract; on July 11, he gave a judgment establishing the proposition that a master could not maintain an action for injuries which caused the immediate death of his servant (*Clark* v. *London General Omnibus Company, Ltd.* [1906] 2 K.B., 648). On January 17, 1907, he gave a decision on a complicated question under the Rivers Pollution Prevention Act, 1870. On January 8, he dealt with a rating question; on January 23, he gave a reserved judgment in a difficult tramway and railway case; on January 26, he helped to affirm a decision of Mr. Justice Phillimore on a charter party and bills of lading case; on February 1, he dealt with the powers of a Naval Court; on February 16, he considered

a Poor Law Appeal; on March 20, 1907, he gave a judgment dealing with the liability of a landlord to a stranger during tenancy. On March 25, 1907, the President, in *Oppenheimer* v. *Frazer* ([1907] 2 K.B., 50), delivered an elaborate judgment on the subject of the protection given to mercantile agents by Section 2 (1), of the Factors Act, 1889; on May 29, he gave a judgment dealing with the meaning of the word " warehouse " within the Workmen's Compensation Act, 1897, Section 7 (2); and on June 4, a judgment in which it was decided that the mere juxtaposition of a ship to a quay is not of itself sufficient to make the person who meets with an accident in the ship a person employed on, in, or about a factory, and that he will not be entitled to compensation unless the operations going on in the ship involve such a use of the quay as will bring in the Provision 7 of Section 104 of the Factory and Workshop Act, 1901. On the same day he gave a judgment on the question under the Workmen's Compensation Act, 1897, of the legal presumption of dependency in the case of a wife. Though the wife was receiving nothing from the husband at the time of his death, there was nevertheless a total dependency of the wife, whose posthumous child was also a dependant. This was one of various difficult compensation cases heard about this time. On July 4, he delivered an interesting judgment on the subject of common employment. On November 6, 1907, the President concurred in a decision dealing with the dismissal of an assistant master by the headmaster of an endowed school, and deciding that a custom entitling assistant masters of endowed schools to a term's notice of dismissal was excluded by the terms of a scheme

which empowered the headmaster to dismiss at pleasure. On December 3, 1907, the President, concurred in a decision on the Railway Clauses Act, 1845, but he felt that "the enactments relating to this matter are drawn as if with the object of creating a sort of Chinese puzzle." The House of Lords took a different view of the puzzle. On December 9 he was sitting with Lord Halsbury and Mr. Justice Bigham, and dealt with the Railway and Canal Traffic Act, 1854, in a case relating to the carriage of a dog. On December 20, in a life assurance case, the view held by Lord Alverstone and the President was upheld in the House of Lords. On February 25, 1908, he delivered a judgment of the Court of Appeal, in which Lord Halsbury concurred, deciding that there was no exemption from rateability of a newly-acquired burial ground in which there were no buildings for burial services under the Poor Rate Exemption Act, 1833. The House of Lords affirmed the decision. On December 8, 1908, the President decided in the case of *Chetti* (*Venugopal*) v. *Chetti* (*Venugopal*) (1909, p. 67), that any incapacity of either a man or woman, which, though recognized and enforced by the law of the domicile of either, is of a kind to which the Courts of this country refuse recognition, does not render a marriage celebrated here invalid on account of any such incapacity. It was a case of a Hindu who wished to repudiate a marriage entered into in England with an English lady domiciled in England on the ground that he could not marry anyone outside his own caste. The President in his elaborate judgment said that the reasoning in the Ogden case, referred to above, tended to support his view in the case before him, and to

show that a man marrying an English woman domiciled in England does not carry with him a disability imposed by the law of his own country which would prevent him from entering into a marriage with her in England. The President's last reported case was that of the *Prince Leopold de Belgique*, a collision case decided on December 15, 1909. The variety of the cases referred to above illustrates the great range of law and fact within which an average Court of Appeal works, and explains Lord Gorell's reference to the overwork from which he suffered during his period of office as President of the Probate, Divorce, and Admiralty Division of the High Court.

CHAPTER VI

IN THE HOUSE OF LORDS

Lord Gorell's first decision of moment in the House of Lords was in the case of *The Schwan*, and was delivered on July 19, 1909. It illustrates the entire common sense of his mind. The Court of Appeal had reversed Mr. Justice Bargrave Deane; the House of Lords restored his judgment.

"The question then seems to be: Is a vessel seaworthy which is fitted with an unusual and dangerous fitting which will permit of water passing from the sea into her holds unless special care is used, and those who have to use the fitting in the ordinary course of navigation have no intimation or knowledge of its unusual and dangerous character, or of the need for the exercise of special care, and might, as engineers of the ship, reasonably assume and act upon the assumption that the fitting was of the ordinary and proper character, which would not permit of water so passing however the fitting was used? I think this question should be answered in the negative."

Lord Gorell on this and other grounds decided that the *Schwan* was not in the circumstances reasonably fit to carry the goods of the appellants, and that the damage was due to the unseaworthiness.

In the case of *Addis* v. *Gramophone Company, Ltd.* ([1909] A.C., at p. 501), Lord Gorell laid down, following the majority of the Court, Lord Collins

dissenting, that where a servant is wrongfully dismissed from his employment the damage for the dismissal cannot include compensation for the manner of the dismissal, for his injured feelings, or for the loss that he may sustain from the fact that the dismissal of itself makes it more difficult for him to obtain fresh employment. He said:

"The general rule is clear that damages in contract must be such as flow naturally from the breach, or such as may be supposed to have been in the contemplation of the parties as the result of the breach. . . . I am unable to find either authority or principle for the contention that he (the plaintiff) is entitled to have damages for the manner in which his discharge took place. . . . The plaintiff has attempted to suggest that the manner of his dismissal has cast a slur upon his character, and has really endeavoured to claim damages for defamation, and to turn the action for the loss of the benefit of the contract into an action of tort, with the result of attempting to give the jury a discretion uncontrolled by the true consideration—namely, what is the money loss to the plaintiff of losing the benefit of the contract ?"

In the important case of *Low or Jackson* v. *General Steam Fishing Company* ([1909] A.C., at p. 540), Lord Gorell joined Lord Loreburn in dissenting from a decision of the House of Lords, which was supported by Lord Ashbourne, Lord James of Hereford, Lord Atkinson, and Lord Shaw of Dunfermline. The question was whether a watchman on duty for twenty-five hours, who had to provide his own food and who left his place to go for a short time to a local hotel, and on his return was drowned in passing from his post to one of the trawlers which he was watching,

suffered from an accident arising " out of and in the course of " his employment within the meaning of the Workmen's Compensation Act, 1906. The House of Lords, reversing the decision of the Second Division of the Court of Session, held that the accident did so arise, but Lord Gorell dissented, as he held that the deceased had no business to leave his duty of watching, and that the accident occurred during an excursion which he had made for his own purposes.

" Considering that his duty was to watch continuously, no doubt to keep the boats free from fire, burglary, and accident of any kind, and to watch the moorings, as mentioned in the findings, it is clear that he could not discharge that duty properly if he were to leave the trawlers during any part of the twenty-five hours. The finding as to food cannot, having regard to the nature of the duty, mean that he might absent himself to procure food. I think it must mean that he either had to bring his food with him or members of his family brought it to him."

Lord Gorell, in effect, refused to recognize the doctrine that necessity overrides duty. Lord James of Hereford held that " the obtaining of refreshment was necessary to the performance of the deceased's duties." Lord Gorell was apparently not impressed by this contention, which, in fact, is not favoured by the Common Law. Necessity is no answer to the commission of crime. Lord Gorell, in effect, held that it is no answer to a breach of duty.

On July 22, 1909, Lord Gorell delivered the judgment of the Judicial Committee of the Privy Council in an important rating appeal from the High Court of Australia, *The Attorney-General for the State of Queensland* v. *Council of the City of Brisbane* ([1909]

A.C., at p. 585), in which will be found a clear review of the legislation of Queensland relating to the imposition of rates. The facts of the case are not of general interest in England, but it is perhaps noticeable that Lord Gorell declared that it was desirable that the legislature should define more clearly and distinctly the rights and liabilities of ratepayers in Queensland. On the next day, July 23, Lord Gorell delivered in the Privy Council an important judgment on an appeal—*Bow, McLachlan and Co.* v. *Ship "Camosun"* ([1909] A.C., at p. 601)—from the Supreme Court of Canada raising a question as to the jurisdiction in Admiralty of the Exchequer Court of Canada. In an elaborate judgment he made it clear that that jurisdiction is no greater than the Admiralty jurisdiction of the High Court of England. This led at once to the question: "What is the Admiralty jurisdiction of the High Court of England with regard to such matters as that in controversy?"—namely, the payment of the balance due on the mortgage of a ship. The history of the long contest between the civilians of the Admiralty Court and the Courts of Common Law is well known, and need not be gone into now. It resulted in the Admiralty jurisdiction being within certain well-defined limits, which were, however, extended by the legislature in more modern times, but not sufficiently to include a suit to enforce such a claim as that made by the respondents. The Admiralty Court Act of 1861 (Section 11) extended that jurisdiction to include the claim of the appellants, which was in respect of a mortgage duly registered under the Merchant Shipping Act, 1854. The respondents' claim, that of setting off a sum of money expended by them,

was unenforceable in an Admiralty Court. The case was one of general and national interest as settling the principles underlying the jurisdiction of the Canadian Admiralty Court. It is interesting to note that in successive days Lord Gorell helped to reverse decisions of the High Court of Australia and the Supreme Court of Canada.

In the case of *Winans* v. *Attorney-General* ([1910] A.C., at p. 35), Lord Gorell delivered an important judgment on the question whether estate duty is payable on certain personal property locally situated in the United Kingdom, but belonging to an American domiciled in America. Lord Gorell began with the proposition that in the old days the Ordinary of the Bishop (subsequently replaced by the Probate Division of the High Court) "could administer all chattels within his jurisdiction, and if an instrument was created of a chattel nature capable of being transferred by acts done here and sold for money here, there was no reason why the Ordinary or his appointee should not administer that species of property; that such an instrument was in effect a saleable chattel, and followed the nature of other chattels as to the jurisdiction to grant probate." In view of this fact Lord Abinger, presiding over a strong Court, had held, in the case of *Attorney-General* v. *Bouwens* (4, M. and W., 171), that probate duty is payable in respect of bonds of foreign governments of which a testator dying in this country was the holder at the time of his death, and which have come into the hands of executors in this country, such bonds being marketable securities within this kingdom, saleable and transferable by delivery only, and it not being necessary to do any act out of the kingdom to render

the transfer of them valid. But in the case before Lord Gorell it was contended that the principle to apply was the recognized rule that personal property follows the person and is to be considered as situate wherever the domicile of the proprietor is. This principle has been taken to limit the interpretation of the Legacy and Succession Duty Acts. Personal property is distributed according to the law of the domicile, and those who are benefited receive their benefit according to that law. Lord Gorell carefully reviewed the history of the five death duties in existence in England before the passing of the Finance Act, 1894, under Section 1 of which it was sought to make these bonds to bearer liable to estate duty. He found that the Probate Duty, the Account Duty, and the Temporary Estate Duty imposed in 1889 dealt with the duty on the amount of property passing whatever its destination, while the Legacy Duty and Succession Duty dealt with the duty on the value of the interests taken, and the duty varied with the relationship of the person taking the property to the person from whom the interest was derived or the predecessor. Lord Gorell held that it was difficult if not impossible to suggest any case in which, with regard to persons dying after the commencement of the Act of 1894, the new duty was not substituted for the old probate duties. This conclusion was supported by the various sections of the Act of 1894. Now, if the testator had died before the passing of that Act, his executors would have had to take out probate and pay probate duty in order to acquire possession of and a title to his personal assets in this country. Lord Gorell described the scheme of the Act of 1894 in the following words:

"The scheme of the Act, based upon the general principle that statutes of this country may affect citizens thereof and persons temporarily resident here and property situate here, although belonging to persons abroad, appears to be that the State should take toll where it can properly do so on such property passing on the death of such person independently of the destination of the property, that it should take such toll on the property found in this country to whomsoever it belongs, and that it should take toll even over the property outside the country, if the deceased is domiciled in this country, where such property is liable to legacy and succession duty."

Consequently it was necessary for those who appealed against the incidence of the duty to make out that the property in question was not situate in this country, and this having regard to the nature of the words they failed to do. The House of Lords consequently held that foreign bonds and certificates payable to bearer, passing by delivery, and marketable on the London Stock Exchange are, when physically situate in the United Kingdom at the death of the owner, liable to estate duty under the Finance Act, 1894, even though the deceased was a foreigner domiciled abroad.

Lord Gorell's elaborate judgment in the case of *Attorney-General* v. *Till* ([1910] A.C., pp. 55-64) is an excellent example of the pains that he always took to pierce down to the very roots of a long controversy. In that case the respondent conducted his case in person, and, having persuaded the Court of Appeal to reverse the Lord Chief Justice (Lord Alverstone), made it necessary for the Crown to appeal to the Lords, since a very important issue was involved—

the question whether an incorrect statement, made not fraudulently but negligently, in an Income Tax return under the Act of 1842 (Section 52) enabled the Crown to put in force the penalty under Section 55 for non-delivery of the statement required by Section 52. The House of Lords held that this failure to deliver a statement was not limited, as the respondent contended that it was limited, to a case of non-delivery of any statement. Lord Gorell, while finding against the respondent, went out of his way to declare that he had "argued his case extremely well." It was a not uncommon practice of his to pay a generous compliment to those who had done their best. A scarcely less interesting judgment was delivered on November 15, in the case of *The North British Railway Co.* v. *Budhill Coal and Sandstone Co.* (1910, A.C., at p. 128), deciding that sandstone is not a mineral within the meaning of the statutory phrase "names of coal, ironstone, slate, or other minerals," a decision that Lord Gorell described as of great importance to railway companies and landowners in England and Scotland. The judgment is notable for the penetrating fashion in which he enumerated and criticized the tests propounded. He finally arrived at the conclusion that the proper test was the use of the words in the ordinary sense in which they are understood and used by landowners and those engaged in mining and commerce. He and the whole House held that in common parlance "mines and minerals" did not include ordinary sandstone. The judgment was a clear and common sense decision, arrived at by a process of exhaustion which shut out successively an elaborate series of legal refinements of meaning.

On March 16 and May 4, 1911, Lord Gorell sat in the Privy Council with Lord Macnaghten, Lord Robson, and Sir Arthur Wilson, when the case of *Cornelis Gideon de Jager and Others* v. *James Alexander Foster and Others* (1911, A.C., 450) was heard on appeal from the Supreme Court of the Cape of Good Hope. The judgment was delivered by Lord Gorell. The questions in dispute depended on the construction of a codicil to a mutual will executed in the Dutch language on September 22, 1812, by Carel Johannes de Jager and his wife Susanna, to whom he was married in community of goods. The codicil was executed on July 19, 1822. This will and codicil gave rise to a century of litigation which in Lord Gorell's judgment is set out with fascinating precision. The net result of these appalling legal battles was that the two grandsons of the original testators were joint fiduciary heirs in equal shares of the bequeathed property on the Oliphants River, and that each of these grandsons was burdened with a *fidei commissum* in favour of his eldest son and no others, and that it was not intended by the said testators to burden the said shares in the hands of their grandsons with any further *fidei commissa.* The question raised in the appeal was whether the two grandsons of the original testators became on their respective fathers' deaths, as the respondents contended, the full and absolute owners of their respective shares or whether on their deaths, as contended by the appellants, these respective shares were intended by the original testators to revert to and be divided in equal shares among all their grandchildren and other remoter heirs. The Privy Council upheld the Court below in holding that the two grand-

sons upon taking the *fidei commissum* bequests became entitled to the land in full ownership free from any further *fidei commissa*, thus giving logical effect to the results of previous litigation. This decision is a salient example of Lord Gorell's power of stating, analyzing in detail, and recombining complex facts in such a fashion as to produce an overwhelmingly logical result.

On July 14, 1911, in the case of *Harris* v. *The Earl of Chesterfield* (1911, A.C., at p. 634) Lord Gorell in the House of Lords dealt with an extraordinarily complex question of English law relating to the right of non-riparian freeholders to fish in the non-tidal portions of the River Wye. Lord Gorell held that there could be no unlimited right of fishing *in alieno solo* appurtenant to land.

On July 21, 1911, he delivered a judgment in *Richard Evans and Co., Ltd.* v. *Astley* (1911, A.C., 685) under the Workman's Compensation Act, 1906, which again illustrates his power of so marshalling facts as to show conclusively what inferences could reasonably be drawn from them. A case of very general interest was that of *William Edge and Sons, Ltd.* v. *William Niccolls and Sons, Ltd.* (1911, A.C., p. 693), in which Lord Gorell in a considered judgment fully analyzed the principles of "passing off." He had taken immense pains over this judgment, and expressed his satisfaction to the present writer at the results of his work.

The action was brought by the appellants for the purpose of restraining the respondents from passing off their laundry blues, tints, or dyes as the goods of the appellants by imitating the get-up of the appellants' goods. In 1884, William Edge patented certain

laundry blues, got up in a special manner, and in 1893 he did the same with certain tints. His business was taken over by the plaintiff company in 1894. In 1891 the patent, which was clearly bad, had been revoked. Until the respondents took the action complained of no one except the plaintiffs had sold blues and tints done up in the same way as the appellants' well-advertised articles. The manner in which the goods were done up had become associated in the minds of purchasers with the appellants' goods. The respondent company was formed in 1907, taking over a business which made and sold tints and dyes done up in a different way from the appellants'. The respondents subsequently adopted the appellants' methods of wrapping and parcelling up specified in the revoked letters patent. The only difference was that the respondents added a label bearing the name "Niccolls." The complaint made by the appellants was that the get-up of the respondents' goods so nearly resembled the get-up of appellants' goods as to be calculated to deceive and to lead to the respondents' goods being passed off on persons who wished to buy the appellants' goods. The real question, Lord Gorell said (after a statement of fact that practically disposed of the case), was "one of fact, namely, whether the defendants' goods so resemble the plaintiffs' as to be calculated to deceive the persons who buy?" The respondents argued that they had a right to make an article the subject of an exhausted patent, that the appellants wanted to stop them selling an article of general utility; but these points were beside the mark. The only real issue was whether the respondents' course of action was calculated to lead to their goods being

mistaken for those of the appellants. The use of the name "Niccolls" did not prevent purchasers from the retail trade being deceived, even though they did not know the name of "Edge."

On June 16 Lord Gorell, in the case of *T. W. Thomas and Co., Ltd.* v. *The Portsea Steamship Company, Ltd.* (1912, A.C., 1), took an interesting and very important point on a question of construction—namely, whether under certain circumstances an arbitration clause contained in a charter party should be read into a bill of lading. Lord Gorell after pointing out that if it were in fact read into the bill of lading it would prove inconsistent with the terms of a negotiable instrument, declared that it would have, moreover, the effect of ousting the parties from the jurisdiction of the Court. "Now I think, broadly speaking, that very clear language should be introduced into any contract which is to have that effect." In other words, the jurisdiction of the Court cannot be excluded by any but the clearest intention on the part of the parties to a contract. Here is a broad principle of law of great importance.

In the very important case of *De Beers Consolidated Mines, Ltd.* v. *British South Africa Company* (1912, A.C., 52) Lord Gorell agreed with the other peers that the agreement by the plaintiff company to grant to the British South Africa Company an exclusive right or lease to work in perpetuity all the diamondiferous ground in the territories of the plaintiff company was not part of a contemporaneous mortgage transaction by which the plaintiff company issued debentures secured by a floating charge on the plaintiff company's undertaking which were accepted by the British South Africa Company in satisfaction

of a debt owing by the plaintiff company and of a further advance. These debentures were duly paid off. The Court of Appeal had held that the stipulation for the lease was a clog on the equity of redemption, and the Lords reversed, as a matter of construction of the agreement, the decision. Lord Gorell, agreeing with Lords Atkinson, Halsbury, and Loreburn, questioned the applicability of the doctrine of the clogging of an equity of redemption "to the case of floating debentures when the mortgagor is left able to deal with the assets included in the charge and there is no specific charge created in the first instance, but the charge crystallizes on a subsequent event and the debenture holders cannot recover more than the amounts payable under the debentures."

A very different type of case was *Daniel Morgan* v. *William Dixon, Ltd.* (1912, A.C., p. 74). In this case a workman who had given notice of an accident within the meaning of the Workman's Compensation Act, 1906, refused to submit himself for medical examination by a medical practitioner provided by his employers except upon the condition that his own medical attendant should be present throughout the examination. There were no special circumstances which required the presence of the medical attendant. Lord Gorell based his decision against the workman's contention on the ground that law is a reasonable thing. The workman's proposition "leaves out of consideration altogether what in these cases is practically a question of fact, whether it is reasonable or not for the workman to have his medical attendant present at the examination made on behalf of the employer." The burden was on the workman to show that there was some reason for the attendance of a

further medical man. The case of *Banknock Coal Company* v. *Lawrie* (1912, A.C., 105), a case of compensation for death by accident in which the respondent sought to remove the cause to a Court other than that in which the case was brought, is an instance of the apparent ease with which Lord Gorell brought himself to the consideration of the technique and practice of an unfamiliar system of law, in this case Scots law. His lengthy judgment in this case is lucidity itself.

In the case of *Crawford and Law* v. *Allan Line Steamship Company, Ltd.* (1912, A.C., 130), the appellants claimed for damage to certain sacks or bags of flour carried on the respondents' steamship *Corinthian* from New York to Glasgow. The object of the action was to stop the loading of flour at New York in wet weather. The flour was despatched under through-bills of lading from Minneapolis for Glasgow. The sacks or bags when delivered to the inland carriers were in apparent good condition. The conditions in the bills of lading fell into two parts. The first dealt with the service by the inland carriers to the port of New York, which terminated with delivery to the steamer. The delivery in this case was from the inland carriers' lighters when the sacks were placed in the steamer's slings to be hoisted on board the steamer. The second part of the conditions dealt with the service after delivery to the steamer until delivery at Glasgow. When the bags arrived at Glasgow it was found that 4,132 were "caked"—that is to say, with a layer hardened by water, in this case fresh water. When the respondents received the bags at New York from the inland carriers 110 sacks were caked or wet. The respon-

dents did not prove that the damage beyond this was done before they received the goods. The bags became wetted in the loading, though precautions were taken to avoid this. In cases of through-bills of lading the consignors and consignees have no control over the transit, and if the shipowner accepts the goods in apparent good order and condition he takes the responsibility of delivering them in that order and condition, except in so far as it is shown that the damage was done before he received the goods or was caused by perils excepted in his part of the contract. The fact that there was an immense shipment of flour and that the owners in order to prevent delay loaded in spite of the weather and had no time for an adequate examination and therefore were unable to notify the inland carriers as to the extent of the cargo being caked or wet did not aid the shipowners. "If they wish to protect themselves they must make a proper examination." The case is a good instance of common sense applied to a series of very complicated commercial documents.

Lord Gorell was present in the House on February 27, 1912, at the hearing of the case of *Glasgow and South-Western Railway Company* v. *The Provost, etc., of the Burgh of Ayr* (1912, A.C., 520), and agreed with the judgment of the House. On December 15, 1911, he had delivered a lengthy judgment (which was in effect the judgment of the House) in the case of *The Attorney-General* v. *Birmingham, Tame, and Rea District Drainage Board* (1912, A.C., 788). This case, dealing with the alleged pollution of the River Tame in respect of which an injunction had been granted, was after an exhaustive examination summed up as follows by Lord Gorell:

"Looking broadly at this case, it seems to me that it was one in which for a time there was a statutory breach for which an injunction could be obtained, but that that breach was rectified before the final decision. The respondents had made every effort to cope with the difficulty, had expended large sums in doing so, and had, according to the facts found, been successful. They have been ordered to pay the costs of the proceedings so far; the result is that in my opinion there was nothing to prevent the Court of Appeal from discharging or moulding the injunction as it thought fit in the circumstances or taking an undertaking in lieu of an injunction, but the undertaking should not give rise to question as to lessening the future duties of the respondent."

On July 26, 1912, the hearing was finally disposed of. This case is the last judgment by Lord Gorell that appears in the law reports, and it certainly bears the impress of that passion for common sense which underlies all his decisions.

CHAPTER VII

AT HOME AND ABROAD

A LARGE enjoyment of life, pleasant company, splendid scenery, and noble art was one of the salient traits of Lord Gorell's character. Whatever he did, he did with all his might, and this was as true of his pleasures as of his work. Devoted, as we have seen, to athletics at school, at Cambridge, and at Chester, he remained an active man all his life, though in later years he was careful not to exhaust his physical energies when mental activity demanded so much of his available strength. He did not think that mental fatigue is relieved by physical exercise, and believed that physical rest is necessary to the tired brain. He, however, very often rode in the morning before Court and found it helpful between the preparation of cases (in bed in the very early morning) and the day's work. He greatly believed in travel and especially foreign travel, and few men secured a greater share of this form of recreation.

In 1871, in the interval between his early business experience and the date of joining the firm of solicitors, Messrs. Bateson and Robinson, with whom he acquired so great a grasp of Admiralty work, he formed a party of seven to visit Egypt and the Holy Land. In a letter to his mother, then at Naples with his sisters, from Ismailia, dated February 23,

1871, he says: "On Saturday last we saw the Pyramids and I found I knew them thoroughly." In his notes, written in 1912, he recalls the fact that he had studied the plan of the Great Pyramid so thoroughly that he was able to warn his friends to look out for a particular step or drop in one of the passages. He went to Heliopolis, "and saw the cultivation of the country wonderfully carried out by means of irrigation." They enjoyed Cairo and its crowds and runners, and revelled in *Lucia di Lammermoor* at the Opera House. Ismailia they found delightful, sailed on the lake, swam, rowed to the entrance of the canal: "It looks narrower than I fancied, but I'm convinced it's a perfect success. A large steamer came in while we sailed. Strange it is to see two of them in what was a desert."

The rest of the tour can be given in Barnes's own words, from the account, written for his mother, which has been preserved:

"On February 26 last, myself and party of friends found ourselves at six o'clock in the morning on board the steamer *Inus*, within sight of the port of Jaffa or Joppa. We rushed on deck to welcome the sun rising over the mountains of Judea, as we had passed the night under the cabin table, all the berths being filled with Cook's savages (not the Pacific Islanders, but tourists under the convoy of Cook the Excursionist, who are in Palestine called *Cuckoos* in consequence of their arrival being always in spring, and from their ousting everyone else from their nests).

"The view before us was magnificent. On rising ground close to the sea lay Jaffa or Joppa, with its flat roofs and grey walls glittering in the morning sun. Beyond and to the north and south ran the flat country which stretches to the foot of the moun-

tains and which was covered with thick groves of orange and lemon trees. Far in the distance were the blue hills of Judea with the golden sun just topping them. To us, who had a few weeks before been skating on the meadows at Sefton and coughing amid the English fogs, it was like a peep at *paradise*, an illusion soon to be dissipated, however, for on our landing, which our dragoman or servant *Ramadan* accomplished before the Cuckoos could secure all the boats, we rowed through the passages in the rocks surrounding the port and stepped out into a scene of indescribable filth and confusion. Hundreds of squalid, dirty Arabs crowded round us and hurried our luggage into a Custom house *not* like ours at Liverpool, but a cellar filled with stinking hides and boxes of oranges. Here, by means of a judicious tip applied by our Arab servant to the dignified old Turk, who presided over the Sultan's Customs, we got rid of a tedious examination, and piling our portmanteaus on Arabs' backs, set off for a German inn outside the town. The streets are only a few feet wide, but several feet in mud; mats are hung over the top to keep the burning rays of the sun out, and in many places the streets pass underneath the houses, which are arched over them. Camels bearing heavy loads of oranges, asses with Arabs riding over them, veiled women and filthy children crowded these narrow valleys.

"After depositing our boxes and engaging sleeping rooms, we visited the house of Simon the Tanner. This house is supposed to be built on the site of the real house which fell down a hundred years ago, as the aged keeper told us. It stands now, as the Bible says in Acts x., "by the seaside," and curiously enough we found some tanyards close to the place. The house itself consists of two square rooms with arched roofs, and there is a stone staircase outside to mount by on to the roof, and it was on this that St. Peter's trance took place.

"There being nothing else ancient of interest to

see, we proceeded to call upon an English lady, Miss Arnott, who, living there without another Englishwoman in the place, has devoted herself to educating little children, collecting them from all religions. We found about thirty reading and singing in English and Arabic, the oldest of whom might be twelve or thirteen. Several at this age were to be married in a few days.

"After this we wandered into the country to see the beautiful orange groves, and so tempting were the golden fruits that I could not resist climbing a hedge to get one, but my foot catching I fell headlong some ten feet into the grove spiking myself with the prickly cactus. I was, however, rewarded by the loveliness of the grove: enormous oranges, some measuring fifteen or sixteen inches round, hung in thousands on the trees and formed a bright contrast to the green foliage. I plucked one and was quietly coming out again when I heard yells and shrieks of half a dozen Arabs, who on my issuing from the hedge collared me, with their dirty hands in my neck, and dragged me off to the Consul with such horrible and infernal yells in Arabic as nearly to deafen me. My friends looked on with great laughter, but for me it was no joke. After going a few hundred yards I held out a shilling, which was pocketed by them without producing any effect. By this time their master had come up, more irate and jabbering worse than they did. I held out another shilling to him, saying in Arabic 'one shilling for one orange.' But he pushed it back and made the man who had the other refund it.

"Still, I thought, shillings are useful here in difficulties, so ought they to be there, and I tried again and this time with success, for they pocketed the one I offered and let me go, still however cursing me in Arabic.

"I learned from an old Cockney living among a number of Americans and Germans who have founded a colony there to await the coming of Christ

that the Arabs are exceedingly jealous of any persons entering their orange groves, and would perhaps maltreat them if no assistance were near. My friends fortunately prevented that. This same old Cockney pointed out to us a place which he called Solomon's Arbour, puzzling us much as we did not remember that Solomon had a country villa here. It was not until some time afterwards that we found he meant the old port or harbour made by Solomon.

"Next day we took horses to Ramleh, which is considered to be Arimathea to which Joseph belonged. Here and at Lydda, or Lud, there is nothing very remarkable connected with early times save a beautiful remnant of a church at Lydda, built by our King Richard, Cœur de Lion, during the Crusades, now divided between the Greek Church and the Mohammedans. We slept in a Russian Convent built for the accommodation of Russian pilgrims. A minaret or tower of a mosque overlooked this, and at intervals during the night a dervish cried out the hour and '*Allah Akba Islam*—There is no God but one God, and Mahomet is his prophet.'

"Early the following morning we started for the long ride up to Jerusalem. Our baggage was piled on to *one* mule until the poor brute was nearly hidden, but to this was added its driver's weight, for he clambered up on to the top of the portmanteaus, and so persuasive are their methods of making animals progress, that this mule went faster for the thirty miles than our horses. These modes are: twitching the tail, biting it, or running a bradawl into the wretched animal's backbone.

"On our route we passed through the valley of Aijalon, leaving on our left the hill from which Joshua commanded the sun and moon to stand still while the pursuit of the five kings and their armies was continued. And we noticed that the valley was studded everywhere with stones, supposed to be stones which fell from heaven on them.

"Further away to the left was Samuel's tomb at

Ramah. Kirjath Jearim was the first village of importance we entered. Now it is called *Abu Gaash*, from a great robber who levied blackmail on all travellers.

"Next we crossed the brook from which David took the smooth pebbles for his combat with Goliath. I tried to find some smooth pebbles, but could not, they were all rough. Whereupon a waggish friend remarked that David must have taken them all. Two rich old Turks had here spread their carpet in a field and were saying their prayers and bowing towards Mecca.

"Then one dragoman pointed out the place where David is said to have killed the lion and the bear. From this we mounted the summit of a hill, and the view of Jerusalem burst upon us. In approaching from this side the view is much spoilt by the new large Russian convent built rather above the town. We descended slightly from this to the gate, for on this side the ground is higher outside the walls than the town, while on the other side there is a precipitous descent from the walls. We were preparing to enjoy the entrance into the town when an awful fight arose between the commissioners from the two hotels as to which should have us. They leapt from their horses and fought with sticks and stones till we interfered, and one dragoman settled the dispute by going to the Hotel Mediterranean. When asked if this was the better, he astonished us by his familiarity with slang English by saying: 'Ho yaas, that other man no gammon me, I tell him Hi Cockey not for Shoce. See any greens in my eyes.'

"That modern and ancient Jerusalem are entirely different may be judged from the fact that even on the top of Mount Zion the accumulation of ruins and débris is 50 feet in depth, while in the Valley of the Tyropeon, which divides Mount Zion from the Temple, the accumulation is about 150 feet. So that scarcely anything ancient now exists except the

foundations of the Temple, consisting of enormous stones some 30 feet in length; a remnant of the arch which led from the Temple to Solomon's Place on Mount Zion and used by him as an ascent to the Temple; and the aqueduct which watered the city. Inside the large plateau which was occupied by the Temple and its courts now stands the beautiful Mosque of Omar, into which until recently, none save Mohammedans were admitted, and many Jews and Christians have been stoned, beaten, and nearly killed on having wandered in. We required a guard with us and were only permitted a few minutes inside. Through the floor projects the summit of the Mount Moriah on which the Temple stood, and on this rock was the altar of incense. A small cavern exists underneath into which the blood of the victims flowed through a hole pierced in the rock. Here they showed us the pretended mark of Mahomet's turban when he tried to lift the rock, and above the pretended marks of the Angel Gabriel's fingers, who is said to have held it down. Every place in Jerusalem has the most absurd legends and tales attached to it. But it is really considered true that Abraham worshipped in this cave. Small mosques and some fine cypress and olive trees are placed all over the plateau, forming of it even now the most beautiful place in the world. We had not much time to investigate it, for the Mohammedans began to come in, causing our guards to hurry us out for fear of their attacking us. Outside in a small court a large number of Jews, who assemble there every Saturday (their Sunday), were lamenting over their city, their fallen condition and their Temple, the very entrance of which is now closed against them. Men in long fur cloaks and caps, with their hair grown long in front of their ears and hanging down these in two curls (which is a sign that they are Pharisees); women in white, hooded but not veiled, and even little children were kissing the great stones of the Temple and weeping as if their hearts were breaking.

"Leaving this affecting sight we met with a Jewish wedding procession, into which we at once joined to see the fun. The wedding ceremony had been performed and the bridegroom was at his house, to which the bride was being led. Women went in front with lights and musicians played on flutes, etc. Two other women supported the bride, who was veiled from head to foot in white, and occasionally they gave her rose-water to drink to cheer her spirits, a drink like tea which cheers but not inebriates. We followed them into the courtyard of the house, while the music became louder and louder, up the stairs outside the house into an upper room in which we found none but women preparing to dance, and the poor bridegroom, who was a mild-looking man of *twelve* years of age, sitting between his bride and an awful looking mother-in-law. The miserable boy never raised his eyes from the Old Testament he was reading; but as they would continue no further ceremonies and the girls would not dance till we departed, I adopted Mark Twain's words: 'Dutton' said I, 'pass'; and we all passed out.

"Afterwards we went to a small synagogue to witness the celebration of the Feast of Purim. Hundreds of Jews were crowded indiscriminately into a room not bigger than this and were reading the Book of Esther in Hebrew when we arrived; but soon they commenced to sing hymns, the most horrible squalling I ever heard, all through their noses, just such noses as you can see any day in Lewis's shop in Liverpool.

"Perhaps the most extraordinary religious ceremony we met with was that of the whirling dervishes at Cairo. We first entered an upper room; the Chief Dervish bowed to us with the usual Arab salutation and ordered us coffee. After partaking, we all went into a large building with a portion railed off, inside which after they had bowed gravely to each other half a dozen times, twelve or fourteen dervishes commenced to whirl to the tune of horribly discordant flutes. They had long petticoats and

hats like inverted flower-pots. Three separate times they whirled like tops for five minutes till they made our heads reel, but no sign of giddiness did one of them exhibit. The ceremony ended with one yell. It was more pitiable than ludicrous, as the poor fanatics looked miserably pale.

"I have not time to describe a quarter of what we saw, much less to give you any idea of Jerusalem itself; with people from all parts of the world and in every costume crowding streets no better than those of Joppa. But I must tell you how the whole city is undermined with enormous quarries from which the Temple was built and in which may still be seen immense stones which had not been required. We were lost for some time in this awful place and wandered about in search of an exit till at last our guide (much good he was) saw a small light which he thought was near the Temple, but turned out to be the hole we entered at.

"Nothing is known of the site of the Holy Sepulchre, of the place of Crucifixion, or of any of the places connected with our Lord's last days. But the English clergyman pointed out to me a rising knoll outside the City which is in the opinion of some clever men the place of Crucifixion. Below it, large rocks have been rent in twain and have fallen down. The north road to Anothoth runs close to it, so that people would pass by the scene, and the women would stand afar off on the other side of the Valley of Jehoshaphat.

"The whole of this valley is filled with tombs which reach far up the Mount of Olives. Jews are buried now, and have been buried here from time to time immemorial until the whole is dotted with white tombs. It is in fact the great object of a Jew to be buried here because they believe that the judgment will take place there, which is also a belief among the Mohammedans, who think Mahomet will come and judge them sitting astride of a round pillar which overhangs the valley from the Temple.

"Absalom's tomb is the most beautiful here. It is cut out of the solid rock, with a tall spire of masonry. Every good man as he passes it throws a stone at the burial place of one who proved such a rebellious son. And the accumulation of stones is so great that the tomb has to be periodically cleared.

"Lower down the valley is the Pool of Siloam, now merely a small spring issuing from a long, low subterranean passage, and on the opposite side of the Valley of Gehimone is the hill on which Judas is supposed to have hanged himself.

"From Jerusalem we took horses (some of them such wretched animals as to merit Mark Twain's description 'that they seemed ready to lean up against a wall and think') and riding over the Mount of Olives, past the Garden of Gethsemane and the spots on which Christ was accustomed to preach and from which the view of Jerusalem is so magnificent, we came to Bethany. Here we visited what is supposed to be the tomb of Lazarus. A very steep flight of steps cut in the rock led into a small square chamber, from which a little passage ran into a grave where the recalling of Lazarus to life must have taken place and whence he must have come in the awful manner described in the Bible.

"Further on we again met Cook's party, who had had all sorts of disasters to the old ladies of the party, one of whom I had overheard whispering to the dragoman at Jaffa: 'I've never ridden before, so when the others gallop you'll hold me on, won't you?' We reached Jericho at six in the evening, passing down the Valley of the Brook Cherith, and would you believe it, our dragoman showed us the place where the man fell among thieves?

"At the ruins of Jericho we spent two days in tents and found the fountain which Elisha cured and the remnants of the walls of Jericho which may have been those which fell down when the Israelites walked round them.

"Then we rode past modern Jericho, a mere collec-

tion of mud huts from the tops of which dogs barked at us, but no one appeared, so that you could not wish anyone a worse fate than to *go to Jericho*. From this to the Jordan danger was to be apprehended from the Bedouin Arabs. We had a guard of four Arabs and the son of the Sheik of Bethany: a small body of eight or nine and one of the best riders I ever saw.

"Suddenly as we rode a Bedouin was seen in the distance, and our dragoman shouted 'Stop!' (which meant really 'Prepare for galloping back to Jerusalem') and then he galloped forward to reconnoitre. He could find no one, so we proceeded somewhat anxiously, for our guard was of no use except to recognize the rascals who might rob us, and then the Governor of Jerusalem would wring damages out of their village.

"We bathed in the Jordan about the place where the Israelites crossed over, and to this place thousands of Russian and Armenian Pilgrims come at Easter, headed by the Governor of Jerusalem, and on arrival at the bank, strip, men and women, and bathe altogether in a fervour of religious enthusiasm without any idea of impropriety. Poor superstitious people, they crawl on hands and knees into the place which is shown as our Lord's tomb, and consider their souls eternally saved if they can sleep round it. Half Jerusalem lives by selling holy beads and other relics, with which many pilgrims drive a retail trade on their return home.

"We rode on to the Dead Sea and had a swim, over the top of Sodom and Gomorrah. It is as easy to swim in it as to lie on a bed, but the salt is intensely painful to the eyes or taste. Many dead fish were lying on the banks which had come down from the Jordan and were killed by the salt. And for the benefit of those who think the contrary, for you know some persons believe that birds cannot fly over the Dead Sea, I may say that they *can* fly over it. In fact we saw a large flight of some birds like starlings.

"Turning our backs on the Dead Sea and the

Mountains of Moab, we climbed, without meeting any Bedouins, up to the Greek Convent of Marsaba in the Valley of the Kidron, which was stormed in the sixth century by the Persians, who had put to death 400 monks, several of whose heads are set for pilgrims to kiss. It was a lovely moonlight night and after our supper I went out on the outer wall of the convent, which overlooks the precipice, and could distinctly see the jackals in the bottom of the valley. I hurled some large stones down at them, but the moment each stone left my hand they seemed to see it against the clear sky and dodged it easily. No ladies are ever admitted into the convent, which excited great wrath in Miss Martineau, who was compelled to camp outside.

"The following morning we rode up to Bethlehem, where, under a church, the oldest Christian building in the world, built by the Empress Helena, is now shown the place where Christ was born, for almost every holy place in the East is a cave. Of course this is untrue, but it imposes on the pilgrims. The Church is divided between the Roman Catholics, Greeks, and Armenians, each of whom have an entrance to the holy Grotto. Bethlehem has most lovely vineyards and produces a wine tasting like small beer. It is generally more fertile than all the rest of the country, and must have formed fine pasture for Jesse's flocks when David tended them.

"Outside this and all the towns miserable old beggars sit as described in the Bible, 'by the wayside begging.' They are chiefly old women, and many of them are lepers, who come forward to you as you pass, whining like whipped dogs, and holding up their disgusting hands and arms, which the leprosy had either withered away leaving nothing but stumps, or else has bent and twisted till they look more like bits of dried stick than anything else. It is one of the most horrible sights of the East.

"Our return to Jerusalem and thence to Jaffa concluded our tour and must conclude my writing."

In 1874 Barnes paid his first visit to Switzerland and threw himself into hotel life at Pontresina. Dr. Maclagan (also a Peterhouse man and later Archbishop of York) was at the same hotel. A curious picture is drawn by Barnes of hotel amusements in those days.

"We are introduced to Joachim Müller, the American poet, who assisted me in some theatricals, where he read some Latin out from Justinian's 'Institutes' with an extraordinary American accent, till those who knew Latin, many of them clergymen, were convulsed, and who, when asked to swear in a jury of charming girls who were supposed to be trying Shylock, looked fixedly at them for a few moments and then in clear American tones said: 'Damn you, sit down'—(convulsions on part of girls and shock of clergy and others). We had great amusement and society all our time and splendid walks up the mountains. I had a splendid climb round Bernina group, ascending by the Rosegg glacier and coming back over the Bellavista Festung with three other men."

The party walked on to Lugano by way of Maloja, Chiavenna and Cadenabbia and thence up the Val Ansasea to Maeunaga and eventually worked into the Rhone Valley and on to Lucerne, climbed the Rigi and hurled their alpenstocks over a precipice: a pretty stiff tour to which Lord Gorell looked back with envy "later in life when I was exhausted and fagged with work." A taste was acquired. In 1875 a trip to the Eggishorne and over the Simplon to the Lakes and on to Venice was carried out, while in 1876 the party went to Arolla and had some fine climbing. Barnes and his sisters on one occasion started from the Pavilion de Mont Fletrie at 3.0 a.m.:

"Up the Col du Geant in a thick fog which lasted till we reached the top of the Col. There we, as it were, pushed our heads through the clouds, and saw a vast sea of cloud with the tops of the mountains striking up through it and extending for an immense distance over the western side. The Swiss side was quite clear."

In 1877 the party were at Pontresina again, and there his sister Georgina became engaged to Mr. A. F. Warr. Many vacations were spent there:

"The absolute freedom and pleasure they gave are never to be forgotten, and even as age creeps on, one can recall with joy many of the incidents of our young walking days. After I married, my rambles were wider, but I and my wife retained a great affection for Pontresina. Even now, if I were to search at the Kronenhof, I believe I should find my old axe and rope and some flower-pots with which we used to decorate our rooms. I think we were popular, and I know we always had a splendid time."

These words, written in 1912, show how deeply the pure joys of life had entered into the writer's soul, and that feeling was not to be washed out by the avalanche of law and of the sadder sides of human nature that the coming years were to bring. The trips were fortunate for his sisters, since Linda Barnes became engaged to Henry Morgan, later Master of Jesus College, Cambridge. The travelling was not always on pleasure. In 1879 Barnes and his sister Linda went (after a trip to Pontresina) to Lisbon—where he had a great underwriting case which involved "two months of awfully hard work" taking evidence on commission.

Of Lisbon he says nothing, though the beauties of the Tagus might well have fascinated his keenly observant eye.

In 1881 Barnes and his sister Linda were still living at 80, Kensington Park Road. On April 30, 1881, he was married to Mary Humpston Mitchell, eldest daughter of Thomas Mitchell of West Arthurlie in Scotland. The grandmother, Mrs. Ronald, was of Derbyshire origin, and some of her relations, through whom Barnes came to know the Mitchells in Kensington, had lived near the Barnes family at Anfield. He had known Miss Mitchell fairly well before the trip to Lisbon, and they had had opportunities of meeting in London, despite the growth of Barnes's practice, and in the Easter holidays of 1880 the engagement was announced.

In the Long Vacation Barnes stayed with the Mitchells at Hope Park, Blairgowrie, and in the following Easter Vacation the happy pair were married by the Rev. Dr. Black at 7, Windsor Terrace, West Glasgow, in the drawing-room, in the fashion of the United Presbyterian Church. Barnes writes amusingly of the marriage. He was afraid of the practical dangers of private international law:

"I had banns cried in Kensington Church and also in the Parish Church of Govan (I think), Glasgow, and I took other steps to be sure the marriage was all right, as she was resident in Scotland and I in England. At that time I was not so familiar as I afterwards became with the necessary law and the formalities to deal with such a case, and I thought I had better make matters quite clear."

The ceremony on "the hearth rug" at 7, Windsor Terrace, amidst crowds of relations and friends,

left a deep impression on Barnes's mind, and he has given in his notes for his children a detailed account of it all. A very brief honeymoon began a marriage which was to be "filled with the most intense community of thought and has been blessed with the constant enjoyment of union. What I owe to her I cannot attempt adequately to describe." The Long Vacation gave Barnes a period of rest from the rapidly increasing burden of practice, and the newly married pair went with Linda Barnes, Annie Mitchell, and Henry Morgan to Switzerland and Italy.

Henry (the second Lord Gorell) was born on January 21, 1882. In the Long Vacation of that year Barnes and his wife went for a trip to Canada and the United States, sailing on the Allan Liner *Nova Scotian* from Liverpool to St. John's, Newfoundland, on August 15. A diary of the voyage in letter form, crisp and amusing, survives. A very bad passage from St. John's to Halifax is vividly described: "Casualties of storm: one elderly man—shoulder dislocated by being thrown right across vessel; one woman—ribs broken in similar; one puppy—the last from Newfoundland—killed; crockery, etc., etc., etc., smashed." The Mitchells had many connections in St. John's, and this added to the pleasures of new surroundings. The mysteries and smell of the cod industry were revealed to the inquisitive lawyer. "There were no Newfoundland dogs in Newfoundland. The only puppy was one killed in the storm I have described." On September 12 they were on a Lake Ontario steamer, and Barnes is struggling to write to Mrs. Mitchell. The letter is continued on shore and contains a pen and ink

sketch of a negress who supplied them with exquisite lemon sherbet—"the sort of thing one reads of in the 'Arabian Nights.'" On September 23 he writes from New York in the intense heat of that late autumn. The letters are full of acute critical observations—the New York cars were anathema—and the highest spirits. Philadelphia he found energetic and go-ahead. They had a letter of introduction to a very go-ahead lady of whom Barnes supplies an amazing pen and ink sketch to supplement the following description:

"She was a long, ghostly looking creature with a loose calico frock and scraggy bonnet with things under her chin—red and white. Stockings with a hole in one, and a dot-and-go-one way of going down stairs. We called her the 'Scraggy 'un.' When we called she kept us waiting half an hour while she 'fixed up'—you see the result when she was fixed up. She was very nice, but awfully scraggy. Well, we thought that woman would be the death of us. Just let me tell you roughly what we saw in one morning under her guidance. Met her 9.30. Saw her brother's office. Independence Hall with a crowd of detailed sights in it—rooms where portraits were, relics of the 'independence' times. Top of a tower there, view over city. Carpenter's Hall, where Congress sat for it. All down Chestnut Street, where the business goes on. Post Office, Customs House, Merchants' Exchange, Christ Church, an old Church of Queen Anne's time, Penn's Cottage where William Penn first lived, Ladna Coffee House, dated from 1702, Front Street, Walter Street, to see the river and harbour, Court House. Then to New Church, which the verger called 'plain but costly.' Public buildings, Wanamaker's store (Whiteley of Philadelphia), and she was still game for more, but we got rid of her for one hour's rest.

But, oh, goodness ! she was at us again at the end of it, and dragged us to the Park, etc., etc., etc., till I literally got off the cars and left her—Oh ! the relief. Dear madam, a day more would have killed your dear child."

On October 2 they were in the White Mountains, after many American adventures, including the amazing experience of hearing Dr. Talmage preach on the Prodigal Son. Barnes's criticism of New York and especially Fifth Avenue is a little caustic. The people there were not the folk of Pall Mall and Rotten Row. "The street itself is a dull, uninteresting, ugly, long alley. Here and there, it is true, there is a magnificent church, but they are all utterly spoilt by being crammed into too small a space close up to the road and houses against them." They were delighted with Harvard and its President, and found the White Mountains wonderful. Next they went on to Quebec and sailed by the *Peruvian*. "A great trip and very expanding to the mind."

In 1883 Barnes and his wife went to Holland for Easter and in the Long Vacation to Pontresina. On April 16, 1884, Ronald (the present Lord Gorell), was born. Just about this time Barnes, on the suggestion of his uncle, Alfred Barnes, the Member of Parliament for the Eastern Division of Derbyshire, decided to stand for Parliament. Fortunately this decision came to nothing. In the autumn of this year there was a long expedition to Norway, Sweden, Finland, Russia, Poland and Germany. Barnes was always able to take these extended holidays, and no doubt the complete relaxation was necessary after the pressure of the Law sittings.

It is impossible not to quote a charming letter which he wrote on the trip to his little son Henry. It is written from:

ST. PETERSBURG, RUSSIA,
Friday, September 20, 1884.

FOR HENRY.

"MY DEAR SON,

"Dear Mother and I are far away. When you are a big man you shall come here and see all the world. We sailed away in a real big boat. Oh, such a big boat. Wouldn't you like to come in a real big boat? Then we came to a far-away land. Then we drove in a little carriage, and we drove and drove and saw in that Far Land such funny piggies. Little piggies all running about the roads and some had funny pieces of wood on their necks. This is like a piggy with the wood on its neck [*sketch*]. And then in a larger town we found Aunt Ge and Uncle Gus, and we were all happy. Aunt Ge and Uncle Gus and Aunt Linda and Uncle Henry and dear Mother and I all together went to another far land, and then dear Mother and I came away alone to another far land, in another real big boat for days and days. There are lots of sojers here, such lots and lots of little carriages and horses. We are very well and soon we will come home and stop with you and baby brother. We shall be so glad to see you and baby brother. Give dear Grama a kiss from us and also to Aunt Annie and Aunt Nellie. Give dear baby brother a long loving kiss from dear Mother and dear Father.

"YOUR DEAR FATHER."

This letter to a little boy of three is quoted as characteristic of that essential tenderness of nature which underlay the whole of Barnes's life and work. Even in his judgments in sad cases it is possible for

those who have eyes to see to find it peering out, and it is the dominating note of all his letters, letters too private and personal to quote. But this little letter, itself like a Russian folk-story, will suggest everything.

In 1885 they were at St. Moritz. Aura, the only daughter, was born on January 31, 1887. In 1887 the family moved from 80, Kensington Park Road, and settled at 14, Kensington Park Gardens. The same year they went to Italy (a "pedestrian's journal" is extant), Greece, and Constantinople.

"We had a splendid time there, saw most of its fine sights, and stayed one night with the Cliftons at Candilli. I had known of him through a case; he was a barrister there. Mizzi who opposed him in the case I met also. He was a wonderful linguist who could, he said, cross-examine in eight languages."

The trip ended with a great sorrow for Mrs. Barnes. Her mother, who was staying at Territet, died there in the autumn. Barnes had seen her on the way home. He was devoted to his mother-in-law. "Her sweet nature has been lost to us, but has left its mark very vividly in the character of her children."

In 1888 they were again in the Engadine and went on to Venice, and took a steamer to Trieste and on to the Grecian Isles.

"We reached Patras and landed at four or five in the morning and came by train up the Gulf of Corinth. The sweet one kept repeating snatches of ancient Greek history to me—passages from Byron and the Acts of the Apostles. The whole way was through vineyards and olive-yards and pomegranates and the débris of earthquakes. It was enchanting, and we had a learned professor of Greek from Oxford

who had spent all his life learning Greek and could not exchange a word with anyone of modern times. English education is wonderful. We were able to explain most of the localities to him."

And so past Corinth to Athens. When at last they stood beneath the Parthenon,

"I was transfixed—the ruin is still so grand, the columns so perfect still, the view round over Athens, Lycabittus, Hymettus, Parnassus, Piræus and the Islands so magnificent that you will pardon me in my first and only disagreement with Mary when she considered that Carlton Hill is finer and more in accordance with modern ideas. . . . We stood also on Mars' Hill. There was no audience to address."

They went on to Constantinople. On the way, as the boat passed the plain of Troy, Mrs. Barnes "recited verses from Homer and Virgil." The view from the entrance to the Golden Horn fascinated them:

"I cannot describe this adequately in a letter: Asia on one side, Europe on the other, and . . . in between are sights to take one's breath away. . . . I have bought a fez, but can't wear it because only Turkish subjects wear it, and by wearing it one acknowledges oneself a Turk or subject to their laws, and the Consul gave me quite a fright by his shocked air at finding I had one on. And we can't go out alone for fear of losing the way: it is all so fearfully intricate. . . . Santa Sophia is enough to make one ecstatic. The columns and their capitals are more beautiful than anything we have ever seen, and were it not for the difficulty of walking in over-shoes twice too big for one, we might really have felt in paradise there. We performed a religious service in one of

the mosques—*i.e.*, we watched—we watched them wash, we watched them pray, and the effect on one when a large mass of men go down on their knees with their backs towards one and then proceed to kiss the ground is curious owing to the position and features of the body which they present. We attended a course of instruction in another mosque where at different parts priests sitting on large sacks and a table in front of them expounded the Koran to a group of students squatting before them in lovely turbans and garments. Our churches are not in it with these Turks for the picturesque. We can't go out at night without a lantern. If we do we shall be put in prison, like a young Englishman was last week. The watchman passes under our window each night and knocks his stick on the ground to show the world he is about. We are to see the Sultan on Friday. We are to stay with English friends in Asia to-morrow. We are to be filled cram full with ideas and scenes, and we shall require days to tell all we see. Mary is so happy."

Winter expeditions to St. Moritz afforded Barnes much joy. His brother was the first Englishman who spent a winter there about the year 1878. When Barnes first visited the place in the winter of 1889 there was quite a coterie there and he repeated the experiment, for three weeks each time, in 1890, 1891, and 1893. (In 1892 he was the Vacation Judge and could not get away.)

"St. Moritz in winter was a novelty. . . . It is difficult to conceive anything so delightful as the sunny keen air we used to have, the bright healthy days with skating and toboganning. Ski-ing had not then been regularly introduced. The contrast in twenty-four hours was so wonderful. One morning one would be driving in wet, disagreeable weather to Victoria Station with fog and general gloom, the

next day in the evening one would be dropping down the steep hill into Tiefenkasten, surrounded by the snow-covered mountains, and after arriving at the hotel there, being welcomed by Herr and Marie Schmoeller, and the third day one would be climbing slowly over the Julier Pass and gliding rapidly down into the Engadine in time for dinner at St. Moritz. The railway has altered all this, but I don't believe that anyone can now realize the joy of a journey to the Engadine over the Julier Pass in winter who only travels by train. I could write much about those trips; they are so vividly impressed upon my memory, and I can conjure up at a moment's notice the sight of the Kulm Hotel rink on a keen, still, frosty morning when the sun was shining brightly, the blue sky overhead, and the smoke going straight up in thin columns from the chimneys with their wood fires. It was good to be alive on such days. . . . We had one memorable walk from St. Moritz to Pontresina through the woods—very hard work, ploughing through powdered snow. Fox traces were everywhere, and the woods in winter were a glorious sight. We arrived very tired at Pontresina and drove home. We knew every inch of the path through the woods in summer, but with all our knowledge it was difficult enough to get satisfactorily through when all the hollows were filled with snow."

There was exciting toboganning, but—

"Our chief occupation was skating. I had the honour of assisting in founding the St. Moritz Skating Club, which was not a club in any ordinary sense. It simply consisted in a number of good and fair skaters setting up a set of rules for tests for men and ladies, and if a candidate could pass the test he or she was considered a member of the Skating Club—no subscription nor any formal club. The tests were very hard. I remember some of those for men—all four edges, all the turns, three to a centre, twice back,

and forward, etc. These few are difficult enough to accomplish even fairly well, but when one used to see the size of figure and accuracy which were expected, and watched the judges even going on hands and knees to judge of how the turn was done, or how clear and accurate was the curve, it was possible to realize how very difficult the test could be made. I know that I could not in the time possible in my vacations pass the test, and I expect I should have taken six months' work to do so. Mary did not attempt tests, but she skated vigorously all day and sometimes suffered from severe falls. Still there was no doubt about her enjoying it all, but she did not take at all kindly to toboganning. These were halcyon days. Alas! they had to pass. Not only does age prevent the activity which is required, but the time comes when the Engadine is found too high and one has to be content with lower altitudes. I ought not to forget that in our four visits we had great fun from the evening entertainments, especially in the fancy dress balls. One year I took out my Court suit and looked very fine at the ball, and I well remember the difficulty Mary had to get the powder out of her hair in time to leave the day after one of these balls."

Barnes never ceased to be a boy at heart and there is something boyish in a Judge of the High Court appearing at a fancy dress ball in a Court suit.

In 1894 Barnes broke down in health, the result of years of overwork which much strenuous, perhaps over strenuous, holiday-making had not cured. After the illness he went to Cromer and then for a trip to America, spending some time at Lake Mohawk and later at New York. After an absence altogether of a year from work, Barnes returned, as we have seen, to new and even more strenuous judicial activities. In 1896 Barnes and his wife went again to the United

States by the *Etruria*. They had a very bad passage, which Barnes describes in detail, and adds: "I have hardly ever seen such a fine sight as the sea flying over the *Etruria* in bad weather. I was on the bridge, but found it too wet to stay long." They stayed at New York, Boston, and then at Lennox with Mr. and Mrs Marquand, whom they had met at Schwalbach in 1894.

"Theirs was a most delightful old-fashioned villa, and they had an enormous circle of friends. While there we dined with Mr. and Mrs. Westinghouse; he is of electrical fame, and had a beautiful house near Lennox. We had a most extraordinary dinner there chiefly in honour of Lord Kelvin (an old Peterhouse man) and Lady Kelvin. There was a row of electric lights round the dining-room only about one foot apart, orchids on one's napkin, and a gorgeous silk scarf to support the flowers and with a menu embossed somehow on it. There were singers specially from New York, a hall or building for some form of entertainment afterwards with carriages circulating between it and the house, electric lights down the drive for, I should think, a mile, and people who came up in private cars and slept the night in them—altogether a wonderful and magnificent entertainment. We had one very delightful drive of two days with our host and hostess to Williamstown. This was a perfectly delightful expedition; we had a 'Surrey' I think they call it. We stayed the night at the old university town of Williamstown, and came back the next day. After leaving the Marquands we went to Boston for a few days, and then to New York, and so home."

They had an interesting experience in New York at a dinner given at the Metropolitan Club in honour of Barnes:

"I met and sat next Carter, the leader of the Bar, a splendid fellow who led against Russell in the Behring Sea Arbitration at Paris. There were a large number of swells, including Beaman, who was American junior opposed to Cohen in the Alabama Arbitration, Judges Pryor, Patterson, and Williams, Choate and Ingraham, and several of the leading swell advocates. It was a gorgeous dinner and they were all most kind to me."

In New York they called on Sir Charles and Lady Russell who had been receiving almost a royal reception. They also saw Sir Frank and Lady Lockwood.

"He had got some most amusing sketches of Cleveland and others. . . . Lady Russell told us how, at the close of Russell's great address, everyone rushed to shake hands with him and her, and one lady said to her: 'Mrs. Russell, how I envy you that man. I should like to spend my life with him.' And another said to Miss Russell: 'Young woman, have you ever considered if you marry what it will be to leave that man ?' "

The jingoism of Mr. Grover Cleveland as to the boundary between British Guiana and Venezuela had been forgotten, though in the previous December war even had seemed possible. American lawyers had, however, no misapprehensions, and gladly fraternized with their English brethren in 1896.

In 1897 the American visit was repeated with great success. In these trips "we saw a great deal, learnt much, and extended our horizon of knowledge and information in many directions."

It was on one of these trips that a newspaper reporter—

"accosted me in the Waldorf to know if I would give him my views of the relative merits of the

American *v.* English systems of jurisprudence, but I successfully managed to sail before he got an interview."

In 1897 Barnes acquired the lovely house and property "Stratford Hills" at Stratford St. Mary in Suffolk. This new venture and the country life, shooting, horse-rearing, farming, and local antiquarian work which it involved was a new enjoyment into which Sir Gorell and Lady Barnes threw themselves (as did their children) with delight. Life there began in the Long Vacation of 1898. In April, 1911, Lord Gorell was elected Chairman of the Ipswich Quarter Sessions.

"'Stratford Hills' has filled a large place in our lives and in those of our children."

The new country home, of course, checked, possibly wisely, the extensive travels of these inveterate pilgrims. It was in the first winter at "Stratford Hills" on January 1, 1909, that Barnes received a letter from Lord Loreburn offering him a peerage.

"It was a momentous matter to decide. On the one hand was the Presidency with its pay and patronage, on the other the position of the peerage with the children's future to consider. I really did not hesitate; I allowed myself to act according to what I thought would produce the best service I could offer the country, and I went off with Mary to see the Lord Chancellor at his house near Deal. We had many long talks, and ultimately I sent him my resignation from my office and was created a peer as Lord Gorell of Brampton in the County of Derby. I think it difficult to look back at this time. Of course, I was gratified at the change of position to the peerage, but I lost touch at once

with the Courts I loved and all the friends I met daily, and though it is of less importance I ought to mention that I lost my salary of £5,000 a year and had in place only my pension of £3,500 a year. Clearing up my room at the Law Courts and leaving the Courts was probably one of the saddest times I ever had or was to have. . . . I took my seat at the meeting of Parliament and in consequence had quite a large number present to see me sworn in. The Chief and Collins kindly acted as my supporters. My interview with Sir A. Scott-Gatty to select my title was most amusing, and I was hugely interested in the delightful old ceremony of swearing in, with the bowing which was necessary, especially the three repeated bows of myself and my supporters to the Lord Chancellor. It was very interesting to hear my whole name and title read out in the sonorous voice of the clerk to the House."

The pleasure and interest which Barnes took in the machinery of peerage-making was touched with the same boyish delight that kept him fresh for work and pleasure through so many years. He at once plunged into the new work and worked harder as a peer even than he had worked as President of his old Division. We have already seen the multiplicity of his activities. In the winter of 1909 Lord and Lady Gorell, with their daughter, sailed for the West Indies in the *Clyde* with a number of other tourists, who made up a delightful party. The ship called at Barbados, Trinidad, Carthagena, Columbia, Colon and Jamaica. At Colon Lord Gorell and Miss Barnes crossed the Isthmus to Panama.

"We had a good sight of the great and amazing works of the Canal, and our first sight of the Pacific recalled to us all the stories of the old Spanish and

buccaneering times which Sir Frederick Treves tells so well in his book on the West Indies called 'The Cradle of the Deep.'"

They went on to Jamaica, and there met Lord Balfour of Burleigh, who was out on a commission to inquire into the position and resources of the islands, and then back to Colon and Panama. "It was awfully hot, but we did not suffer, and again I enjoyed the journey across and back very much"—this time with Lady Gorell. They found the quaint old town of Carthagena, with its grand port, "quite a dream"; they went on to Trinidad, saw the carnival, and had a "wonderful day"; then on to Barbados, and marvelled at the sugar crops, and so home, meeting with a frightful storm off the Azores, which lasted all the way to Southampton. In fact, they were nearly blown from their moorings at Cherbourg.

This journey was followed by the opening of the Divorce Commission. The whole of 1910 was taken up with the hearing of evidence, a most exhausting business, though Lord Gorell found time for many other activities. His interest in the Mercantile Marine never flagged. On July 28, 1910, he gave away the prizes on H.M.S. *Worcester*, the Thames National College; and the notes for his speech, as well as an official report of his speech, are extant. The notes compared with the text of the speech show with what entire care he prepared this, as indeed all his considered speeches. This speech is a striking instance of the pains that he took to bring home salient facts to his hearers. The speech throws a strong light on the professional purposefulness of much of his travelling:

"Some of you may wonder what on earth a gentleman standing up in a frock coat and whom you may probably consider to be a 'land lubber' has got to tell you. I have made in my time a great many voyages . . . you may be a passenger and yet learn very little. But I have stood on the bridge (a privilege granted me by many companies) beside the master, through storm, tempest, and fog, and all the other troubles to be met with in ocean navigation. I can tell you it is a great satisfaction to feel that you are in the hands of a man whose training has fitted him for his post, and who can be relied upon to deal with any difficulty in emergency, and in whose hands you feel your life safe. I have also done something myself which gives me some little qualification to address those concerned with the British Mercantile Marine. For nearly seventeen years I had the privilege to sit in the Admiralty Court in this country. I need hardly say that a landsman is in a difficulty in dealing with nautical cases, but he always has someone from the Trinity House to tell him which end of the ship is going first."

Lord Gorell went on to say that as the *Worcester* had four old boys as Elder Brothers he felt associated with the ship. He had much to say for the headmaster who moulded officers of the Mercantile Marine with that great responsibility and their duty "to uphold the character of the nation, the character of their owners, and the character of the foundations in which they received their training."

This speech is reprinted as Appendix II., as it reveals many sides of its author.

In the winter of 1910 a trip round Africa was made in a German steamer, a tremendous journey.

"We sailed from Southampton, called at Las Palmas, Teneriffe, Schwakopfmund and Ludericks-

luder, Cape Town, Port Elizabeth, Algoa Bay, Durban, Lorenzo Marques, Beira, Scinde, Mozambique, Dar-es-Salaam, Zanzibar, Tanga, Mombasa, Aden, Suez, Port Said, Naples, Marseilles, Tangiers, and Lisbon, arriving back at Southampton. This was a most interesting and exciting voyage. I arrived back late at night the day before the Commission sat again, and I got up to town by a morning train, had the car at Waterloo, got off quickly to (21) St. James's Square, and walked quietly into the Commission Room as if in no hurry about five minutes before we sat."

That was characteristic of Lord Gorell. To get all that could be got by any possibility into the time available, whether work or play, and to appear to have an amplitude of time and leisure on hand was his delight. The Divorce Commission work proved very heavy, but the Chairman, by great skill and recognition of the essential unity of the Commissioners on so many points, at last carried a number of resolutions covering the whole ground,

" and thankful I am to get to the end of them. . . . When I look back over this eventful Commission I feel that there was real accord in mostly everything except where the minority held to their views as to the causes for which divorce should be allowed. It was not till December (1911) that I finished my draft and got it ready for circulation. It was prepared mainly on the lines of the resolutions, was circulated, and Mary and I went off to Mentone."

It was about this time that he told a friend in the Park that he was suffering from Commissionitis !

During the year Lord Gorell had been ill with laryngitis, but even then he worked hard in bed at the County Courts Bill, which was introduced on

his recovery and carried. He was helped by Sir Lucius Selfe, but "found it very trying work." He was, indeed, much occupied by House of Lords legislature work at the time: the Copyright Bill, the Naval Prize Bill (which was prepared by a Committee to which he had given much time), the Stevedores Bill, the Maritime Conventions Bill.

Lord Gorell came back from Mentone late in January, 1912, and, finding at a meeting of the Divorce Commission on January 30 that a Minority Report had been determined on, the Majority Report was passed at that and one more sitting. On the evening of the day that the Majority Report was passed and Lord Gorell's work was really completed, he was taken ill, and a lengthy illness, the forerunner of his last illness, began. After a long sojourn at Eastbourne he was advised to take a voyage, and Lady Gorell came to London and arranged for a passage to Durban and back in the *Guildford Castle.* Lady Gorell's unfailing powers of self-sacrifice comes out in the story that Lord Gorell himself tells of the preparation for the voyage. Lady Gorell was determined that her husband should not go alone. He was obviously shaken to a dangerous degree by his illness. He writes:

"We were getting ready to sail when Mary was attacked by her old enemy, influenza. She was taken ill on a Friday, and we had to sail on the next Thursday or miss our boat. She just got well enough to go without real risk, but with some danger of exhaustion. We had our luggage (she and I and Aura) in a 'bus, and she and I drove in a good taxi of Reader's. Aura, Williams, and Seabrook went in the 'bus. We all drove from home to the East India Docks basin, a long and trying drive

for Mary, got her on board with such speed as was possible, and put her to bed, thankful to have accomplished this job. She was very exhausted. Williams and Seabrook stayed till near dinner-time, and made us all comfortable. The Morgans drove in a taxi to the ship to see us off. This was the last time, alas! that I saw Henry Morgan. We sailed during the night."

Off Southampton they passed the masts of the P. and O. s.s. *Oceana* which had been sunk in collision, a vivid reminder of old Admiralty days. They called at Las Palmas and Teneriffe. The long voyage to the Cape was uneventful. During the voyage, however, an event happened which was known to the officers by signal from another ship, but was kept strictly secret. Lord Gorell suspected that something had happened, though, as he says, he had no idea of "the appalling tragedy which had occurred," the awful disaster to the *Titanic*. Lady Gorell soon recovered at sea, and at Durban there was something like the old gaiety of travel with which these old travellers were so familiar. From Durban they were taken out in a motor-car to a neighbouring sugar estate—"a most delightful day." But Lord Gorell was feeling his illness a good deal at this time. Yet he writes: "Durban was very charming. The weather was delightful, the sea-bathing luxurious. We only watched it. We enjoyed drives and tram-rides and rickshaws," and met old fellow-travellers from the voyage round Africa and the trip to the West Indies. They went on to Cape Town, and drove out to Cecil Rhodes' house, "where the monument to him is, with Watts' splendid equestrian statue 'Force.' It stands look-

ing away to the north most splendidly on the side of Table Mountain." On the way home they called at St. Helena and saw Napoleon's house quite well as they approached the island. Rhodes and Napoleon stand out as seamarks of this last voyage. They touched at Ascension, "which is treated as a ship," and so home. So far as possible they entered into the life of the ship, though Lord Gorell felt the sound of the screw very much and could not sleep.

"Both outward and homeward there were the usual sort of amusements—sports, dancing, cricket, etc. On the way out Mary gave away the prizes and I made a speech, but we did not do so coming home. I was not well enough, but Mary made a little speech which was considered excellent, probably better far than I could have done. . . . I was very glad to be at home. . . . I think the voyage did me no good, but rather harm."

Lord Gorell could not attend the meeting of the Divorce Commission held on July 1, 1912, when the Commissioners spent considerable time in going through Lord Gorell's revised draft report, which in fact received nothing but purely verbal corrections. The work was completed on July 8. The Commission itself came to an end on November 2, 1912, when Lord Gorell delivered a parting speech which could not be better described than in the words of the late Lord Guthrie, writing to Lord Gorell on the same day:

"Just a line to say how delighted and gratified we all were to see you to-day, and to congratulate you on your most skilful and charming speech to us. It was delightfully done, and was a fitting

finish to the many tactful and able speeches by which you have steered our barque to the desired haven, past many dangerous shores, and between many threatening rocks. You made splendid use of our extraordinary unanimity on so many most vital matters. But you did not say, and probably you are the only man (or woman !) among us who does not realize that this most important result is due to yourself."

At that time it might have been thought that Lord Gorell, then in the prime of life and with great possibilities before him, would be restored once again to perfect health. But this was not to be. The winter and early spring at Mentone did not bring for him the needed recuperation. His health broke again, and to the deep sorrow of an extraordinarily wide circle of friends and admirers, he died there on April 22, 1913. His mortal part was not to rest in foreign soil. On Monday, April 28, 1913, the burial took place at Brampton, near Chesterfield, where the first John Gorell Barnes lived and died; and on the same day a memorial service was held at the Temple Church for this strenuous servant of England and of justice.

In the period of his death Barnes was, looking back now down the vista of seven dreadful years, fortunate: *felix opportunitate mortis.* He saw little of death in the immediate circle of his happiness; he realized an unusual completeness of life, unmarred by failure or regret. He achieved greatness laboriously but happily, and bore its burdens with dignity, ease, and an unfailing sense of duty. He looked at life largely, generously, tenderly, and life rewarded him as she always rewards such natures. He was a favourite of Fortune, that just goddess,

being one who, in the words of a contemporary writer, never made an enemy nor lost a friend. Nor was he long separated from the wife who was to him in the burdens and joys of life more than cold words can tell. Mary, Lady Gorell, died on November 19, 1918: *unanimi conjuges.*

CHAPTER VIII

EXTRA-JUDICIAL WORK

THE last year of work on the Bench and the first year in the House of Lords was crowded, too crowded, with extra-judicial work. A Committee appointed by the Lord Chancellor to consider improvements in the High Court dealt with a matter of great importance to the profession and the public. The President's work on this Committee led to his appointment as Chairman of the County Courts Committee, the report of which he signed a few days after his elevation to the Peerage. He worked very hard on this report, which in certain points foreran the severer labours of the Divorce Commission. "We recommended improvements, which ultimately found their way into Lord Loreburn's County Court Bill, which was rejected by the Lords, to his great annoyance." The Bill was rejected by five votes. "I think that it was the result of strong Conservative opposition, and it only added to the ire which was accumulating against the opposition to Liberal measures and which ultimately led to the passing of the Parliament Bill." However, in the next year "it was carried through the House of Lords in a much improved form, but lack of time caused it to be dropped in the Commons. I spoke strongly in its favour. All the work on the County Courts Bill was very heavy to me. . . .

The great bone of contention was the extension of the County Court's jurisdiction to almost any action unless the defendant objected."

In 1909 Lord Gorell was appointed arbitrator in the railway dispute between the Great Eastern Railway Company and its men. He was appointed by the Speaker and the Master of the Rolls under a scheme for arranging disputes. He sat for eleven days, and had a very difficult inquiry which involved a personal view of the line "on an express train to see the working of signal boxes, shunting yards, etc. My award was at first well received by the men, but later I believe they thought it not so favourable as they at first thought. At any rate, however, I completed my work with credit, I believe."

In the same year Lord Gorell sat on the long and troublesome Censorship Inquiry by a Joint Committee with Mr. Herbert Samuel in the Chair, and became Chairman of the Copyright Committee which was to report on the International Copyright Convention.

"I got the subject of copyright up very carefully, beginning the study at Mentone in April. I was at work six months on this Committee, and finally drew the report, very largely assisted by Mr. W. J. Phillips, the Secretary, and John Cutler, K.C. It was a great effort and required a complete knowledge of the law. I gave a statement of all the Acts and showed the confused state of the law in England, and wished to have the opportunity of an international arrangement taken to reduce the English law into a better state. There was a mass of evidence about the matters connected with reproductions of a musical character by means of discs and rolls.

I favoured the view that the composer should have absolute copyright, and the report was so passed with a dissentient, but in the Bill which resulted a system of licences was adopted. The result of our labours was later the Copyright Act, at which I assisted very much in the Lords, and a very difficult matter was brought to a final conclusion."

It is desirable to refer in some detail to the work of the County Courts Committee. The Report of this Committee appointed in July, 1908, by the Lord Chancellor (Lord Loreburn) to inquire into certain matters of County Courts procedure was dated February 19, 1909, and was signed by Lord Gorell, Mr. Justice Channell, Mr. H. Tindall Atkinson, K.C., Sir John Macdonell, Sir M. D. Chalmers, Mr. B. J. Bridgman, Mr. R. S. Cleaver, and Mr. R. Ellett. Mr. H. D. Bonsey signed a separate document. The business of the Committee was " to consider the relations now subsisting between the High Court of Justice and the County Courts, and to report whether any and what alteration or modification should be made in these relations, and consequently in the jurisdiction and practice of the County Courts." The Report was the result of a number of meetings, and was largely based on material supplied by the County Court Judges and Registrars, the General Council of the Bar, the Law Societies, and the Association of Chambers of Commerce. The Committee was convinced of a growing, very real and pressing demand for increased facilities for dealing with all litigation locally, expeditiously, and economically, and especially litigation of a mercantile character. The Committee endeavoured to provide for this without interfering with the

speedy trial of small cases by a very simple and inexpensive procedure. The County Courts were founded by statute (9 & 10 Vict., c. 95) in 1846 with this intention. The jurisdiction was later extended to £50, and in 1903 to £100 in personal actions, while not insubstantial jurisdiction in equity matters was bestowed as well as a limited Admiralty jurisdiction exercised by certain appointed Courts. Jurisdiction in a great variety of matters was gradually given to these Courts. The total number of Common Law actions heard in 1907 was 836,529 (including 887 with a jury), of which about 40,000 were heard in Court, the rest being disposed of by the Registrars. In 98 per cent. of the cases the plaintiff recovered judgment, the average amount being between two and three pounds. There were 573 cases in which plaints were entered by agreement relating to sums over £100. These figures are compared with the 580 civil cases disposed of by the High Court or circuit in the same period. The Committee considered that the great diminution of business on circuit was mainly, if not entirely, due to a prevailing and long-standing dissatisfaction with a system which did not meet the needs of the day. The trial of cases on circuit could not take place with sufficient convenience, frequency, or continuity. Reforms had been recommended by Judicature Commissioners in 1869 and 1872, and by the Judges in 1892 and 1896. The Committee decided that the real question for determination " is, What is the best way of dealing with that work which is, or ought to be, disposed of in the provinces, and is beyond the present jurisdiction of the County Courts. . . ? We think that no change in the

extent of the foundation of the County Courts should be made, but that a better method of working the system and combining it with the High Court system should be adopted." For this purpose it was recommended that the circuit system should be remodelled, and that the principle of concentration of civil business at suitable centres in the country (as recommended by the Judges in 1892) should be applied. The main basis of the report of the Committee was that the High Court Judges should be in sufficient strength to deal adequately with all the work which ought to be done by them whether in London or on circuit, even though the proposal should result in some of the Judges devoting their whole time to circuit work, and that the same facilities should be afforded to the country as to London for the trial of cases by the High Court Judges. If some such scheme were introduced, there would no longer be any desire to extend compulsorily the jurisdiction of the County Court. The Committee did not recommend the extension of the jurisdiction of the County Courts to probate business, but in matrimonial cases it was felt that "without doubt there is a practical denial of justice in this matter to numbers of people, and there are people who belong to ranks of life in which the relief to be obtained under the Divorce Acts is probably more necessary than in ranks above them. The question must be further considered by the light of the very serious state of things created by the operation of the Summary Jurisdiction (Married Women) Act of 1895, the effect of which is pointed out in the case of *Dodd* v. *Dodd* (L.R.P.D., [1906], p. 203)." The Report goes on to discuss these evils,

and states that "from the days when Cranmer and his associates reported on the *Reformatio Legum Ecclesiasticarum* to the present time, the best opinion has been that permanent separation without divorce had a distinct tendency to encourage immorality and is a very unsatisfactory remedy." In this section of the Report the hand of Lord Gorell is very plain, and indeed the considered policy of this part of the Report foreshadows the work of the Divorce Commission, dealt with at length in the next chapter. The Committee recommended that "the County Courts (other than the Metropolitan Courts and Courts in the home or near counties, whence access to London is easy) should be given a limited jurisdiction in matrimonial cases, and that within the defined limits the County Courts should have power to proceed on the same grounds as the High Court. We recommend, further, that the Summary Jurisdiction (Married Women) Act, 1895, should be amended by limiting the power of the Courts of Summary Jurisdiction with regard to the making of orders containing a provision that the applicant be no longer bound to cohabit with her husband." All this was to appear in the Report of the Divorce Commission, as was the recommendation that the orders of the Court of Summary Jurisdiction in cases of cruelty should be of a temporary character,

"during which the wife might, if she desires a permanent separation, proceed to enforce it by proceedings in the County Court. We think, further, that in a similar way the power of the Courts of Summary Jurisdiction to make orders for permanent separation (for drunkenness) under the Licensing

Act, 1902, should be transferred to the County Court, and that a similar power should be conferred on the High Court. We apprehend that the matters referred to us to report upon do not include any questions of substantive law, and we therefore make no recommendations as to general changes in divorce law. The alterations we suggest partake more of the nature of procedure than of general change of law. They deal with tribunals, and remedy the objectionable features in the Act of 1895."

The Committee proposed that the jurisdiction should be limited to cases in which the petitioner could satisfy the Court that his or her whole assets after payment of debts are not worth, say, £50, and that the joint incomes of the petitioner and the respondent are less than, say, £150 per annum. To avoid expense, it was recommended that the cases should be heard by a Judge without a jury, and the Judge should have power to assess damages which should be limited to £100. "Most of the cases in London are heard by the Judge, and probably it might be of advantage if all were." To avoid trickery the papers in all cases before hearing should be forwarded to the Principal Registry and be passed by the Registrar there. This would enable the President or Judge to direct the transfer of the case to the High Court if there were the least question. There should also be power to remit a case from the High Court to the County Court. Minutes of proceedings in the County Court should be kept. The power of intervention by the King's Proctor should be retained in the new cases, and there should be a right of appeal to the High Court.

"We do not recommend that any matrimonial cases should be tried at the Assizes. . . . We

submit for consideration that it would be very undesirable to permit the publication of proceedings at matrimonial cases heard under the suggested jurisdiction of the County Courts. . . . We think that the right of publication should be confined, as, for instance, in France, to that of the decrees made. We further submit for consideration whether similar action might not be taken with advantage with regard to the High Court. A step in this direction was taken some time ago, with most beneficial results, by prohibiting any sketching in the Divorce Court, and the illustrated Press has very appreciatively and courteously responded to suggestions made as to the undesirability of drawing special attention to this class of case by ceasing from publishing illustrations connected with matrimonial cases."

In all this a foreshadowing of the coming Royal Commission can plainly be seen.

In the section of the report dealing with Admiralty cases the views of Lord Gorell are written plainly. The Committee deprecated the extension of the County Court Admiralty jurisdiction on the grounds that "the Admiralty Court is in a sense an international Court, and its judgments are often against foreign ships and their owners. It is not satisfactory to subject them to any but the Superior Court except in trifling cases"; the cases require the everyday experience of those Judges of the High Court to whom they are allotted which no local Judge can gain; the Court in London "is assisted by the Elder Brethren of the Trinity House, who are of great experience, absolutely independent, and in active touch with navigation and maritime matters, and whose advice is invaluable to the Judges. No such body can be found elsewhere, and there is great

difficulty in the County Courts which have Admiralty jurisdiction in finding assessors who possess similar qualifications." If there was need for a local Court at Liverpool the circuit Judge could undertake the work.

It is unnecessary here to refer to the many matters of detail dealt with in the Report, but some reference must be made to the final section on rights of audience since the section contains Lord Gorell's views as to the professional status of the Bar. The Committee recommended that "if jurisdiction in matrimonial cases be given to County Courts, the Bar should have exclusive audience in these cases." It was felt, moreover, that the position of the Bar in all future legislation dealing with practice should be closely watched since if the High Court became mainly an Appeal Court and solicitors were allowed rights of advocacy in the Courts of first instance "the inevitable result would be before long the amalgamation of the two branches of the profession, and an amalgamated profession in which the advocate members were in direct contact with the clients would not have the independence which the Bar have had." The report dwells on the fact that

"it is in the interests of the public, even more than of the Bar itself, that the strength and independence of the Bar should be maintained. The satisfactory character of the administration of justice in this country really arises from the independence of the Bar. The character and independence of the Judges are due to it. We would refer to and adopt the words used by Mr. Justice Blackburn as one of the reasons for his dissent from the second report of the Judicature Commissioners in 1872 when he wrote: 'I attach much importance to the keeping up the great Central

Bar of England. The only real practical check on the Judges is the habitual respect which they all pay to what is called "the opinion of the Profession," and the same powerful body forms, as I think, a real and the principal check on the abuse of patronage by the Government.'"

Lord Gorell, in the adoption of these strong words and in his subsequent plea for the maintenance of "the unique position of the Bar," which is largely responsible for the fact that "the administration of justice in this country in civil cases as well as in criminal is more satisfactory than in any other country in the world," paid a tribute which should not be forgotten to a profession in which he had played so leading a part.

The Report of the Committee on the Law of Copyright (Cd. 4976, 1909) and dated December, 1909, was made after sixteen sittings and the examination of forty-five witnesses and the consideration of a number of papers and statements published in the Appendix to the Report. It is not proposed here to consider the details or even the principles of the Report, since the real results are incorporated in the Copyright Act. The terms of reference contained in Mr. Winston Churchill's Minute of March 9, 1909, ran as follows: "To examine the various points in which the revised International Copyright Convention signed at Berlin on November 13, 1908, is not in accordance with the law of the United Kingdom, including those points which are expressly left to the internal legislation of such country, and to consider in each case whether the law should be altered so as to enable His Majesty's Government to give effect to the Revised Convention." The report

opens with a masterly survey of the statutes dealing with the subject from the Engraving Copyright Act of 1734 to the Patents and Designs Act of 1907. It was plain that confusion prevailed, and that "it would be a great advantage if British law were placed on a plain and uniform basis and that basis were one which is common so far as practicable to the nations which join in the Convention." The report deals with each article of the Revised Convention and expressed "our approval of the Revised Convention as a whole." Two years later the Copyright Act, 1911, was passed, on December 16, and swept away much existing legislation from 1734 to 1906. The Act defined and regulated Imperial Copyright: it made the term for copyright "the life of the author and a period of fifty years after his death" subject to a general right of publication on the payment of royalties at any time after the expiration of twenty-five years from the death of the author of a published work, and to the issue of compulsory licences at any time after the death of an author when the owner of the copyright refuses permission to reproduce the work or perform the work in public. Subject to the provisions of the Act as to engravings, photographs or portraits ordered and made for valuable consideration, and as to work performed in the course of employment, and as to author's rights in contributions to periodicals, the author of the work is declared to be the first owner of the copyright therein. The right of the owner of a copyright to assign is limited by the provision that the reversionary interest in the copyright after a period of twenty-five years from the author's death shall, despite any agreement to the contrary, devolve on the author's legal personal

representatives as part of the estate. In this way substantial hardships on the descendants of authors whose works have become of great value is apparently avoided. It is not, however, proposed here to enter into the details of the new law. It is sufficient for the present purpose to indicate the substantial labours that devolved upon Lord Gorell in the formulation of the far-reaching reforms which were the direct fruit of his labours on the Copyright Committee, and in the House of Lords when legislation based on the report was carried into effect. All these various activities, however, were crowned and outshone by the heavy work on the Divorce Commission.

CHAPTER IX

THE DIVORCE COMMISSION

As we have seen, the Royal Commission on Divorce and Matrimonial Causes appointed by King Edward VII. in 1909 was the direct result of Lord Gorell's judicial experience of the needs of the people. When he came to close quarters with the questions that had to arise and be answered if the Commission were to produce a report adequate to the needs revealed in the daily work of the Divorce Court, he saw that a detailed examination of the whole subject was necessary, something much more thorough and exhaustive than the work undertaken by the Royal Commission whose report led to the Divorce Act of 1857. The names of the commissioners were a guarantee that every aspect of this complex social subject would be fully investigated and the principles underlying the subject exposed. Lord Gorell was Chairman. It is needless to dwell further on his qualifications for the work. His experience as a Judge in the Divorce Division for sixteen years had shown him in full operation every weakness in practice and principle of the existing law. The Archbishop of York and Sir Lewis T. Dibdin adequately represented the Church or ecclesiastical view. Mr. Thomas Burt (the secretary of the Northumberland Miners' Mutual Provident Asso-

ciation), Mrs. H. J. Tennant (sometime H.M. Superintending Inspector of Factories), and Mr. Edgar Brierley (a Stipendiary Magistrate of the City of Manchester), were fully able to present the views of the industrial and poorer classes. The interests of women were likely to be well safeguarded by Lady Frances Balfour and Mrs. Tennant. Lord Guthrie, Sir W. R. Anson, His Honour Judge Henry Tindal Atkinson, Sir Rufus Isaacs, and Mr. Brierley were able to give the Chairman adequate support from the legal side. Mr. J. A. Spender well represented the Press, while Lord Derby and Sir George White were representatives of the two Houses of Parliament who brought a large knowledge of political and social affairs to the aid of the Commission. Unhappily Sir Rufus Isaacs was compelled to resign at an early date on becoming Solicitor-General, and in the middle of the inquiry Lord Derby also was forced to resign by pressure of other work. The retirement of Sir Rufus Isaacs made a place for Sir Frederick Treves, who rendered invaluable service from the medical side.

It was part of Lord Gorell's scheme to secure once and for all exhaustive evidence with respect to the various fields of inquiry: religious, medical, social questions, and questions of the dangers and difficulties of practice were all to be investigated with the thoroughness only possible if the principal experts of the day were available for examination. It was, in Lord Gorell's view, necessary to consider the whole law, ancient and modern, relating to matrimonial affairs, the origin of the existing law, the principles on which that law should rest, the administration of the law; the difficult question of

the publication of reports of cases in the daily and weekly Press; the attitude of the public towards the marriage tie; the fundamental interests, not only of married persons, but of their children; the interests of the State in married life; the morality of the people as a whole. The inquiry, moreover, involved the hearing of expert evidence as to the religious aspect of marriage and its termination, the conditions of married life, the significance of divorce, in fact, spiritual as well as social conditions. Lord Gorell felt that such an inquiry, conducted on an adequate scale, might affect permanently the outlook of the whole world in its attitude towards the status of marriage. In view of such a large issue Lord Gorell and the other commissioners felt it desirable that the evidence should be heard in public, and that the witnesses should be without exception of the first rank. Three Judges of the High Court, various law court officials, eight County Court Judges and six County Court Registrars, eight stipendiary magistrates, twenty police-court missionaries and many other social workers, many members of the Bar and solicitors and other representatives of English and foreign legal systems; three bishops and six clergy of the Church of England, sixteen representatives of other theological denominations (including two representatives of the Roman Catholic Church), as well as eleven witnesses on technical theological questions, twelve representatives of the Press, twenty-six specialists on lunacy, inebriacy, and public health matters (including five women), and four prison officials, supplied the large body of evidence now on record on the subject of divorce and separation and on all the technical religious,

medical, juridical, and social questions intimately related to the complex status of marriage and its dissolution. To those—such as Henry Gorell Barnes (the second Lord Gorell) and myself, who acted respectively as secretary and assistant-secretary to the Commission—who had the privilege of listening to this mass of evidence, it was a revelation of outstanding value to watch the fashion in which Lord Gorell handled the witnesses. Scrupulously fair to all sorts and conditions of opinions, he never failed to elucidate and make clear the salient points of the evidence that the witness had to supply. In such an inquiry on so vast a scale—a scale transcending that of any ordinary law case, however important—the witnesses, whatever their distinction might have been, were bound to wander from the actual issue and dwell upon the more general issues of the field in which they were accustomed to work: fields of legal practice, theology, medicine, social reform, politics. The Chairman, with that infinite courtesy, skill, and humour which were his, kept these witnesses to the exact point necessary to the complex inquiry, and made them yield up, with the skill of a transcendental chemist, the exact product which they were capable of yielding. Nor was the cross-examination by successive members of the commission less stimulating. The Archbishop of York showed a skill in cross-examination which elicited the continual admiration of the Chairman despite or because of their difference of outlook, and made the members of the Bar present regret that he had given up to mankind what was meant for the inner Bar.

Perhaps one of the chief personal pleasures of the

weekly work to Lord Gorell was this cross-examination of all types of men, of women, of experts. The experts themselves entered into the humour of the situation, and during the lunch interval the events of the morning were discussed with a delight in which the Chairman, who presided as host, joined. The essentially social aspect of his nature came out in those memorable chatty meals, and one recalls now something of the way in which he revelled in his vacation holidays. The brief interval to him was a short holiday in which all his boyish fun exploded. But he was ever in his chair again at the exact moment. He seemed to disappear from the luncheon room before anyone was conscious of it, and his disappearance was a signal for a scurry back to the great room in St. James's Square. After the day's evidence was over he would sit for hours sometimes with his secretaries evaluating the day's evidence, commenting on the value of the evidence of this or that expert, and giving detailed directions for the clearing up of this or that difficult technical, legal, or historical point. I was the historical secretary, and many a difficult task he set me, in addition to the history of divorce which I was specially retained to prepare, and one knew that he expected a solution, however difficult, though he was the most generous and helpful of leaders. The result, whether in the case of Henry Barnes or myself, was that we worked like slaves to make clear the point on which he had, with serene astuteness, determined was a keynote for the next meeting or the Report. When the information was secured at the Record Office or in some obscure book or medieval manuscript, it appeared in evidence or in the report as the inevitable thing

which could not but be there. I cannot help recalling one small point on which he was most anxious to have exact information. It was that famous judgment on divorce of Mr. Justice Maule which really led to the reform of divorce practice in this country. It was found that there were many traditional versions extant, but with none of these variants was Lord Gorell satisfied. He said that he must have a contemporary report. None of the various reports gave the name of the case, the date of the judgment, and the place on circuit. I could not find a complete file of *The Times*, which was my only hope, but at last I discovered one at the Law Society and there in *The Times*, after much search, I found in the issue for Monday, April 3, 1845, a full report of the decision given at Warwick on the previous Saturday. Here was a contemporary text. Lord Gorell was delighted, and there never was a man whose delight was more contagious. If he was pleased, the person who pleased him was raised to a substantial pitch of exaltation. His generous outlook on the work of others was habitual. His pleasure at the working out of his ideas during the Divorce Commission was identical with his kindness to young counsel who handled their cases with skill or learning. For such he had always a glowing word of praise that sent them rejoicing on their way and made them love their profession. In such a spirit Lord Gorell got the best out of his witnesses and his fellow-commissioners, as well as out of his officials. In this way it was inevitable that a Report should be produced which, whether the student agrees with it or not, was a piece of work redolent of reality. It was one of the jests of the

Commission that the only specialists who were not secured were a representative of the Greek Church (with its eleven grounds for divorce) and a professional co-respondent. But the law cases supplied the latter though not the former.

It will be convenient here briefly to refer to the state of the law of divorce as it was when the Commission sat, and to state the conclusions arrived at by the Commission, in its two Reports, with respect to the future of the legal side of the state of marriage. The Matrimonial Causes Act, 1857 (20 & 21 Vict., c. 85), founded the present Divorce Court and its jurisdiction. It removed from the Ecclesiastical Court such jurisdiction as they had had in these matters and gave to the new Court jurisdiction in (1) dissolution of marriage; (2) judicial separation; (3) nullity of marriage; (4) restitution of conjugal rights, and certain other matters.

By Section 27 of the Act of 1857 a decree of judicial separation can be obtained on the ground of (*a*) adultery, etc.; (*b*) cruelty; (*c*) desertion without cause for two years and upwards.

By Section 22, in suits for judicial separation and suits for nullity, the Court is to proceed and act and give relief on the principles and rules of the Ecclesiastical Courts, but subject to the provisions of the Act, and to orders and rules made under it.

Section 27 of the Act of 1857 allowed complete divorce with a right of remarriage on the petition of the husband in the case of the adultery of the wife and on the petition of the wife in the cases of incestuous adultery, bigamy with adultery, adultery coupled with such cruelty as would have entitled the wife in the Ecclesiastical Courts to a divorce

a mensa et thoro (the equivalent of judicial separation, that is to say, divorce without the right of remarriage), adultery coupled with desertion, without reasonable excuse, for two years or upwards, rape.

Section 30 provides the following absolute defences to a petition: Denial of the alleged facts; connivance by the petitioner—that is to say, such conduct as proves that the petitioner corruptly intended that the other party to the marriage should commit adultery; condonation—that is to say, forgiveness with full knowledge of all the circumstances, followed by cohabitation; and collusion—that is to say, the presentation or prosecution of the petition by an agreement between the parties to the marriage or their agents. Such defences, if established, are an absolute bar to the granting of a divorce. Section 31 provides five discretionary defences—that is to say, defences which, if established, leave it within the discretion of the Court whether a decree should or should not be granted. These defences are: The adultery of the petitioner; unreasonable delay in presenting or prosecuting the petition; cruelty by the petitioner; wilful desertion or separation by the petitioner without reasonable excuse from the other party before the adultery complained of. By Section 33 and 34, the husband can claim damages from a co-respondent and obtain costs. Section 57 declared the right of remarriage after divorce, but relieved clergymen of the Church of England from the duty of solemnizing the marriage of any person whose former marriage was dissolved on the ground of his or her adultery, but makes provision for the use of their churches for the purpose by some other minister entitled to officiate in the diocese. Subse-

quent acts in suits for divorce and nullity of marriage laid down that the decree should in the first instance be a decree *nisi* not to be made absolute until after the expiration of six calendar months, unless the Court fix a shorter time. Powers were also given to any person and to the King's Proctor to intervene, showing cause why the decree should not be made absolute. The Matrimonial Causes Act, 1884, abolished the power of enforcing by attachment a decree for restitution of conjugal rights, but provided that failure to comply with such a decree constituted desertion without reasonable cause. Thus, if a husband had been guilty of adultery and had failed to comply with a decree of restitution of conjugal rights, the wife could forthwith present a petition on the ground of adultery and desertion. This provision has been largely used in recent years. The commissioners, having considered the existing law, dealt at length with the laws of foreign countries in order that the general opinion of the world as expressed by foreign and colonial legislatures should be available for consideration. The investigation showed that Italy and Spain and Newfoundland were the only countries which maintained in its integrity the mediæval Catholic doctrine of divorce without the right of remarriage, though in Austria the doctrine was applied to Catholics, while in Ireland and in the Canadian Provinces of Quebec, Ontario, Manitoba, and the North-west Territories full divorce could only be secured by legislation *ad hoc*. Divorce by mutual consent was recognized for Jews in Austria and for the general population in Belgium, Portugal, and Roumania. Divorce on the ground of imprisonment for life or some substantial punishment was allowed

in Denmark, France, Hungary, the Netherlands, Roumania, Russia, Sweden, the Cape Province of South Africa, New South Wales, New Zealand, Victoria, Western Australia. Divorce on the ground of insanity was allowed in Bulgaria, Denmark, Germany, Portugal, Russia (Lutherans), Sweden, New Zealand, Western Australia. Divorce on the ground of habitual drunkenness in certain circumstances was allowed in Bulgaria, Sweden, New South Wales, New Zealand, Victoria, Western Australia. In fact, drunkenness indirectly plays a part on many grounds for divorce in various countries. Desertion was a ground for divorce in Austria, Bulgaria (four years), Denmark, France (one year), Hungary, the Netherlands (five years), Portugal (three years), Russia (five years), Scotland (four years), Sweden (one year out of the kingdom), Switzerland (two years), the Cape Province, Natal (eighteen months), New South Wales (three years), New Zealand (five years), Victoria (three years), Western Australia (five years). The attitude of so many countries on the question of a wider basis for divorce than exists in England was one that rendered an exhaustive inquiry into the English position essential.

The examination of the theological experts and scholars who gave elaborate evidence before the Commission as to the significance and principles to be derived from the Scriptural evidence on the subject was most interesting to follow. The Scriptural texts were put under the microscope and views of extraordinary divergency emerged reflecting the attitude towards the texts adopted by various schools of theological thought and the possibilities as to the meaning of the texts revealed by various scholars.

The following five different principles were laid down:

1. That Christian marriages are indissoluble;
2. That all marriages are indissoluble;
3. That marriage is dissoluble on the ground of adultery;
4. That marriage is dissoluble on the grounds of (*a*) adultery; (*b*) desertion;
5. That marriage is dissoluble on other serious grounds based upon the needs of human life.

With respect to the evidence, the Minority Commissioners—the Archbishop of York, Sir Lewis T. Dibdin, and Sir W. R. Anson—dwelt on "the absolute unanimity of these witnesses upon the fact and the nature of our Lord's teaching to the world on marriage and divorce. All are agreed that Christ intended to proclaim the great principle that marriage ought to be indissoluble. There is wide divergence as to whether the ideal thus held up by our Lord was or was not intended by Him to exclude any exceptions, but there is no doubt in the minds of any of the theological witnesses as to that ideal itself."

The Minority Commissioners felt that this ideal of an inviolable contract terminable only by death enumerated and vouched for by "this remarkable consensus of authority," was irreconcilable with the proposals for the extension of the recognized ground of divorce ultimately adopted by the Majority of the Commissioners. This Majority felt that the divergencies of opinion among the theological experts left them free to consider the whole question of divorce. "Our conclusion is that we must proceed to recommend the Legislature to act upon

an unfettered consideration of what is best for the interest of the State, society, and morality, and for that of parties to suits and their families." The Majority of the Commissioners therefore came to the conclusion that their Report "should proceed upon the basis that the State should not regard the marriage tie as necessarily indissoluble in its nature, or as dissoluble only on the ground of adultery; but, regarding the dissolubility of the tie as not limited to the ground of adultery, may allow other grave causes." The Commissioners then proceeded to discuss and take evidence with respect to jurisdiction for the purpose of hearing and determining matrimonial causes; the alterations, practice, and public need necessitated in the system of separation of married people under the Summary Jurisdiction (Married Women) Act, 1895, and the Licensing Act, 1902; the amendment of the law in such a way as to place the sexes on an equal footing as regards the grounds upon which divorce might be obtained; the amendment of the law as to the grounds on which divorce might be obtained; questions of procedure; and finally the publication in the Press of reports of divorce and other matrimonial suits. Detailed discussions of great length with much expert evidence are recorded on all these subjects. The recommendations of the Majority as to grounds for divorce were based on this exhaustive examination, which was not without its effect on the Minority Report, since that Report made every effort to meet the hardships and difficulties disclosed, without extending, as we shall see, the actual grounds of divorce. The Majority laid down the principle that dissolution of marriage

must not be allowed for other than very grave causes. About adultery there could be no doubt, since faithfulness to the marriage vow is an essential feature of the union. Wilful desertion was admitted as a ground, since it had not only operated without effects adverse to general morality in Scotland since 1573, but is a cause even more disastrous to home life than an act of adultery. A large majority of the witnesses were in favour of establishing this as a ground for divorce. The Majority also adopted as a ground such conduct by one married person to the other as makes it unsafe, having regard to the risk of life, limb, or health, bodily or mentally, for the latter to continue to live with the former. After considering a very great volume of medical evidence, the Majority adopted as a ground for divorce insanity certified as incurable and so found by the Court, such ground not to become operative until the insane spouse has been continuously under detention for not less than five years, and being a woman is not over fifty years, or being a man not over sixty years. Various safeguards were devised by the Commissioners, and incurable insanity brought about by the conduct of the petitioner was not to be a ground of divorce. The evidence given showed how hard cases of insanity are, especially among the poor. The evidence covered a very wide range and brought out some terrible facts as to the disastrous results of marriage with persons of insane tendencies. The question of habitual drunkenness was felt by the Majority to be more difficult, and though this ground was adopted under very stringent conditions which would satisfy the Court that there was no

reasonable prospect of joint married life, yet Mrs. Tennant felt herself unable to agree with the recommendation. The Majority refused to adopt imprisonment as a ground for divorce except in the case of a person condemned to death whose sentence had been commuted to penal servitude for life. Here again Mrs. Tennant was unable to agree with the recommendation. The Majority were unanimous in recommending as additional grounds for divorce desertion, cruelty, and incurable insanity under the conditions already stated.

It will perhaps be sufficient here on other questions to indicate the general conclusions arrived at by the Majority of the Commissioners, and to point out how very largely the Minority concurred in these general conclusions. First, the Majority held that for the purpose of giving larger facilities for the hearing of matrimonial suits, the High Court of Justice should sit locally in districts approximating to the existing circuits of the High Court; that there should be commissioners for each district selected from among the County Judges or persons qualified to be Commissioners of Assize; that the jurisdiction should be limited at first to cases in which the joint income of the petitioner and the respondent should not be more than £300 per annum and the assets not more than £250. Secondly, the Majority were in favour of abolishing the powers of Courts of Summary Jurisdiction under the Acts of 1895 and 1902 to make orders having the permanent effect of a decree of judicial separation, and held that such jurisdiction should be limited to the High Court, the Court of Summary Jurisdiction retaining power to make temporary orders for separation

and maintenance where necessary for the reasonable immediate protection of the wife or husband, and the support of the wife and the children with her. The Majority also recommended that the law should be so amended as to place the two sexes on an equal footing as regards the grounds on which divorce might be obtained. Various important reforms as to domicil were adopted, thus making it possible for a wife to take proceedings if she has been deserted while she and her husband were domiciled in England and the husband had obtained by the desertion a new domicil. Moreover, the important case was dealt with where a foreign Court has power to declare and does declare a marriage null, thus leaving a woman a wife by the laws of England and no wife in the country of the husband and without power to invoke the English Courts, since her domicil would be that of her husband. In these circumstances the Majority recommended that the English Courts should be at liberty to declare the marriage null, even though it may have been celebrated in accordance with the law of the place of celebration. The Majority also adopted a wider law of nullity, allowing a marriage to be declared null and void where unsound mind or venereal disease in one of the parties (unsuspected by the other party at the date of the marriage) becomes definite within six months of the marriage, provided that the suit is brought within one year of the marriage and marital relations ceased on the discovery. A further important point was the extension of the doctrine of presumption of death so as to allow of second marriage either where a spouse has been continually absent for seven years and has not been known

to the other spouse to have been living within that time, or where a spouse is reasonably supposed to be dead and the petitioner satisfies the Court that there is reasonable ground for declaring that spouse to be dead. The Majority also adopted a number of recommendations relating to procedure and practice, largely guided by the exhaustive knowledge of practice and of the reforms needed possessed by Lord Gorell. Among these suggested changes was the proposal that all matrimonial causes should be heard by a Judge alone without a jury. The Majority refused after much argument to entertain the proposal to forbid the intermarriage of the guilty parties. The Majority of the Commissioners finally adopted very stringent recommendations dealing with the publication of reports of divorce and other matrimonial suits. They proposed to give the Judge power to close the Court where the interests of decency, morality, humanity, or justice required it; to forbid the reporting or publication of evidence, correspondence, documents, or speeches unsuitable for publication in the interests of decency or morality. They recommended that no report should be published till the case was finished; that the publications of pictorial representations of parties, witnesses, or others concerned in a suit should be prohibited; that the penalty for infringing these prohibitions should be liability for contempt of Court. The need for the change in the law was strongly felt by Lord Gorell. He knew well the terrible harm of such publications, and he argued with all his well-known power for this change in the law. Could he have foreseen the regrettable lengths to which publication has gone in the numerous

and unhappy divorce suits which have followed the war, it is probable that he would have urged that the matter should be made the subject of special and separate legislation. Indeed, most of the reforms in procedure which he and his fellow-commissioners proposed have been shown to be entirely necessary in the decade that has passed since the Royal Commission first sat, a decade which has seen developed into a fine art the processes of constructive adultery devised by ingenious lawyers for the purpose of creating in practice what is little short of divorce by mutual consent.

The Minority Report condemned, as we have seen, the proposals for an extension of the grounds of divorce. The Minority admitted that the State would have strong reasons for making such a change if it were proved that the present restrictions were responsible for widespread immorality, but they declared that the evidence before the Commission showed that there was no demand from the poorer classes or any effective demand for multiplied causes of divorce. They held that the proposals for an extended law of presumption of death (involving the right of remarriage) would meet many of the worst cases of hardship arising from desertion. They also held that to adopt cruelty as a ground for divorce would promote, as divorce for desertion would promote, collusion, and they denied that there was a consensus of evidence of any great demand for divorce on the ground of insanity. The proposal to grant a nullity decree where the insanity was developed immediately after marriage would prove a remedy for some at least of these cases. In the case of drunkenness they regarded the present time,

when drunkenness considered as a disease is likely to become amenable to treatment, as unsuitable to stamp it as something final and irreparable by making it a ground for divorce. The Minority condemned the proposed extensions of the grounds of divorce as opposed to the Christian faith in its social operation, as opposed to the interests of family life by leading to domestic instability. The remedy for the suffering caused by ill-regulated marriages to the parties and their children lay in such influence as can be exerted to rouse the conscience and stimulate the moral sense of the nation. The Minority on issues other than those concerned with the extension of the grounds for divorce were very largely at one with the Majority of the Commissioners. Indeed it may be said that the Commissioners were unanimous on a volume of reforms and changes which would do much to-day to cleanse the purlieus of society and greatly lessen present discontents. The Minority accepted the proposed changes as to costs, procedure, and practice in the High Court and under the Acts of 1895 and 1902, thus sanctioning many changes, and especially the change that would give the poor the same facilities as the well-to-do in the matter of divorce under the existing law, though, of course, the Minority did not accept the Majority recommendations substituting divorce for separation in certain cases where magistrates' orders have been made. The Minority accepted the sweeping proposed changes as to nullity of marriage, as to presumption of death, as to equality of the sexes (a point on which the Church has never had any doubts, since the Ecclesiastical Courts always recognized that equality), and as to

the publication of reports. They also agreed to the principle of local Courts, though they suggested a much smaller number than was contemplated by the Majority. This unanimity of all the Commissioners was a great triumph for Lord Gorell, and was largely due to the conspicuous fairness with which the whole case was brought before the Commissioners and the lucidity with which the principles involved were set forth by him.

Lord Gorell returned from a holiday at Mentone in January, 1912, and a meeting of the Commission was held on January 30, when it became plain that there was to be a Minority Report. "Therefore the way was clear for passing rapidly the Majority Report, and we did so in one sitting, and that day I was taken ill with influenza." So he writes in his notes. That day proved to be the last on which I saw Lord Gorell. After the meeting was over I stayed on till a late hour working with him, and though he was glad to have secured so great a measure of success, I saw that he was restless and tired. For a long time he stood thinking deeply by the fire in the room where we worked in St. James's Square, and I was so familiar with his entire absorption in the subject in hand—when he always seemed to be literally peering into the principles of a case or a problem—that I waited to see if he wanted any help. At last I asked if there were any further points to clear up. I remember that he looked powerful, determined, extraordinarily absorbed, but at the same time he seemed restless. The place was empty, and I did not like leaving him, as I felt that something was wrong, that at any rate he was overwrought. However, presently he in-

sisted on staying and that I should go home. I think now, looking back, that he was suddenly realizing that the end to his tireless, and often self-imposed, labours had come, as indeed it had. He looked in the prime of life and health, but I am sure that his deep thinking on that February evening was of final things, of the end of a great career, of the close of the long day's work, of the bell that ringeth to evensong.

* * * * *

This is perhaps the place in which to attempt some estimate of the man and his work.

The object presumably (though books die easily) of a study of a successful worker's life is so to present his personality as to make it an object-lesson for later workers in the same field. Great artists leave their works behind them, and in many or most cases the world is left to discover the man from his works; and so successive biographers strive to reconstruct Homer, Praxiteles, Virgil, Dante, Chaucer, Rafael, Shakespeare, Milton. In some cases there are works only; in some a few (or many) life-facts as well as works; in some there are the phrases of eye-witnesses. In the case of a lawyer his works, in the shape of legal arguments and decisions, at the most seem to reveal one facet of the personality, and that facet few people other than legal historians and careful practitioners take the trouble to examine. Yet the great lawyer is as important in the history of the world as the great poet or the great mathematician, since it is his work to secure that basic orderliness of society, to unfold those ultimate and therefore spiritual

principles of orderly social evolution which the greatest thinkers have recorded, principles analogous in the human sphere to those to which Newton devoted his great gifts. It is of no mean significance that the greatest poet of the Middle Ages, Dante Alighieri, was also a jurist. It is, therefore, worth while for contemporaries to attempt to record the salient characteristics of great lawyers, though in this place it is not intended, as indeed it is too early, to claim any special or peculiar rank for Gorell Barnes among the great lawyers of the nineteenth century. That he was among the great lawyers it would be idle to deny. His grasp of legal principles, his ability to follow them amid that play of infinitely complicated circumstances which arises in the endless lawsuits of a great and ancient mercantile community, placed him among the lawyers who were something more than highly skilled practitioners. It is valuable, therefore, to see in brief how his life and his character were related to his work.

He was, first and foremost, an enthusiast in anything that he touched. Throughout his life this enthusiasm in work and play never failed. It was a great quality without which he would never have achieved such complete professional success, a success achieved, as an estimate in *The Times* pointed out, without making an enemy or losing a friend. His enthusiasm was generous enthusiasm. In one sense his geese were always swans. The work he was doing at the moment, the trusted friend or fellow-worker, the persons who seemed at the moment to hold the field of his life-work and friends alike were important beyond the common

wont. It is true that he chose his work, his friends, his fellow-workers with care; that he was intensely critical, and selected perhaps with difficulty, but once the selection was made, then the work and the friend had an importance to him rare in the history of work and friendship. Thus it was that he added a new dignity to each task that he undertook and to each post that he filled. It is the duty of man to magnify his office in life, whatever it may be, and Gorell Barnes fulfilled his duty with a generous enthusiasm, the contagion of which not only bound his friends to him, but found him friends and, in early days, clients at every turn.

To generous enthusiasm Gorell Barnes added intense loyalty to his own ideas and ideals as well as to his friends. It was not that he was an egoist, though successful men must have pronounced personalities; it was an essential loyalty of nature to principles. His mind was habitually thinking out principles, and when once he had arrived at them he was loyal to them and applied them to life as well as to law. It was in this constant and conscious application of principles that he found it possible to grapple with such masses of work. He had an amazing gift for dispensing with the irrelevant. Then he was ambitious—that is to say, he saw far ahead, saw the possibilities of his own career, saw the legitimate fashion of realizing those possibilities and set himself the task. It is not a sin to be ambitious except with angels; and Barnes was not, and did not look like, an angel, though he was blessed with many transcendent qualities which human, and possibly other, angels sadly lack. He was essentially a human being with

the desire and determination to excel in a fair field with no favour. He owed nothing to favour. By sheer hard work coupled with fine judgment and excellent thinking power he worked himself from the bottom to the first rank of the legal profession. He was not a schemer, nor a flatterer, nor did he rely for advancement on any of the baser arts. He was perfectly courageous, perfectly straightforward; but a terrible competitor, possessing as he did a power of concentrated work that must be rare even in the legal profession. All these various qualities would, however, hardly have achieved such great success had not Gorell Barnes possessed in a singular degree a power that even great lawyers sometimes lack, the full power of making up his mind. No doubt his judgment was not infallible (though in matters of law he was rarely reversed), but he never hesitated. The process in his mind was sometimes rather slow, very often very rapid, but the process of making up his mind was a definite thinking process, the application of principles to facts. He probably never "jumped to conclusions" in law or friendship, though the enthusiasm of his manner and his almost exaggerated praise of those he loved and respected might lead a casual observer to think that his conclusions were not always reasoned out. When his mind was made up it was made up: that was the end of the matter. Very often it was only by really tremendous work that he made up his mind and wrote his judgments. He felt that the Court of Appeal work was very heavy and difficult, though he revelled in presiding in that Court with the Senior Wrangler of his own year on the one side and the Senior Classic on the

other. He felt that this had made up for the comparative failure of his own University career—comparative, that is to say, beside the great achievements of Fletcher Moulton and W. R. Kennedy. But here and in the House of Lords he had almost a passionate enthusiasm for the solution of legal problems as they arose, the solution by the formulation and application of juridical principles. That to him was the delight of law. His only criticism of Lord Justice Mathew, his old master, "the cleverest man I have ever met," was that "his tendency to dispose of cases on the facts placed a check in some cases on the framing of great legal judgments as some great lawyers have produced." The framing of great legal judgments was the joy of Barnes's legal life. They were works of art from his point of view, complete in every detail, the finished product of a legal artist. That is what Barnes really was, and his life so fell, or was so arranged, that it enabled him to carry out his legal ideals to their logical conclusions. His own joy in life and his contagious enthusiasm, his consideration for others, his great social qualities, his capacity for friendship, his quiet sense of humour, his love of the problems of life for their own sake, and his extraordinarily happy private life made all things possible.

It would be difficult to estimate all that the late Lady Gorell meant in the career of her husband. She was the natural supplement of his personality as he was of hers. To read, as I have read, some of their letters to each other is to see how complete was the spiritual union of these two personalities. To know them both was to realize how much they were to each other. Her passionate love of art, her

joy in the beauties of nature, her powers of help in his work, her almost unfailing judgment in difficult matters brought light and entire happiness into a career of the most toilsome kind. He would take his intellectual difficulties to his wife and together they would solve them. Her life was no sinecure, and she had the ceaseless anxiety of the overwork from which her husband inevitably suffered, and his long illnesses which resulted from that overwork. On the other hand, they had more delightful holidays together than most married people, and in those holidays the social side that was really so much to both of them had its free rein. Moreover, the family life with the children was an increasing joy to them both, whether in London or at the Suffolk home, and nothing could exceed the natural pride that they both took in the brilliant Henry who, as the second Lord Gorell, fell gallantly in the late war. The masses of papers and correspondence which it has been my fortune to read in preparing and thinking out this account of Lord Gorell's life and work confirm the views of him as a man and as a lawyer which I have endeavoured to set out above. It was the human side of Lord Gorell that fascinated his friends. In that human side, that kindly, shrewd, genial, penetrating, and humane personality, contemporaries sometimes were apt to overlook the permanent legal side, and to forget that stream of decisions which are likely, as the juristic work of the nineteenth and early twentieth century falls into perspective, to take a notable and permanent place in the history of English law.

APPENDICES

APPENDIX I

PRINCIPLES OF DIVORCE LEGISLATION

(Reprinted from Volume III. of the Minutes of Evidence taken before the Royal Commission on Divorce and Matrimonial Causes, by kind permission of the Controller, His Majesty's Stationery Office.)

WINCHESTER HOUSE, ST. JAMES'S SQUARE, LONDON, S.W.
Fifty-sixth Day. Wednesday, 17th May, 1911.

Present:

The Right Hon. Lord Gorell (*Chairman*).

His Grace the Lord Archbishop of York.
The Lady Frances Balfour.
The Right Hon. Thomas Burt, M.P.
The Hon. Lord Guthrie.
Sir William R. Anson, Bart., M.P.
Sir Frederick Treves, Bart., G.C.V.O., C.B., LL.D., F.R.C.S.
Sir Lewis T. Dibdin, D.C.L.
Sir George White, M.P.
His Honour Judge Tindal Atkinson.
Mrs. H. J. Tennant.
Edgar Brierley, Esq.

The Hon. Henry Gorell Barnes (*Secretary*).
J. E. G. De Montmorency, Esq. (*Assistant Secretary*).

The Right Hon. LORD GORELL, *called and examined.*

CHAIRMAN: I should like to put in as part of the evidence some Notes which I have prepared on the question of the principles to be applied in divorce legislation. I have given considerable time, study, and research to the matters with which I have dealt, and trust that the Notes may prove of some service. In putting in the Notes in this way I am following the course adopted by Sir Lewis Dibdin with regard to his excellent Notes on the *Reformatio Legum Ecclesiasticarum.*

THE ARCHBISHOP OF YORK: As you are now in the position of a witness and not in that of Chairman, I beg to take this opportunity of thanking you, on behalf of the Commissioners, for your labours.

NOTES PREPARED BY LORD GORELL AS TO THE PRINCIPLES UPON WHICH DIVORCE LEGISLATION SHOULD PROCEED.

Object of the Notes.

1. Before the appointment of this Commission, my attention had been specially directed to three questions: (1) as to whether or not it was desirable and possible to afford further facilities than at present exist for the purpose of enabling persons of little means to bring their matrimonial cases before the Courts; (2) as to whether wives should not have the same rights of divorce as husbands; and (3) as to whether the present system of newspaper reporting of divorce cases should not be restricted or prohibited. But the inquiry upon which the Commissioners have been engaged extends over a far wider range of subjects, and questions of the most far-reaching kind are raised and have been presented for consideration by the terms of the Commission. In order to answer these it is necessary to form clear views upon the principles to be applied in their determination.

2. Since the appointment of the Commission, I have therefore endeavoured, so far as my powers have enabled me to do so, by a careful study of the very interesting, learned, and exhaustive evidence which has been laid before the Commission by experts, representative of all shades of opinion and of all kinds of experience, and of the history of the laws of marriage and divorce from early times to the present, by an examination of the writings of numerous authors, both ancient, mediæval, and

modern, and by most anxious reflection, to elucidate for my own satisfaction the fundamental principles which require to be ascertained. And I venture to express the hope that, in placing before the commissioners the results of my investigations, study, and research, I may afford some assistance in laying down the lines upon which legislation should proceed.

3. I confess that I do so with great diffidence, not only because of the complex nature of the problems involved, the vast mass of historical and other literature to be examined, and the large volume, weighty character, and conflicting nature of the evidence, both of opinion and of experience, which has been given, but also because the questions raised on the inquiry touch not merely upon human laws and institutions but upon matters which are affected by religious beliefs and opinions, and are regarded by very many as concerned with man's spiritual welfare as well as with his social conditions.

4. It has, indeed, been impossible to avoid being at times daunted by the gravity of the task which has been set before the Commissioners, but that task has been faced by them with such serious and engrossing attention and earnest determination to make a great effort to solve problems which have perplexed the Christian world for centuries as to make me feel confident that the result of the discussions will be to produce, if not a final solution of those problems, at any rate recommendations which, it may be hoped, will prove that steps should be taken sufficient to meet the most crying evils and the most pressing grievances disclosed by the witnesses who have appeared before the Commission.

First Full Inquiry.

5. Numerous and vital changes have been made during the last century in the divorce laws of some foreign countries and of some British colonies, but, so far as I can learn, this is the first time that a formal and exhaustive inquiry has been made in this country, or, indeed, in any country, into the questions submitted for consideration. I have been unable to discover from the learned and deeply interesting account of the document known as the *Reformatio Legum Ecclesiasticarum*, prepared and put in evidence by Sir Lewis Dibdin, that any evidence in the nature of that laid before the Commission was taken before the abortive Commissions of Henry VIII. and Edward VI.—I mean with regard to social and economic conditions, the state of morality in the country or the effect thereon of the laws, or with regard to other matters upon which so much evidence has been given before the Commission. It is sufficient for present purposes to say that the aforesaid document, according to Sir Lewis Dibdin, presents only the views of "certain individual Churchmen of great eminence and influence" (Q. 34,940, lix.). He states that they "were no doubt also adopted by the rank and file of a section of extreme Protestants in this country, but, except during a few years of Edward the Sixth's reign, were never dominant in the Church of England." English theologians were probably largely influenced by the opinions expressed by the great continental reformers and the greater freedom of thought which resulted from the Reformation, and it seems also probable that the views referred to were shared by many of

the laity, but to what extent they were generally adopted does not appear at all clear.

6. General evidence of the aforesaid character was not taken by the Royal Commission of 1850-1853, though a few questions as to the principle of the equality of the sexes may be found addressed to some of the six witnesses whose evidence that Commission had. The object of that Commission was mainly, if not entirely, to deal with the establishment through the Courts of law of a more reasonable and satisfactory system of procedure in divorce than that which then obtained by means of private Acts of Parliament, and that object was kept steadily in view by the Government in the debates in the year 1857, when, for this reason only, substantial changes in the law as administered by Parliament were opposed by them, with the exception that desertion for two years was added to the existing grounds for judicial separation and as a ground which, added to adultery, would give a wife a right to sue for a divorce against a husband.

7. This Commission is indebted to the witnesses who have been called before it for an immense mass of information and learning as well as statements based on practical experience relating to all parts of the matters inquired into, much of which has evidently been the result of very careful investigation and thought.

Difference between an Inquiry held To-day and in Former Times.

8. But, further, it is of the utmost importance in considering much that has been thought and has taken place with regard to these matters to keep in mind the immense difference there is between the

circumstances under which an inquiry is held in the years 1910 and 1911 and those existing at any period of the world's history prior, say, to the last fifty years.

9. We live in a world which would be hardly recognized even by our grandparents. To-day, astronomy, geology, biology, and other sciences have revealed secrets of the heavens and earth which were unknown to and undreamed of by man in former days; more especially have they given to him some conception of the immeasurable periods of time through which the earth must have revolved on its orbit; disclosed traces of the existence of human life upon it from vastly remote times; and manifested the impossibility of accepting in an historical and not an allegorical sense the Biblical account of the creation of the world and man. The habitable globe is now fairly known throughout; communication from one part of it to another by transit is extremely rapid, and by message is instantaneous, so that people at one extremity of it know daily and even hourly what is going on at another extreme. The sea has been conquered, and even the conquest of the air is at hand. Diseases, plagues, and pestilences have been traced, or are in process of being traced, to their sources, and are no longer attributed directly to a supernatural origin. Although much remains to be clearly discovered, man's habitat is understood to-day to an extent which, to the former dwellers upon earth, must have been inconceivable. Heavenly bodies have also been mapped out, counted, examined as to their motions, structure, distance, inter-relationship and other properties, and, although discovery may be still in its infancy and mysteries of the universe are still undiscovered and may perhaps remain insoluble,

much has been done to free the human mind from superstitious beliefs and terrors and from that dark ignorance which for so long overshadowed human life.

10. Contrast the state of knowledge which to-day exists with that which prevailed in the days of which we have first any reasonably reliable records, whether by monuments, writings, or otherwise; and even with that which prevailed in later historic times, whether Jewish, Greek, Roman, early Christian, mediæval, or indeed even with that of fifty years ago, and then consider how the state of knowledge at various times has influenced beliefs, thoughts, and actions, and how there has been a gradual, insensible yet radical modification of the habits of thought prevailing in Europe. The change is still, no doubt, in progress. Its limits have not yet been reached, and it would be idle to attempt to forecast the developments which time will bring forth; but the change itself is profound and fundamental.

11. When we face to-day problems of human life, it is necessary to consider what reliance we are to place upon the opinions of legislators, scholars, divines, and others in earlier days upon those problems, when their opinions were unavoidably affected by their beliefs as to many matters which were mysterious to them, but with regard to which we have now actual and accurate knowledge; when men believed that the earth was the centre of the universe, and all the heavenly bodies were its attendants, and that any deviation from the ordinary daily course of those bodies, as, for instance, the appearance of a comet or the occurrence of an eclipse, portended something disastrous to the dwellers upon earth, and was specially directed against them; when they attri-

buted the devastation of countries by plague or other diseases to what used to be regarded as a special interposition of divine power, and termed a "visitation from God," instead of in some cases to their own neglect of proper precautions, and in others to the workings of microbes or modifications of structure discovered by modern scientists; when it was thought that human power and duty were effectively discharged by offering up prayers for deliverance from physical evils which are now recognized as due to natural causes and human weaknesses, and are combated and controlled by human action properly directed even with the knowledge already attained; and when their superstition was such that they condemned or censured those who advanced scientific theories, now recognized to be sound, but not then acceptable even to the enlightened, or sent to the stake those unfortunates to whom they attributed evil powers derived from an infernal spirit. It seems in these circumstances not unreasonable to attach less importance and weight to the opinions of men of early times, including the Fathers of the Church, and of later divines and scholars than were attached thereto in days which were less enlightened than our own, and even up to comparatively recent times. The effect of these erroneous views and of this ignorance was not confined to the particular matters involved: they affected men's whole outlook on human life.

Two Illustrations.

12. It is not necessary to elaborate these observations, but it may be useful to give two well-known illustrations of the wide difference between views generally accepted to-day and those entertained

even as late as the seventeenth and eighteenth centuries.

13. Even after the minds of men had been stirred by the great movement of the Reformation, we find that the discoveries and theories of eminent experimental philosophers, such as Hipparchus or Ptolemy, were generally forgotten or overlooked; that the promulgation by Copernicus of the system which goes by his name was regarded as a danger to religion, and that on February 24, 1616, consulting theologians of the holy office characterized the two propositions that the sun is immovable in the centre of the world and that the earth has a diurnal motion of rotation—the first as "absurd in philosophy and formally heretical because expressly contrary to Holy Scripture," and the second as "open to the same censure in philosophy and at least erroneous as to faith," and that on June 22, 1633, Galileo, whose discoveries are so well known and who extended and improved upon the discoveries and theories of his predecessors, was condemned by seven cardinals "as vehemently suspected of heresy" to incarceration at the pleasure of the tribunal, and by way of penance was enjoined to recite once a week for three years the seven penitential psalms. The decree, however, fortunately for him, did not receive papal ratification.

14. Another illustration is the persistent continuance of the belief in witchcraft. One of the last executions for this offence in our enlightened country took place in 1665, when two wretched women were hanged at Bury St. Edmunds under a sentence of Sir Matthew Hale, then Lord Chief Baron. Sir Thomas Browne, a great physician as well as a great writer, was called at the trial as a

witness, and swore that he was clearly of opinion that the persons were bewitched. The trial is reported in State Trials (vol. vi., 647-702), and a concise account of it is given in Lord Campbell's "Lives of the Chief Justices," vol. i., p. 563 *et seq.* (ed. 1849).

15. Dalyell, in his "Superstitions of Scotland," pp. 669, 670, notices having seen nine women burning together at Leith in the year 1664, and even as late as 1773 the divines of the Associated Presbytery of Scotland passed a resolution declaring their belief in witchcraft and deploring the scepticism which was general (Macaulay's "History," vol. iii., p. 706, ed. 1855). Executions for this offence took place in England and Scotland as late as the end of the seventeenth or beginning of the eighteenth century (1712), but the burning of a sorcerer in Spain appears to have taken place as late as 1780. I may refer for these dates to Sir William Lecky's work, "Rationalism in Europe," pp. 122, 135, 136, and p. 5. The first volume, chap. i., gives a full account of the history of the belief in magic and witchcraft and the consequences thereof.

Change in Conceptions.

16. It has seemed to me desirable to make these preliminary observations, because they appear to be necessary when approaching the consideration of problems which have been discussed from time to time for centuries, and can now, for reasons above indicated, be looked at from an entirely new point of view, unfettered by many difficulties which our forefathers must have felt. Although at first their materiality may not be readily apparent, the bearing

which they have upon the subject will become clear as I proceed.

It is right to add that not only have our increase in knowledge and our abandonment or modification of old beliefs and opinions completely altered our standpoint from that of our forefathers, but results similar in character have followed from modern conceptions of the relations between the sexes. In times not so very remote it was considered that a wife was the property of her husband, or more or less under his dominion, and that her lot was to endure treatment at his hands, even though it might be destructive of her happiness and disastrous to her health, which nearly every witness examined before the Commission thought entitled her nowadays not only to remonstrate but to terminate co-habitation. Further, even in the present day, the idea which used to be universal is not yet extinct, that a woman ought to continue co-habitation in the interest of her husband and out of deference to her marriage vows, although her husband's vicious example and teaching may be ruinous to her children already born, and intercourse with him may result in the production of diseased and degenerate offspring.

Different Views to be considered.

17. I pass on to matters with which the State is immediately concerned. What view should be adopted with regard to the principles to be applied to the formation and dissolution of matrimony ?

18. If marriage ought to be considered by the Legislature as indissoluble, the Act of 1857 ought to be repealed, and no private Acts of Parliament dissolving marriages ought to be passed, and it

would be unnecessary to attempt to answer any of the questions raised, except on some minor points and as to the jurisdiction and procedure of Courts of Summary Jurisdiction. The result of this position cannot be shirked. England would then be the scene of unredressed matrimonial wrongs to an extent greater than in any previous period of her history, unless resort were had to the revival of the extensive mediæval powers of annulment and the abuses which would arise therefrom.

19. If marriage ought to be considered by the Legislature as indissoluble, except for the cause of adultery, questions raised as to means of enabling the poorer classes to bring their cases before the Courts, as to publication, as to the equality of the sexes with regard to adultery, and as to some amendments in the administration of the law in the High Court and in Courts of Summary Jurisdiction, will require to be considered.

20. If, however, marriage ought to be regarded by the Legislature as dissoluble upon grounds in addition to adultery, it will then be necessary to deal with the question of what ought to be the other grounds, and the conditions and restrictions under which they ought to be allowed, as well as with all the questions aforesaid.

21. It is, then, necessary to determine on what principles the Legislature should proceed in enacting laws on the subject of marriage and divorce; or, dividing the question, should the Legislature proceed in enacting such laws on the principle that marriage is—

(*a*) indissoluble; or
(*b*) is dissoluble only on the ground of adultery; or
(*c*) is dissoluble on some grounds in addition to adultery?

22. The first important point to notice is that questions relating to marriage and divorce affect all the inhabitants of this country, whether they are believing Christians, nominal Christians, or do not belong to any Christian Church, and the Legislature cannot allow its consideration of these questions, even in a country in which the larger proportion of the inhabitants are Christians, or nominally such, to be limited by the views expressed by representatives of Christian Churches, especially where so much difference exists between them, as the evidence before the Commission shows. I shall revert to this point later on, but I shall at first proceed to deal with the questions mainly from the points of view in which they may be regarded by Christians.

Question as regarded by Christians.

23. I notice that with regard to the three entirely different principles above stated, it may be necessary, even from a Christian point of view, to differentiate between marriages contracted between Christians and marriages outside Christianity, for I understand that a number of members of the Church of England who maintain that the bond of Christian marriage is indissoluble except by death, agreeing in this respect with the doctrines of the Roman Catholic Church, do not regard marriages contracted outside Christianity as *essentially* indissoluble. This is expressed as a conclusion by Mr. Watkins in his work on "Holy Matrimony" at p. 589, and I gather that this is in accordance with the evidence of the Bishop of Birmingham, from which I quote the following questions and answers:—

"21,243. (*Chairman*): Is your view now, as a conclusion, that marriage should be treated as indissoluble ?—In the Church—yes.

"21,244. In the Church ?—Yes. I will not say what I think is possible in civil society, but in the Church.

* * * * *

"21,258. How would your view apply to the cases, which undoubtedly would be numerous in England, of persons who are not Christians at all and yet are married according to their own rights or according to the registrar's forms of celebration—I mean the State must consider all its citizens ?—Quite so. The early Christians regarded those marriages very largely as marriages which might be rendered Christian if the parties became Christians, but which were, so to speak, voidable. St. Paul, for example, maintains that if two parties had been married, being pagans, and had subsequently become Christians, it was a matter of choice between them whether they maintained or did not maintain the marriage.

"21,259. I wanted to get at this, whether the view you present at the moment is that a Christian marriage should be treated as indissoluble, but that any other marriage should be treated as dissoluble by the State in considering the matter ?—I should respectfully propose that the State would have to (taking the matter in its broadest sense) pay great regard to the fact of differences of conception. I conceive that in India the State does that. It recognizes there that the marriage contract or agreement means a great many different things. Unhappily, as I should think, the modern State would have to pay regard to that.

* * * * *

"21,504. (*Lord Guthrie*): My Lord, do you think that all marriages entered into in England are indissoluble for any cause, or only what have been called Christian marriages ?—Not all marriages, because, of course, Jewish marriages would not be, I suppose."

24. The result of this differentiation is thus expressed by the witness:

"21,442. How far, under those circumstances, would you think that the State was bound to consider, with regard to its marriage law, the large numbers of its citizens who do not wish for Christian matrimony, or who were not, because they were not Christian, capable of Christian marriage ?—Oh, certainly.

"21,443. You think the State is bound to consider that ?—Oh, most certainly. I do not think the State law can be maintained at a level much higher than the average public opinion of the citizens at any time.

"21,444. So would you consider it as inconsistent that the principles you have laid down this afternoon that the State should have regard in its public law to these citizens who cannot be regarded as desiring or capable of Christian marriage ?—Of course a Christian citizen would try to influence public opinion, but he cannot complain at the State law following public opinion."

25. It is to be observed that the Rev. Edmund Wood, who gave evidence on behalf of the English Church Union, appeared to be of opinion that for reasons he put forward with regard to the original institution of matrimony, all marriages should be regarded as indissoluble (Q. 40,384-5).

26. Those who maintain that Christian marriage is indissoluble argue that, however aggravated and

however widespread the hardships and personal injustice may be that arise from the application of this principle, these wrongs must remain without a remedy other than mere separation between the parties, and their sufferings must be tolerated as belonging to the necessary order of things, inasmuch as there is a specific law of marriage instituted by God Himself at the Creation and expressly adopted and confirmed by Christ; a law incapable of variation; a law set forth in definite terms, and so clear that any municipal variation of it is as much a defiance of the order of things as a breach of what are known as natural laws.

27. Then, again, other members of Christian Churches accept the view which has been acted on in England for about two hundred years and is recognized by the present Statute Law that Christian as well as non-Christian marriage is dissoluble on the ground of adultery, and found this view upon the interpretation of St. Matthew's Gospel, in which they consider that Christ is represented as allowing this exception. But, save with regard to this exception, their attitude towards the hardships and personal injustice caused by other matters, which break up a home even as much or more than adultery, is similar to that of those who maintain the absolute indissolubility of marriage.

28. And, again, other members of Christian Churches admitting broader views maintain that the conditions of divorce are properly to be determined by the State in the light of Christian principle, with reference to the actual necessities and circumstances of men. This is shown by the following passage from the evidence of Canon Hensley Henson, who maintained that the mass of the communicants

in England would not sustain the rigid view of the clergy (Q. 22,678):

> "22,585. * * * * * *
> It will be sufficiently apparent that when the sacramental view of marriage is frankly abandoned, and the permanence of the marriage bond is seen to be contingent on conditions which may cease, there emerges the grave and difficult practical question as to the circumstances which shall be held to imply such a destruction of the marriage bond. All Christians hold that *death* destroys the bond; most Christians hold that *adultery* does so. Beyond that point there is less agreement, but most Protestant Christians agree in the principle that whatever can be shown to render impossible the primary objects of marriage is *primâ facie* a sufficient ground for divorce. If it be rightly contended that there is nothing in the Gospels which can fairly be described as 'a definite and detailed social law,' and if it is not the case that Christ's words with respect to marriage are in such sense 'plain and direct' as to close the question for His disciples, then it would seem to follow that the conditions of divorce are properly to be determined by the State in the light of Christian principle with reference to the actual necessities and circumstances of men. So long as the marriage law does not violate Christian principle it can claim from the Church respect and obedience."

29. Those who would affirm the first principle (that marriage is indissoluble) are naturally opposed to any extension of the present law and system of its administration, and those who would affirm the second (that marriage is dissoluble only on the ground of adultery) would naturally be in opposition to an extension of the law to other grounds of

divorce besides adultery, but are not necessarily averse to an improvement in its administration; whereas those who would favour the last alternative would not necessarily find themselves opposed to either reform.

30. Two important points may be noticed before proceeding to examine the proper principles to be applied. One is the remarkable diversity of view in the Church of England with regard to these principles—and there are other Churches which differ still further—and yet all Churches have identically the same sources from which to draw their conclusions; and, although there is a whole world of literature upon the subject, the original materials on which the question depends are extremely limited. If these materials in the Old and New Testaments are examined without partiality or preconceived inclination to arrive at one result rather than another, and with adequate regard as to the origin of these materials, there ought to be no reason for such wide diversity of opinion.

31. The other point is that where Christians affirm either of the first two principles and apply them only to Christians and not to non-Christians, they do not affirm any general ordinance applicable to all mankind, or any general principle, as governing monogamous union—a remarkable and, as it seems to me, illogical position to adopt if there be any express Divine law which should be applied originating in a principle enunciated at the Creation. On the other hand, those Christians who would affirm the last alternative would probably find that, commencing with a general principle of indissolubility, and admitting exceptions according to human necessities, they would be in practical accord with

non-Christians who would settle the difficulties by human principles, that is to say, by basing their conclusions upon a consideration of the conditions of human life and of what would best tend to the social and moral well-being of the people. They would be unable to regard any law as of divine origin which did not show an adequate consideration of such matters or any appreciation of evolution in human relations. Such a law would involve a contradiction in terms.

32. It is, therefore, in the first instance, desirable to come to a reasonably certain conclusion as to whether or not the views, either of those who affirm the principle first stated, or of those who affirm the second, are supported by divine ordinance, and if so which view is so supported; and then, if no reasonably certain conclusion can be reached in favour of either of those views, to proceed to consider the principles by which those who would support the last alternative principle (whether they do so from a Christian or a non-Christian point of view, influenced both on grounds of religious and public policy or out of regard to considerations of public policy only) should be guided.

33. An answer in the affirmative to either of the first two questions stated will be found to rest mainly upon the views entertained by ecclesiastics and those following their views, which declare that, according to the teaching of the Founder of Christianity, divorce is absolutely forbidden to Christians entirely, or at any rate, for any cause except one, that is to say, adultery; or, in other words, that Christian marriage is indissoluble, or at any rate indissoluble except for the said one cause. Passages in the Holy Scriptures are used in support of these

views. The most important, in addition to the verses 1-4 of the 24th chapter of Deuteronomy, are the following taken from the Revised Version:

ST. MATTHEW V.

31. It was said also, Whosoever shall put away his wife, let him give her a writing of divorcement.

32. But I say unto you, that every one that putteth away his wife, saving for the cause of fornication, maketh her an adulteress; and whoever shall marry her when she is put away committeth adultery.

ST. MATTHEW XIX.

3. And there came unto Him Pharisees, tempting Him, and saying, Is it lawful for a man to put away his wife for every cause ?

4. And He answered and said, Have ye not read, that He which made them from the beginning made them male and female ?

5. And said, For this cause shall a man leave his father and mother, and shall cleave to his wife; and the twain shall become one flesh ?

6. So that they are no more twain, but one flesh. What therefore God hath joined together, let not man put asunder.

7. They say unto Him, Why then did Moses command to give a bill of divorcement, and to put her away ?

8. He saith unto them, Moses for your hardness of heart suffered you to put away your wives: but from the beginning it hath not been so.

9. And I say unto you, Whosoever shall put away his wife, except for fornication, and shall marry another, committeth adultery: and he that marrieth her when she is put away committeth adultery.

10. The disciples say unto Him, If the case of the man is so with his wife, it is not expedient to marry.

11. But He said unto them, All men cannot receive this saying, but they to whom it is given.

12. For there are eunuchs, which were so born from their mother's womb: and there are eunuchs, which were made eunuchs by men: and there are eunuchs, which made themselves eunuchs for the Kingdom of Heaven's sake. He that is able to receive it, let him receive it.

St. Mark X.

2. And there came unto Him Pharisees, and asked Him, Is it lawful for a man to put away his wife ? tempting him.

3. And He answered and said unto them, What did Moses command you ?

4. And they said, Moses suffered to write a bill of divorcement, and to put her away.

5. But Jesus said unto them, For your hardness of heart he wrote you this commandment.

6. But from the beginning of the Creation male and female made He them.

7. For this cause shall a man leave his father and mother, and shall cleave to his wife;

8. And the twain shall become one flesh; so that they are no more twain, but one flesh.

9. What, therefore, God hath joined together, let not man put asunder.

10. And in the house the disciples asked Him again of this matter.

11. And He saith unto them, Whosoever shall put away his wife, and marry another, committeth adultery against her;

12. And if she herself shall put away her husband, and marry another, she committeth adultery.

St. Luke XVI.

18. Every one that putted away his wife and marrieth another, committeth adultery; and he that marrieth one that is put away from a husband committeth adultery.

1 Corinthians VII.

1. Now concerning the things whereof ye wrote: It is good for a man not to touch a woman.

2. But, because of fornications, let each man have his own wife, and let each woman have her own husband.

3. Let the husband render unto the wife her due: and likewise also the wife unto the husband.

4. The wife hath not power over her own body, but the husband: and likewise also the husband hath not power over his own body, but the wife.

5. Defraud ye not one the other, except it be by consent for a season, that ye may give yourselves unto prayer, and may be together again, that Satan tempt you not because of your incontinency.

6. But this I say by way of permission, not of commandment.

7. Yet I would that all men were even as I myself. Howbeit each man hath his own gift from God, one after this manner, and another after that.

8. But I say to the unmarried and to widows, It is good for them if they abide even as I.

9. But if they have not continency, let them marry; for it is better to marry than to burn.

10. But unto the married I give charge, yea not

I but the Lord, That the wife depart not from her husband.

11. (But, and if she depart, let her remain unmarried, or else be reconciled to her husband); and that the husband leave not his wife.

12. But to the rest say I, not the Lord: if any brother hath an unbelieving wife, and she is content to dwell with him, let him not leave her.

13. And the woman which hath an unbelieving husband, and he is content to dwell with her, let her not leave her husband.

14. For the unbelieving husband is sanctified in the wife, and the unbelieving wife is sanctified in the brother; else were your children unclean; but now are they holy.

15. Yet if the unbelieving departeth, let him depart: the brother or the sister is not under bondage in such cases: but God hath called us in peace.

16. For how knowest thou, O wife, whether thou shalt save thy husband? or how knowest thou, O husband, whether thou shalt save thy wife?

ROMANS VII.

2. For the woman that hath a husband is bound by law to the husband while he liveth; but if the husband die, she is discharged from the law of the husband.

3. So then if, while the husband liveth, she be joined to another man, she shall be called an adulteress: but if the husband die, she is free from the law, so that she is no adulteress, though she be joined to another man.

34. For the nineteen centuries which have elapsed since the commencement of the Christian era controversies have raged as to the meaning to be placed

on these passages. The literature on the subject is enormous, including as it does the writings of the early Fathers of the Church, divines, and lay scholars of different ages, opinions of the great Protestant reformers and others, conflicting decrees of councils, etc. It may be interesting to note that Mr. W. E. Gladstone, in his speech of July 31, 1857, in opposition to the second reading of the Bill of 1857 in the House of Commons, gives seven different constructions, as the following extract from the speech will show: "Now, Sir, it is not to be dissembled that a very great diversity of opinion prevails with respect to the due construction to be put on Scripture in this matter. There are, in the first place, those who think that the prohibition of divorce—that is, divorce carrying with it the power of remarriage—is absolute. There are those who think that there is in Scripture permission to marry after divorce in case of adultery alone, but that the permission is limited to the innocent man, and that there is not given to the woman under any circumstances liberty to marry. That I believe to be the most ancient opinion of the Christian Church after the old law, as I shall call it, of indissolubility. There are those who go one step further. They give liberty of divorce and remarriage both to the innocent man and to the innocent woman. There are others who give liberty of divorce after adultery to both parties if they are innocent, and to the man although he is guilty. There are others, and that is the description of the Scotch law at the present moment, who give it to both whether innocent or guilty, provided there is no intermarriage between the guilty parties. There is another class that permits the intermarriage of the guilty parties,

and there is another which considers that divorce may be permitted not only for adultery but for other causes. . . . We have many causes far more fatal to the great obligations of marriage, as disease, idiocy, crime involving imprisonment for life, and which, if the bond be dissoluble, might be urged as a reason for divorce. . . . With respect to the great question of the indissolubility of marriage, let me observe we had too much dogmatism, but the length to which I would push the argument is this —That the Gospel was intended to work out a certain great and provident result; and the mode of attaining this result, the most blessed and precious for mankind at large, was, in the wisdom of God, not by means of commands and forms in a rigid shape, but rather by the infusion of a new spirit into the precepts of the law, a spirit that pervaded every artery and vein of society, raised its tone from the degradation of heathenism, abolished the cruel sacrifice of human life, abolished the exposure of children, abolished polygamy, abolished slavery " (" Hansard," vol. 147, p. 838-841).

35. No common accord or understanding has been reached even at the present day, although the controversies have turned and, according to witnesses before the Commission, still turn mainly, if not entirely, upon the actual words used in the passages referred to. Mr. Watkins, whose work on " Holy Matrimony " has been already mentioned, at p. 151 thereof, says: " The evidence of Holy Scripture is difficult to understand, the appeal to Christian tradition is not quite uniformly answered, and from the standpoint of reason it may be conceded that there are arguments of weight on both sides." This want of accord is perhaps not so strange when

it is remembered that to-day's controversies are inherited from times of ignorance and superstition, from periods of violent recoil from prevailing licence, when ascetic doctrines prevailed and celibacy was glorified at the expense of marriage, when the theory of verbal inspiration and the consequent inerrancy of the Scriptures were universally accepted, and free criticism of those writings and inquiries as to their authorship and source and comparative values were considered inadmissible, and when the limits of man's knowledge and the depth of his ignorance may be easily understood from what I have already stated: if anyone requires ocular demonstration of this, let him look at the celebrated Mappa Mundi in Hereford Cathedral, designed, according to M. D'Avezac, the French geographer, early in 1314.*

36. At the present day the Scriptures are no longer looked on as outside the region of critical investigation, and partly owing to the development of textual and historical criticism, and partly to the progress of modern geological, archæological, biological, and other scientific knowledge, and to the discovery of the Assyro-Babylonian and other cosmogonies, and to other causes,† they can now be criticized in a way that was impossible in former days, and there are considerations to-day which were formerly either unknown or considered without weight, but which

* See *Gentleman's Magazine*, May, 1863, and Murray's "Handbook to the Cathedrals of England," p. 113.

† I refer to the Creation tablets deciphered by the late eminent Assyriologist, George Smith, and brought to the British Museum along with other treasures from the famous library of Assurbanipal (668–626 B.C.) excavated at Kouyunjik (Nineveh) and to Sayce's "Fresh Light from the Ancient Monuments"; Schrader's "Cuneiform Inscriptions in the Old Testament" (translation by Professor O. C. Whitehouse), and "Records of the Past" (edited by Sayce), second series, vol. i., pp. 122, 153; and Boscawen in *The Babylonian and Oriental Record*, October, 1890.

now seem to show grounds upon which religious and ecclesiastical difficulties which the question under discussion presents may be lightened or overcome.

37. The present position is that—

The Roman Catholic Church does not permit divorce *a vinculo.*

The Scottish law, accepted by the Protestant churches of Scotland, allows divorce to either sex for adultery or malicious desertion for four years.

The Greek Church allows divorce to either sex for adultery, and other causes are recognized in Greece, as shown by the synopsis, Minutes of Evidence, p. 4.

The law of England recognizes adultery as a ground of divorce, coupled, in the case of a wife's suit, with certain added circumstances.

The laws of other Christian countries appear in the synopsis aforesaid.

38. The evidence given by witnesses who appeared before the Commissioners discloses that there is not unanimity in the Protestant churches, and that even in the Church of England there are at least the three different opinions stated above held by the clergy and members of that Church on the subject, but which of these opinions is supported by a larger number of persons it is difficult, if not impossible, to judge; nor are there available means of determining the number of the clergy who hold one opinion rather than another, nor the numbers of the laity who agree in one opinion or another, nor the relative proportions of clergy and laity in each case. I restate these opinions for convenience in this form:

(1) That marriage is indissoluble.
(2) That marriage is dissoluble on the ground of adultery.

(3) That marriage is dissoluble for such grave causes as render joint married life actually or practically impossible.

The witnesses base these opinions mainly on questions of construction of the Scriptures, and have very fully discussed them. This is important, because none of the witnesses, including eminent Biblical scholars among the clergy, have claimed any special powers, other than those acquired by study, which enabled them to consider the matters more effectively than can be done by adequately informed, reasonable laymen. For this reason, although the legislature is not likely to examine into questions of theology, yet, as the views aforesaid are material and the grounds upon which they have been formed have been very fully gone into and explained by many learned men before the Commission, I think it right to point out certain matters which may assist open minds in coming to a conclusion upon these questions, if they approach them, as I have endeavoured to do, without allowing preconceived opinions to overrule reason.

39. The points and suggestions which I venture to make are put forward with the utmost diffidence, for they are within the province of the theologian rather than within that of one whose training and work have been of a legal character; but the original materials referred to by the witnesses, and upon which comments have been made from time to time by numerous writers, are after all of a very limited nature, and I think it may be useful to make in these notes observations which have occurred to me from a consideration of the evidence and writings and documents, including certain points arising out of the consideration of the scriptural texts pertinent

to this matter, which do not seem to me to have been raised by any of the witnesses or in any of the works cited by them.

Notes on Various Material Points.

40. (1) The English text is derived from a large number of varying manuscripts and versions in the Greek language,* which seem to have been derived from words spoken in Aramaic, and not from any contemporaneous writings. There does not appear to have been any commitment of the Gospels to a written form until some uncertain number of years after the Crucifixion, though a document known to critics as "Q" (Quelle, source), the existence of which at some time is presumed by them, is regarded as of very early but uncertain date. The Epistle to the Corinthians referred to is supposed to be of a date some twenty-five years after the Crucifixion.† It is stated that owing to the length of time which elapsed between the happening of the events recorded and the dates of the written records and the unreliability of human memory it is impossible to be certain that we now have a precise or full account either of what took place or of what was said.

(2) The state of Jewish society and practice with regard to divorce has been placed before us,‡ and seems to be better understood by scholars at the present day than at former times. We are thus assisted in understanding the bearings of the passages in question on the disputes which existed between

* A short account of this is to be found in Mr. Watkins' book, pp. 152–164.

† See the evidence of the Bishop of Ely (QQ. 23,055, 23,058) and other witnesses.

‡ See evidence of Mr. Abrahams and Dr. Adler.

the Jewish schools, and more especially between the school of Shammai and that of Hillel. The former contended for a strict reading of the passages in the Old Testament, while the latter maintained a view which practically permitted a man to put away his wife whenever he chose to do so. Upon this I may refer to the 24th chapter of Deuteronomy, v. 1-4, and the comments thereon by that well-known and very learned writer, Dr. Driver, Regius Professor of Hebrew and Canon of Christ Church, Oxford, in his work on Deuteronomy (ed. 1909) at pp. 269-273.

(3) The first and second chapters of the Book of Genesis, which contain what has been termed the Mosaic account of the Creation, are, according to what I understand, to be the best modern opinion composed of distinct documents or sources which have been welded together by a later compiler (or "redactor") into a continuous whole. C. I.-II., v. 4^a, and C. II., v. 4^b-25, contain a double narrative of the origin of man upon earth; the former belonging to the age of Ezekiel and the Exile (sixth century B.C.), forming part of what is commonly called the priestly narrative, denoted for brevity by the letter P., and the latter belonging probably to the ninth century B.C., and forming part of what, from its use of the name Jahweh is generally denoted as J. Dr. Driver, from whose great work on "The Book of Genesis" these statements are taken (pp. iii, iv, xvi, Introduction), says at p. xlii of the Introduction: "We are forced therefore to the conclusion that though, as may be safely assumed, the writers to whom we owe the first eleven chapters of Genesis *report faithfully what was currently believed among the Hebrews* respecting the early history of mankind,

at the same time, as is shown in the notes, making their narratives the vehicle of many moral and spiritual lessons, yet there was much which *they did not know and could not take cognisance of:* these chapters, consequently, we are obliged to conclude, incomparable as they are in other respects, contain no account of the *real* beginnings either of the earth itself or of man and human civilization upon it." And again at p. lxi: "We have found that in the first eleven chapters there is little or nothing that can be called historical in our sense of the word: there may be here and there dim recollections of historical occurrences; but the concurrent testimony, of geology and astronomy, anthropology, archæology and comparative philology, is proof that the account given in these chapters of the creation of heaven and earth, the appearance of living things upon the earth, the origin of man, the beginnings of civilization, the destruction of mankind and of all terrestrial animals (except those preserved in the ark) by a flood, the rise of separate nations, and the formation of different languages is no historically true record of these events as they actually happened. And with regard to the histories contained in chapters xii.-l. we have found that, while there is no sufficient reason for doubting the existence and *general* historical character of the biographies of the patriarchs, nevertheless, much uncertainty must be allowed to attach to *details* of the narrative: we have no guarantee that we possess verbally exact reports of the events narrated; and there are reasons for supposing that the figures and characters of the patriarchs are in different respects *idealized.* And, let it be observed, not one of the conclusions reached in the preceding pages is arrived at upon arbitrary

or *a priori* grounds; not one of them depends upon any denial, or even doubt, of the supernatural or of the miraculous; they are, one and all, *forced upon us* by the facts; they follow directly from a simple consideration of the facts of physical science and human nature, brought to our knowledge by the various sciences concerned, from a comparison of these facts with the Biblical statements, and from an application of the ordinary canons of historical criticism. Fifty or sixty years ago, a different judgment at least on some of the points involved was no doubt possible; but the immense accessions of knowledge, in the departments both of the natural sciences and of the early history of man, which have resulted from the researches of recent years, make it impossible now: the irreconcilability of the early narratives of Genesis with the facts of science and history must be recognized and accepted."*

I find in this passage, from a work by one of the greatest living authorities in the Established Church, a statement as to the immense change in thought which has taken place in the last half century, and that the account of the Creation given in the first two chapters of Genesis is no longer regarded as an inspired revelation in the sense of a record of real facts. The bearing of this upon the construction of the already mentioned passages in the New Testament, upon which so much reliance is placed by those who base their opposition to any reform of the law on scriptural grounds, is of the utmost importance, for it will be seen upon a close examination of those passages that a construction of them

* Reference is also made to pp. 33, 36, and 51–56 of the same work. See also "Early Narratives of Genesis" by Bishop Ryle and the article by Whitehouse in Hastings' Dictionary, vol. i., "Cosmogony." See also Cambridge Biblical Essays.

is possible and reasonable to-day to which in former days orthodox Christians might have felt it difficult or even impossible to assent.

(4) A difficulty which has been felt by the Western Church throughout the ages with regard to the treatment of the subject of divorce in the first of the Gospels may, according to certain modern critics, be eliminated if their views be accepted. That difficulty arises from the exception, "except for fornication," in the ninth verse of the 19th chapter of St. Matthew, and the exception, "saving for the cause of fornication," in the 32nd verse of the 5th chapter of the same Gospel, the specification of which exception has been and is regarded by the second category of Christians above alluded to as limiting divorce to one cause only. This exception has been a stumbling-block, on the one hand, to those who oppose divorce altogether, and, on the other hand, to those who advocate divorce for other grounds.

Competent critics point to certain inconsistencies in the account in St. Matthew xix., and maintain that they show that the account in St. Mark is original and that εἰ μὴ ἐπὶ πορνείᾳ and παρεκτὸς λόγου πορνείας are insertions by the editor of St. Matthew into St. Mark's narrative. With regard to this I refer to the evidence of the Bishop of Ely ("Minutes of Evidence," vol. ii., p. 435), of Dr. Paterson (*ibid.*, p. 442), of the Bishop of Birmingham (*ibid.*, p. 347), of Canon Hensley Henson (p. 411), and of Dr. Sanday (Q. 38,476 *et seq.*), Dr. Inge (Q. 38,672 *et seq.*), Dr. Denney (Q. 38,777 *et seq.*), and others. I may also refer to the notes on these verses by W. C. Allen, M.A., Chaplain, Fellow and Lecturer in Theology and Hebrew, Exeter College, Oxford, in "A Critical and

Exegetical Commentary on the Gospel according to St. Matthew," pp. 52, 201-206. At p. 52 he says: "It is, however, open to question whether this exception (in v. 32) is not an addition of the editor, representing no doubt two influences, viz., Jewish custom and tradition, and the exigencies of ethical necessity in the early Christian Church. A similar exception is made in xix. 9, and it will there be seen that the clause is clearly an interpolation. There is, therefore, a presumption that it has also been interpolated here. Moreover, the teaching of Christ as recorded by St. Mark (x. 11), seems to preclude any such exception."

I gather that the exceptions are now regarded by high authorities as interpolations or interpretations of Christ's teaching according to the view of it held by the writer of the first Gospel, and that if these exceptions are eliminated the passages are brought into consistency with those in St. Mark and St. Luke, to which I refer later on. If these views are not accepted, then it is to be noticed that several different interpretations have been given to the word *πορνεία*, which are referred to by the Bishop of Ely in his evidence (vol. ii., p. 434), and that by some the exception has been treated as illustrative and not exclusive. The contention of many eminent theologians seems reasonable, that the introduction of the exception clearly shows that the writer, who recorded the account with the exception, did not consider that Christ laid down a principle of indissolubility absolutely regardless of any exceptions. This last consideration, as bearing on the proper interpretation of the teaching, is of the greatest importance; upon this, *see* the evidence of Dr. Sanday, Dr. Inge, Dr. Denney, etc.

(5) The evidence appears to show that modern critics regard the Gospel according to St. Mark as the earliest written record which we now have of the words and deeds of Jesus Christ, though the document known as "Q" already referred to is thought to have been earlier than St. Mark's Gospel.* This Gospel is attributed to the Mark mentioned in the Acts, and Papias, who was martyred at Pergamos in A.D. 163 mentions a tradition that Mark, who neither heard nor accompanied Christ, committed to writing what he heard from St. Peter. The date and place of the writing seem to be uncertain. There is some tradition that it was written at Rome (Principal Lindsay, "The Gospel according to St. Mark," pp. 14-17).

(6) From the general character of the discourses it seems clear that Christ spoke, not as a legislator, but as indicating general principles, and without expressing exceptions thereto. Clear instances of this are found in the 5th chapter of Matthew, verse 34, "Swear not at all"; verse 39, "Resist not evil" (R.V., "Resist not him that is evil"); verse 40, "And if any man will sue thee at law, and take away thy coat, let him have thy cloke also"; verse 42, "Give to him that asketh thee"; chapter vi., verse 19, "Lay not up for yourselves treasures upon earth"; verse 26, "Take no thought for your life, what ye shall eat, or what ye shall drink; nor yet for your body, what ye shall put on."

Those who forbid divorce in all circumstances because of Christ's unqualified words (supposing they were unqualified) seem to fall into the same error as the Society of Friends, who consider war and

* "Oxford Studies on the Synoptic Problem." Edited by Dr. Sanday, 1911.

litigation absolutely forbidden by Christ's express command, "Resist not evil," and who refuse to take an oath in a court of justice because of his injunction, "swear not at all." None of the witnesses who were examined on this point were able to give a satisfactory explanation why words, equally unambiguous and unqualified in each case, should be subject, when carried into application, to exceptions in the one case and not in the other (*see* the evidence of the Bishop of Ely, p. 437).

Christ's teaching was spiritual. He taught, preaching the Gospel of the Kingdom of Heaven. To Pilate He said, "My kingdom is not of this world," and there are no indications in the Gospels of any interference by Him with the institutions and government of the country. Indeed, when, as it is recorded, the Pharisees sought to entangle Him (and it must be remembered that, in the question of divorce, a similar entanglement was attempted) of giving tribute to Cæsar, the often-quoted reply is attributed to Him: "Render therefore unto Cæsar the things that are Cæsar's, and unto God the things that are God's." Further, He inculcated great general moral principles without giving forth any detailed or definite social laws and without referring to exceptions to general principles, though in the passages which deal with His comments on the Sabbath day, He inculcates an exception to a general principle in case of necessity (*cf.* Matthew, chapter xii., verses 1-13).

I may also refer to the copy of the late Bishop Creighton's letter written from Peterborough on March 18, 1895, to the Rev. Canon Stocks, in his "Life and Letters" by his widow. He says: "The marriage question is dreadfully difficult, and would require a volume. I am sorry for the attitude

recently taken up by Luckock and others. It is not founded on sound knowledge. Speaking generally, the question raises in its extremest form the problem of the actual application to life of the principles of the Gospel. We must remember—it cannot be remembered too much—that the Gospel consists of principles, not of maxims. The only possible principle concerning marriage is that it is indissoluble. But all principles are set aside by sin; and our Lord recognized that as regards marriage. (The interpretation of πορνεία as prenuptial unchastity will not do. Such a man as the Bishop of Lincoln is against it on patristic grounds. It is untenable.) I must own myself to a strong indisposition to set the Church against the State on such a point as the interpretation of the latitude to be assigned to the permission of dissolution which our Lord's words imply. It has always been found difficult to adjust law and equity. But is the Church on this point to admit of no equity ? The mediæval system was a mass of fictions or dispensations and subterfuges. The question has always troubled the English Church. Cranmer, Andrews, Laud alike had no fixed principles. Now the State has taken matters into its hand and marriages are primarily civil contracts. We as Christians abhor divorce. But when a divorce has been judged necessary, are we to refuse any liberty to the innocent and wronged party? It seems to me a matter for our discretion on equitable grounds in each case. I could not advise any of my clergy to refuse to solemnize a marriage of an innocent person who genuinely desired God's blessing. I prefer to err on the side of charity."

(7) The last matter to which I would draw attention is the necessity for bearing in mind the circum-

stances in which the words attributed to Christ are recorded as having been uttered and the context as bearing upon their construction. The importance of this was recognized by the Bishop of Birmingham in the following answers:

> "Q. 21,533. . . . (*Lord Guthrie*): I suppose the view we take in the civil Courts would not be dissented from by you with regard to the Christian question, namely, this: In considering any utterances of Christ's we must, must we not, consider exactly what was the question under discussion in reference to which He speaks ?—Most certainly.
>
> "21,534. You see it happens every day in the Courts that the opinion of a great Judge or a great authority is quoted; the Judge at once asks: What was he talking about; what was the context ?—Yes.
>
> "21,535. And the general opinion of a great priest or a great Judge is represented or controlled by the particular circumstances ?—Yes.
>
> "21,536. Do you agree to that ?—Entirely."

41. I have now stated those matters which it has occurred to me should be borne in mind before approaching the consideration of the written records, and I now proceed to examine first the account which is considered, as already stated, to be the most original representation of the teaching of Christ on the subject of divorce—viz., the 10th chapter of the Gospel according to St. Mark—and in my citations I use the revised version. For close textual criticism and biblical exegesis, reference must be made to the scholarly evidence of Dr. Sanday, Dr. Inge, and others, but there are further matters which seem to me to require careful consideration.

42. The scene of the incident related in St. Mark is laid in the country over which Herod Antipas ruled,

who had divorced his wife in order to marry his own niece, the wife of his brother Herod Philip, and had beheaded John the Baptist for denouncing his conduct. It must be borne in mind that the Pharisees sought to set Herod against Jesus, and no doubt questions were being raised as to the unlimited right to divorce which were likely to affect morals in Judæa as well as throughout the Roman Empire at that time (Principal Lindsay, *op. cit.*, p. 166). The state of the Jewish law and practice, as described by Mr. Abrahams, must also be remembered. This made the question put before Christ (which did not deal with divorce in our sense of the word, but with "putting away") different in essence from the question which has now to be considered. Broadly speaking, divorce was the unrestricted privilege of the man who could either force his wife's consent to a divorce, or proceed against her if she were unwilling. She had no strict rights, but could practically force him, by pressure brought to bear upon him, to file a bill of divorce in certain circumstances, which did not include mere infidelity, if she wished to be free. But how far this position of a wife was a reality as early as the days of Christ seems from Mr. Abrahams' evidence doubtful. It is in these circumstances that the discussion recorded (Mark x. 1-12), appears to have taken place. The writer, indeed, if what is above stated be correct, was certainly not present. He does not indicate who were present, except in general terms; nor what school of thought the Pharisees referred to represented. He gives a fragmentary account, for it is hardly reasonable to suppose that, with ample opportunity, and having regard to the conduct of the ruler of the country and the disputes between the different schools of Jewish thought, the discussion was con-

fined to the few sentences which have reached us, and he gives an account different materially from that recorded in the Gospel according to St. Matthew.

43. It is to be noted that at the commencement of the 10th chapter it is stated that the Pharisees came to Jesus into the borders of Judæa beyond Jordan and asked Him a question: "Is it lawful for a man to put away his wife ? tempting Him." It may be considered reasonable to suppose that this brief account is referring to an attempt to entrap Him into an exposition in reference to the conduct of Herod and the disputes existing at the time which might be used against Him. No other explanation has been suggested, so far as I am aware, of why this question should have been put to "tempt Him." What follows after the question appears to be regarded by some who maintain the indissolubility of marriage as indicating that a new command wider than was necessary for the determination of the immediate question was given by Christ, which was to govern the Christian Church in all circumstances and for all time to come. But it may be answered that a close study of verses 3-12 shows that this cannot have been His intention, that no new command was introduced, that no legislation was attempted, and that He was merely placing before His questioners arguments derived from the Jewish Scriptures. Mr. Watkins observes: "If the copula was an essential feature of the original Divine institution, it must be no less so of Christian marriage, which is no new institution, but the original marriage of Eden taken up into a new hallowing. All that was essential in Eden must be essential now" (Watkins, *op. cit.*, p. 114). If the opinions thus expressed by this writer are to be con-

sidered as indicating the views entertained by any considerable body of opinion, we are relegated to the consideration of the Old Testament records in the early chapters of Genesis for the account of the institution of matrimony. But these are not records of real facts. If, however, these opinions are not to be so considered, then it will be seen from the following observations that, if anything in the nature of a general ordinance was promulgated by Christ, it may be regarded as applicable to the then existing Jewish customs, because it was based upon the current interpretation placed upon these chapters by the Jews, who regarded them as the records of historical facts, though, if so regarded, they are now known to be irreconcilable with the discoveries of modern times, and can be more naturally regarded as the parabolic and philosophical presentment of the author's conception of truth. It was not part of Christ's mission to correct popular impressions of the Jewish Scriptures. For the purpose of dealing with His hearers, He met them on their own ground and with their own weapons. His answer to the question is thus recorded: "What did Moses command you?" and the reply is obviously a reference to the aforesaid chapter of Deuteronomy,* which placed some re-

* Dr. Driver states that the composition of Deuteronomy must thus be placed at a period long subsequent to the age of Moses, and he places it as a work of the seventh century B.C. "Deuteronomy," p. xliv *et seq.*, Introduction, and at p. lvi, he explains that "all Hebrew legislation, both civil and ceremonial, however, was (as a fact) derived ultimately from Moses, though a comparison of the different codes in the Pentateuch shows that the laws cannot all in their present form be Mosaic; the Mosaic nucleus was expanded and developed in various directions as national life became more complex and religious ideas matured. Nevertheless, all Hebrew laws are formulated under Moses' name, a fact which shows that there was a continuous tradition embracing a moral, ceremonial, and a civil element; the new laws or extensions

striction on the then existing freedom of divorce by requiring a bill of divorcement. It is: "Moses suffered to write a bill of divorcement and to put her away." It is then recorded that He gave a reason for Moses suffering the writing of a bill of divorcement and the putting away, thus: (Verse 5) "For your hardness of heart he wrote you this commandment." (Verse 6) "But from the beginning of the Creation male and female made He them." (Verse 7) "For this cause shall a man leave his father and mother, and cleave to his wife." (Verse 8) "And the twain shall become one flesh; so that they are no more twain, but one flesh." It seems clear that He is recorded as quoting from the Book of Genesis, i. 27, "Male and female created He them," and from the second chapter of the same Book, verse 24, which contains the words: "Therefore shall a man leave his father and his mother, and shall cleave until his wife; and they [LXX., 'the twain'] shall be one flesh." But it is of great importance to notice the concluding words of the 8th verse of the 10th chapter of St. Mark, "*so that* they are no more twain, but one flesh." These words are not a quotation, but show an inference drawn from the previous words quoted. The words of the said 24th verse in the 2nd chapter of Genesis appear to be a comment by the narrator upon the account of the creation of woman from a rib of man, which he has given in the previous verses. Dr. Skinner, Professor of Old Testament language and literature, in his work on Genesis, page 70, terms this verse "an ætiological observation of the

---

of old laws, which, as time went on, were seen to be desirable, were accommodated to this tradition and incorporated into it, being afterwards enforced by the priestly or civil authority, as the case might be."

narrator," and adds: "It is not a prophecy from the standpoint of the narrative; nor a recommendation of monogamic marriage (as applied in Matthew xix. 4 *ff.*, Mark x. 6 *ff.*, 1 Cor. vi. 16, Eph. v. 31); it is an answer to the question, What is the meaning of that universal instinct which impels a man to separate from his parents and cling to his wife ? It is strange that the man's attachment to the woman is explained here, and the woman's to the man only in iii. 16." Dr. Driver's note on this verse is: " The narrator's comment, explanatory of the later existing custom, (*cf.* x. 9, xxii. 14^{b}, xxxii. 32). *Therefore*—viz. because man and woman were originally one, and hence essentially belong together—DOTH *a man leave his father and his mother, and* CLEAVE *unto his wife ; and they* BECOME *one flesh* the attachment between them becoming greater, and the union closer, even than between parent and child. Marriage—and, moreover, *monogamic* marriage—is thus explained as the direct consequence of a relation established by the Creator. *Cf.* Matt. xix. 4-6 (Mark x. 6-8); 1 Cor. vi. 16, xi. 8-12; Eph. v. 28-33; 1 Tim. ii. 12-14" (" The Book of Genesis," p. 43). I shall have to refer to the words " one flesh," but reserve my observations thereon until later.

44. It will be observed that the quotation from the said 24th verse is not recorded in precisely the same terms as the original. The 24th verse begins with the word " therefore." In the previous verses of the 2nd chapter of Genesis the writer expresses his conception of the formation of man, the planting of a garden in Eden, the placing of a man in it, and the making of a woman from a rib taken from Adam while he slept, and proceeds in the 23rd verse thus:

"And the man said, This is now bone of my bones, and flesh of my flesh: she shall be called Woman, because she was taken out of Man," and then the writer adds, "*Therefore*," etc.

45. Christ appears to have been referring to the beginning of Creation as it was then believed by the Jews to have taken place and to the Mosaic account, which, as already pointed out, is not now accepted as other than poetical and allegorical, and He was, in effect, arguing that, from the account given in their own scriptures as they then accepted them, the inference is that from the fact of a male and female creation and union, that union should be monogamous and continuous. The Jews would appear to have treated the Mosaic account of Creation as an account of real facts, and throughout the whole of the Gospels there is no suggestion of any disclosure by Christ of (to use Dr. Driver's words) "the irreconcilability of the early narratives of Genesis with the facts of science" (p. lxii), or that in the human capacity in which He appeared on earth he claimed any greater historical or scientific knowledge than those among whom He moved, and therefore it is suggested that His dicta on this matter may be regarded as affected by being statements of inferences from what were then regarded as historical facts, but were not in fact such. It does not seem as if sufficient weight has yet been given to the fact that doctrines put forward by Christian Churches as if they emanated from Christ are in reality founded upon an Old Testament account of what we now realize were not real facts. General principles may well be founded upon allegorical teaching, but precise enactments are not based on such materials. However much spiritual thoughts may be drawn from the conceptions so marvellously

expressed in the early chapters of Genesis, and though some may regard them as part of a progressive revelation to man, the account is not necessarily a sound basis for theories and laws relating to the temporal life of man upon earth.

46. That the discussion is recorded as argumentative is made still clearer by the 9th verse of the 10th chapter: "What therefore (Gr. *οὖν*—therefore, consequently) God hath joined together, let no man put asunder." These words are generally relied upon by objectors to dissolution, but are often misquoted by them, thus: "Those whom God hath joined together, let no man put asunder." The word in the original refers to the institution of marriage in general, not to the particular individuals concerned. An instance of their use in the form just set out is to be found in the Anglican marriage service, and they have been not infrequently misquoted in the course of the proceedings before the Commission. In general quotation the word "therefore" is omitted. But this omission is of the highest moment, because the word omitted shows beyond all question that Christ was not laying down any new principle, but was drawing an argumentative inference Himself from the aforesaid passages in Genesis, which, as the Jews accepted the Mosaic account, gave them a guide on which to found their views on the question which He had been asked. This may be made still plainer by turning back to the second sentence in verse 8, "*so then* they are no more twain, but one flesh," which is followed by the *therefore* of the 9th verse. It will be seen that, addressing the Pharisees on their own scriptures, He only drew a general inference for them from the account of the Creation of man and woman in Genesis as to the normal relationship of the sexes,

and that in the most important verse quoted by Him an inference was drawn by the narrator. We have thus what may be looked upon as an inference upon an inference, which again is drawn from a poetical conception which was concerned with general sex relations, and not in the least with any question of divorce.

47. So much seems to rest upon the Old Testament records quoted by Christ that I pause to notice that, even if they were treated, as in former days they were, as inspired statements of real sayings and doings of the time of Creation, there seems to be nothing in them to justify the conclusion that in no circumstances could the normal relationship of husband and wife be put ân end to; and when we now appreciate that they were compiled some few centuries before the Christian era, and when polygamy, in all probability, extensively prevailed and the putting away of wives was recognized, I confess it seems to me almost impossible to believe that the writer was doing more than expressing his conception of how the world and men and women on it were created; or that he was intending to deal with, or that he had in the slightest degree in mind, questions of dissolution of marriage.

48. To return to the record in the said 10th chapter—the conversation regarded as above suggested is argumentative, and the argument is based on assumptions accepted by His auditors, but which are not in fact tenable now. The account in St. Mark seems to indicate that the conversation with the Pharisees closed at this point, and it is most remarkable, if Christ intended to lay down publicly a distinct prohibition against divorce and remarriage in any circumstances, to find no plain statement to this effect recorded in that part of the account which

deals with what appears to have been a public discussion.

49. The discussion appears to have been resumed " in the house " (verse 10), where it is stated that the disciples asked Him again of this matter. The question put by them is not given, but the answer recorded is found in verses 11 and 12. It is always important to know the actual question put if any dispute arises as to the meaning to be given to an answer. If the two conversations are read by the light of the circumstances in which and the place at which they took place, and of the matters already stated, and, further, if they are read without any preconceived opinions, it seems reasonably clear that Christ was dealing with the impropriety of a man or woman, whenever he or she chose, putting away the other with the object merely of marrying another person; for He says: " Whosoever shall put away his wife, and marry another, committeth adultery against her. And if she herself shall put away her husband and marry another, she committeth adultery." The collocation of the words " put away " and " marry another " shows that the point was putting away a wife or husband, as the case might be, in order to marry another person. The words " against her," which, however, are not to be found in Matthew, may perhaps be considered not very intelligible; possibly they are indicative of a wrong done to the wife by putting her away without proper cause. There is absolutely no reference to any case in which the circumstances are such that the marriage tie has been sundered *de facto* though not *de jure*, and a man and his wife are no longer living together, and it has become impossible for them to do so through the misconduct of one of them,

nor to the interference of public justice in such cases, and it seems extraordinary that the record should be entirely silent upon such points if they had ever been present to the mind of anyone who took part in the discussion from which the statement made to the disciples originated. It may not be unreasonable to suppose, having regard to the brevity of the record, though the subject discussed was one of great importance, that only a fragment has been preserved. It may be noticed that the clause, verse 12, is omitted in the account of Matthew xix. 9, probably because it was inconsistent with the Jewish law, which did not permit a woman to divorce her husband, though upon this see the evidence of Mr. Abrahams already referred to; and Dr. Driver states that "by the later Jews a wife was *permitted in certain cases . . . to claim a divorce.*" But there may be doubts about the 12th verse representing correctly what was said, and the difference between the two Gospels in this respect shows how difficult it is to rely on either of them giving an exact account of what occurred. This is usually the case where more than one account is given from memory of conversations years after they took place. Possibly St. Mark, writing, as has been suggested, for Gentile Christians, may have written the 12th verse in the form in which we have it as a correlative to the 11th verse.

50. The account in St. Matthew appears to be of the same occasion as that mentioned by St. Mark. It is said by some that this account records the conversation as taking place at one and the same time, whereas in St. Mark it is recorded as taking place partly with the Pharisees and partly with the disciples, but, although the former account is some-

what transposed, it seems clear from verse 10 that there is recorded a conversation with the disciples subsequent to that with the Pharisees. The differences are pointed out in the evidence of the witnesses already referred to, and I call attention to that evidence. The general opinion seems to be that this Gospel, as we have it, is much later than that of St. Mark, that the writer may have had the Marcan Gospel before him and the document which critics denominate " Q," as to which there is necessarily much uncertainty.

51. The great difference between the teaching of this Gospel and that of Mark is that in the former the exception of fornication is expressly introduced both in the 19th and the 5th chapters. In the 19th chapter, verse 9, the words " except for fornication " are introduced (it may be noted that they are, according to the authors of the Revised Version, in some ancient authorities followed by the words " maketh her an adulteress," instead of by the words " and shall marry another, committeth adultery," and that the former words seem to indicate a wrongful putting away). In chapter 5, verse 32, the words, " saving for the cause of fornication," are introduced. Critics, as I have noticed, consider, and give reasons for considering, that these words thus introduced, and also the words, " for every cause," in chapter 19, verse 3, and " except for fornication," in the same chapter, 19, verse 9, have been added to St. Mark's account, but if they are to be regarded as authoritative, it is to be noted that one school considers the exception aforesaid as illustrative, while another regards it as allowing of divorce for adultery and for that alone. There have also been suggestions that it related to ante-nuptial incon-

stancy, and not to adultery only, or to prostitution of the wife, or to general misconduct, or to idolatry; and, lastly, the Roman Catholic Church and others consider that it justifies the putting away, which is a separation only and not a divorce. The most weighty modern opinion appears to be in favour of regarding the exception as not mentioned specifically in the discussion and discourse, but that if it were so mentioned it was not referred to as an exclusive exception.

52. Confusion is introduced by the use of the Greek word *πορνεία*, which is the generic form for fornication, instead of the word *μοιχεία*, which means adultery. Gibbon pointed out that the former word is not in pure Greek a common word, and is only a translation of some word used by Christ, the original of which is unknown, nor can its proper meaning be strictly applied to matrimonial sin. He observed: "The ambiguous word, which contains the precept of Christ, is flexible to any interpretation that the wisdom of a legislator can demand."*

53. I have already referred to the question of the construction if the exception I have discussed be omitted, and to the position maintained by the witnesses and writers if it is to remain. The general observations I have already made on St. Mark's account are applicable to the account in St. Matthew, though perhaps with even more force, for the passages in verses 4 and 5, chapter xix., beginning, "Have ye not read," are clearly shown by these words to be quotations from the Jewish Scriptures, though verse 5,

* "Decline and Fall of the Roman Empire," vol. viii., ch. xiv., edition 1791, p. 67 (and also Bury's edition, vol. 4, 481–2, and *see* note 132, p. 481, note). In this note Gibbon says: "Some critics have presumed to think, by an evasive answer, he avoided the giving offence either to the school of Sammai or to that of Hillel (Selden, 'Uxor Hebraica,' l. iii., c. 18–22, 28, 31)."

as we have it, incorrectly treats the words as having been attributed to the Creator. And, further, verse 6 shows, even more clearly than is the case with the account in the 5th chapter of St. Mark, the inferential character of the discussion, for after the quotations from Genesis, the said 6th verse runs thus: "*Wherefore* they are no more twain, but one flesh. What *therefore* God hath joined together let not man put asunder." It will be observed that the account in St. Matthew concludes with verses 10, 11, and 12, which are not to the same effect as the 10th, 11th, and 12th verses of the 10th chapter of St. Mark. Much difficulty appears to have been felt as to the interpretation to be placed upon the former, for it is not clear what "the saying" referred to is, and in one view they seem to relate to the advocacy of celibacy, but whatever "the saying" to which reference is made may be, Christ contemplates that "all men cannot receive" it, and would appear to indicate the necessity of taking human needs into consideration. (See on this point the evidence of Dr. Sanday, Minutes of Evidence, Q. 38,476 *et seq.*)

54. A last point to notice in the account in St. Matthew's Gospel, is that chapter xix., verses 5–9, is regarded by the Roman Catholic Church and others as permitting a separation from bed and board by legal authority, but I can find no trace in Jewish law and tradition of any such proceeding, which is regarded by competent writers as an invention of a later period by the Churches; and, further, the words of the verse are so obviously dealing with the divorce of that time that it is extremely difficult to-day to understand how any other interpretation came to be adopted, except by forcing a construction in order to support the advocacy of enforced celibacy.

It may be asked, as it was asked by Sir George Grey in the debate in the House of Commons in 1857 (July 31), how it is that the putting asunder of husband and wife, which is the result of such a separation as aforesaid, can justly be said to be in accordance with the law of God, while the more complete separation, which takes place as a consequence of divorce *a vinculo*, is maintained to be in direct opposition to that law (Hansard, vol. 147, p. 857). Moreover, when the question with which the discussion started and the whole conversation is considered, it is perfectly clear that the putting away refers to divorce *a vinculo* and not to a mere separation from bed and board. It may be further observed that to follow the Roman Catholic construction logically the right to separation *a mensâ et thoro* should be confined to fornication, but they extend it, at any rate, to cruelty and possibly desertion (Q. 22,933).

55. If these suggestions be correct, it seems unnecessary to examine St. Matthew v. 31, 32, with minuteness, for those verses form part of what is known as the Sermon on the Mount, when a number of general precepts were stated such as would be natural to a moral discourse, but it seems impossible to read the whole of this chapter together without concluding that general principles were being stated in general terms, and exceptions thereto were not being discussed; indeed, it would be unreasonable to expect that on such an occasion precepts would be expressed with the precision requisite if positive rules of law were being laid down.

56. The short passage in St. Luke xvi. 18 consists of one verse only, which is inserted without any indication of how what it states came to be said, and without connection with what precedes or follows.

It has been suggested that the writer has taken it from the source "Q.," which was common to him and to the writer of the work attributed to St. Matthew. The observations already made upon statements of general principles apply here also.

57. The Gospel of St. John contains no account of the teaching in question. With regard to the 7th chapter of the First Epistle of St. Paul to the Corinthians, I cannot discover any adequate reason for considering that its language justifies any proposition that marriage was regarded by the writer as indissoluble. The general effect of it appears to be in the opposite direction, and was evidently so regarded by those who framed the heading of the chapter in the Old Version, which states: "2 He treateth of marriage, 4 showing it to be a remedy against fornication: 10 and that the bond thereof ought not lightly to be dissolved." It is upon this chapter that so much stress is laid by Scottish and Continental theologians as supporting the view by analogy that desertion may be a ground for divorce, upon which point I refer to the evidence of Dr. Paterson (Minutes of Evidence, p. 445).

58. Those who maintain that marriage is indissoluble, consider that they base their views upon divine teachings in the Scriptures, to which I have referred, and I have now pointed out reasons for doubting the soundness of their conclusion, and for attributing the original foundation of these views to Old Testament teaching, based upon the poetic conceptions of ancient Jewish writers.

59. I have now examined what appears to be the main features of the records on which the Christian doctrines of the formation and dissolution of marriage are rested. In the evidence is to be found much

minute and most learned criticism upon these records, and therefore I have confined myself to what appear to be the most striking matters.

60. I confess that to a lawyer the admitted uncertainty, not merely as to what Christ meant by what He is recorded as having said, but as to what He actually did say, makes it incredible that He could have intended His words to be used as indicating principles for legislation. Lawyers are familiar with difficulties arising in the construction of statutes, but the idea is unknown that it should be impossible to ascertain what were the exact terms of the statute itself.

Conclusions from the Records.

61. The conclusions I draw from the records by the light of the general considerations which I have presented are these:

I think it must be borne in mind at the present time that the records differ; that we have no reasonable certainty that we have an exact or full account of what was said; that there were undoubtedly disputes of an important character amongst the Jews at the time of Christ; that these disputes related to the right of a man, without cause assigned or existing, to put away his wife by his own act, and not to the question now under consideration—namely, the right of a man or woman, the victim of grave wrong on the part of his or her spouse, which makes it impossible for the marriage relation to continue, or where other circumstances have supervened which produce the same result, to ask a court of law, before which the said wrong or circumstances are legally proved, to declare at an end in law the relation which is already determined in fact; that these disputes were the cause of the inquiry addressed to

Him in order to entrap Him, as in other cases, into some compromising answer; that no direct answer was given, but that He argued with his inquirers upon the basis of such knowledge of their history and such beliefs as they possessed; that He made some statement afterwards to His disciples which is differently reported in the records as we have them; and that He followed His usual course of dealing with general, moral, and spiritual principles, but made no legislative suggestions.

62. It is, indeed, not reasonably possible to find in the records any plain and clear statement which directs that, while marriage may be freely entered into by the voluntary action of the parties, a state or church is bound to prohibit its dissolution for any cause or only for one cause. Nor does it appear that the great teacher was Himself considering the matter from such a point of view, for otherwise it would seem difficult to account for the complete omission of all reference to the position of the children of a marriage which was sundered in fact.

Observations on Christian Teaching.

63. I would suggest that Christ's whole teaching was concerned with man's moral character and his spiritual life here and hereafter, and not with the actual working or necessary evolution of institutions by which man's temporal life is regulated; and when one reflects on this, and the beliefs and state of knowledge at the time and the circumstances in which the discussions referred to took place, it would seem that what is really to be found in this teaching is that from the creation of man and woman it may be inferred that some union should be formed between them; that that union should, in the best interests

of humanity, be of a monogamous character, from which it should naturally follow that it should be continuous and that each person entering into such a union ought to be faithful to the other. Faithfulness to the union seems to be the keynote to the teaching which He intended to address to the inquirers. A man was not to put away his wife and marry another, nor was a woman to put away her husband and be married to another. But in this, while we find a guiding principle of conduct aiming at the realization of a high ideal of marriage—an ideal, the universal attainment of which, if human nature remains as it has been and is, however much it may be devoutly wished and striven for, is not likely to be completely realized—it is obvious that underlying it, as an assumed but necessary condition, is the co-relative duty of faithfulness, without which no ideal union can be realized. In the first part of the recorded discussion, it seems to be assumed that while each remains faithful there should be no putting asunder. The idea of "putting asunder" is in a certain sense inapplicable to a tie which has already been sundered in fact. And in the second part of the discussion, unless a very constrained construction is placed on the words recognized as being the most original account, there is, when reasonably construed, absolutely no prohibition of a complete severance of the marriage bond when the assumed condition is broken and either party becomes in fact unfaithful to the bond.

64. When one realizes what human nature is, of what horrible conduct human beings are capable under the influence of lust, anger, greed, or drink (witness, for instance, some of the evidence given by Mr. Parr, Director of the Society for the Prevention

of Cruelty to Children, and the evidence relating to cases under the Aliens Act), and the frightful sufferings they can inflict on each other and upon children, and when Christians have in mind the intense pity and superhuman sympathy with which Christ regarded the suffering, the poor and the needy, and His tender regard for little children, it seems impossible to credit that, in teaching the doctrine of faithfulness, He was condemning those who suffer from a breach of it and cannot hope to realize an approach to the ideal, not even a bearable existence, to life-long misery and moral deterioration, if not ruin, when their ideal is shattered by conduct which He condemned, or by supervening circumstances which rendered its realization hopeless and life intolerable. How His teaching, which was founded on considerations applicable to the whole human race, was appropriated as peculiar to Christians, and was translated by interpretations thereof into doctrines which have been established in certain sections of the Church, is matter of history. That it was not at the outset so treated is plain from the fact of the introduction of the exception in St. Matthew, and the fact of the introduction by St. Paul of an exception to meet a case which had not been before Christ. The exception introduced by the editor of the Gospel according to St. Matthew, as Mr. Allen, expressing views many entertain, says, " representing, no doubt, two influences, viz., Jewish custom and tradition and the exigencies of ethical necessity in the early Christian Church," shows the sense in which the teaching was understood by those who lived at the time, and in the same environment as the teacher or writer. Moreover, the importance of this is extremely great, for this Gospel has been commonly

attributed to St. Matthew (the only one of the three Evangelists whose records refer to the points in question who was associated with Christ throughout His ministry), though I gather that this attribution is no longer generally accepted, and if the writer, who, according to Dr. Inge, wrote or compiled the Gospel as we now have it about the year 90 A.D. from the Marcan account, and from some prior document possibly written by St. Matthew himself for the Jewish communities, felt himself justified in introducing the exception (and it has not been suggested that it was not introduced in good faith), it must have been because he considered he was copying or introducing an allowable exception to a declared general principle to meet the necessities of Jewish life according to Jewish customs and mode of thought. It would seem necessarily to follow that other exceptions might in the same way be introduced which are required to meet the necessities of a different civilization.

65. Later, when we turn to the writings of the early Christian Fathers, who did not live in Christ's time, but in conditions which were not those of Jewish society in that time, we find that, while they based their opinions on the records of the Bible, their interpretations in times in which general morality reached to the utmost laxity—times which were full of trouble and disturbances, and when there was much ignorance and superstition—resulted in the putting forward of views which may be regarded as expressing an exaggerated recoil from the licence of the Roman laws. These views were asserted in an endeavour to combat the deplorable state of things which existed in the society of the times in which the writers lived, and were dictated largely, though uncon-

sciously, by mistaken and irrelevant assumptions which necessarily coloured their whole views on the relations between the sexes, and therefore on all subjects connected with marriage and divorce. They, or some of them, were celibates by choice; they forbade the clergy to marry, and lauded the superior sanctity of the celibate state both for clergy and laity. Most of them condemned second marriages, and therefore, of course, condemned the marriage of divorced persons, whether innocent or guilty. Thus Origen (186–254), who has been called "the most learned and original of the early Church Fathers, and perhaps the noblest figure among them all," was not only a celibate, but, according to Eusebius, mutilated himself, following a Judaically literal interpretation of Matthew xix. 11, "there be eunuchs, which have made themselves eunuchs for the kingdom of heaven's sake." It should be added, however, that he was young when he did this and his action was condemned by the Church generally. Origen wrote, in regard to second marriages: "I think that a monogamist, and a virgin, and he who perseveres in chastity are of the Church of God. But he who is a bigamist, albeit his conversation is honest, and he excel in virtues other than chastity, is yet not of the Church, and of the number of those who have not 'spot or wrinkle or any such thing,' but that he is of the second degree, and of those who call upon the name of the Lord, and who are saved in the name of Jesus Christ, yet are in no wise crowned by Him." Tertullian, who subsequently changed his mind and admitted the second marriage after divorce of the innocent woman as well as of the widowed (see C. Dodson's English edition of "Tertullian," p. 432), devotes a whole treatise, "De

Monogamia," to prove that second marriage is "sin"; Athenagoras calls second marriage "reputable adultery"; and St. John Chrysostom, referring to marriage in general, asks, "What can be more bitter than this bondage?"

66. Confusion also resulted from false analogies drawn from the figurative language of Scripture, comparing Christ and the Church to husband and wife, and many other fanciful Scriptural arguments are contained in the writings of the early Fathers.

67. It must also be remembered that, while the Fathers forbade remarriage, they, or some of them, forbade an innocent husband to forgive an adulterous wife, and insisted that it was not merely his right, but his duty to separate himself finally from her. This principle, which was the logical outcome of the Fathers' opinions, is repudiated by Protestant supporters of the Fathers' views, some of whom seem to go to the opposite extreme by enforcing on husbands and wives that they ought to continue to live together, although the result may be to produce misery to themselves and their children. The general remark may here be made that certain views about marriage and divorce are defended on the alleged authority of the early Christian Church. But those who so argue are ready, as in the case of the marriage of the clergy and the second marriage of clergy and laity, to throw over, or ignore the same Fathers when their opinions or practices do not suit them. It may be here remarked that Christian Churches recognize fully second and even subsequent marriages both for the laity and also for the clergy in Protestant Churches, and this is frequently acted on. The Churches, therefore, act on the view that the marriage relationship is of a temporal character

and do not attach to it that spirituality which Mr. Frederic Harrison states is attributed to it by the Positivists, who are entirely against second marriages (Minutes of Evidence, Q. 60,226 *et seq.*).

68. The Fathers and their mediæval and modern followers, seem to look at the questions of marriage and divorce chiefly from the point of view of the spouses and of the Church, and to ignore largely the interests of the family and the State, which most people nowadays consider of the utmost importance. The same tendency, in a modified form, is suggested by the sparse reference in the proofs of certain witnesses submitted to the Commission to any interest other than those of the spouses and the Church. In this connection remark may be made about the immorality which is produced directly and indirectly where divorce is prohibited and spouses, severed for life, but unable to remarry, are as a matter of fact led, in a large proportion of cases, into improper sexual relations with others. This aspect of human life is ignored both by the ancient and modern advocates of the absolute indissolubility of marriage.

69. The writings of the early Fathers have naturally not been without their effect on later times. Subsequent writers founded on their opinions and attached an importance to them which, for reasons already given, cannot be now recognized. The belief developed that marriage was a sacrament, and therefore results in a bond which, as formed by God, cannot be severed by man. The condemnation of this belief contained in Article 25 of the Thirty-nine Articles does not seem to have prevented its adoption in substance by some clergy of the Church of England.

70. It is submitted that it cannot be established that there has been any continuous and unanimous consensus of opinion in the Christian Church in favour of the view that absolute indissolubility of marriage is the necessary result of Christ's teaching.

Opinions entertained at Different Periods.

71. It may be convenient to divide the different periods as follows:

(1) Early Christian Church.
(2) The Latin and Greek Churches.
(3) The Protestant Reformers, British and Continental.
(4) The English scholars and divines, Anglican and Nonconformist, from the Reformation to the end of the eighteenth century.

I shall now briefly summarize the opinions entertained in these periods, but, for reasons already given, I do not think that the importance ought now to be attached to them which would be given to them in the days when they were respectively expressed.

1. *Early Christian Church.*

72. Opinions both ways may be quoted, subject to any questions which may be raised by scholars as to whether we now have the true text of the authors to whom the writings are attributed, as to whether the same author is always consistent in his opinions, and as to whether an author who condemned matrimony or divorce maintained his opinions outside the scholar's study and the hermit's cell, in face of the facts and necessities of life. The opinions of the Fathers were largely founded on reasons now aban-

doned by the best modern scholarship, British, American, and Continental, and, as has already been pointed out, the attitude of that scholarship towards all questions of biblical interpretation is so entirely different from that of the Fathers that their opinions have no longer the authority which they exercised on our forefathers.

73. The question is much debated, but there are grounds for asserting that the views and practices of the Apostolic age and the age immediately subsequent were in accordance with the ordinary understanding of St. Matthew's Gospel and of St. Paul's First Epistle to the Corinthians, that is to say, divorce for adultery, with right to remarry was permitted, at least, to the husband, and that divorce for desertion was permitted, at least in the case of a Christian husband and a non-Christian wife. In regard to the age beginning with, say, the third century, it may be said generally that, in the early Christian Churches, both of the East and West, the best known and most representative names are on the side of indissolubility. In the West, with some notable exceptions, the tendency of opinion was later in favour of indissolubility; while in the East opinion was developed into the views which were, and are, entertained by the Greek Church. As an instance of those who favoured dissolubility, I may take St. Epiphanius (310–403), Bishop of Salamis in Cyprus, who, it may be worth noting, was born of Jewish parents. He states, in his "Panarion," that it is lawful for a man who is living in separation—for whatever ground, fornication or adultery, or other "evil cause"—to marry again. He says: "Him the Word of God censures not, though he be joined to a second wife, or a wife to a second husband, neither doth it declare him cast

out from the Church and from life, but bears with him by reason of his infirmity."

74. On the other hand, take St. John Chrysostom (347–407 A.D.), in favour of indissolubility. He argues against marriage and in favour of virginity, and uses strong expressions as to the indissolubility of the marriage bond. In the case of a woman, he says: "Let her remain unmarried or be reconciled to her husband. . . . What then if he will never be reconciled? one may ask. Thou hast one more mode of release and deliverance. What is that? Await his death. For as the (consecrated) virgin may not marry, because her spouse liveth always, and is immortal; so to her that hath been married it is then only lawful when her husband is dead. . . . Seest thou the restraint, the inexorable bondage, the chain which compasses both parties?"*

75. Augustine, writing in the beginning of the fifth century, found great difficulty in the interpretation of the Scriptures. He admits, after discussing the Scriptural texts, that the question of divorce and remarriage is surrounded with difficulties: "His ita pro meo modulo pertractatis atque discussis, quæstionem tamen de conjugiis obscurissimam et implicatissimam esse, non nescio. Nec audeo profiteri omnes sinus ejus, vel in hoc opere, vel in alio me adhuc explicasse, vel jam posse, si urgear, explicare" ("de Conjugiis Adulterinis ad Pollentinum," cap. xxv. (end), paragraph 32 in Paris edition, 1838, vol. x., col. 680. Basle edition, 1556, tom. 6, col. 854).

76. Although his opinions varied somewhat, his conclusions were that Christian marriage was indissoluble by reason of its sacramental character.

* *See also* in cap. Matthæi xix.; Homilia xxxii., Antwerp, 1542, p. 178. (In this Homily St. Chrysostom discusses the whole divorce question.)

77. It ought to be added, in the case of some of the passages usually quoted from the Fathers in favour of indissolubility, the same question arises as in the case of Christ's teaching—did the writers, while laying down general principles, mean to exclude all possible exceptions ? Equally strong passages against resorting to divorce will be found in the writings of divines who maintain the lawfulness of divorce, including Martin Luther, who wrote in one passage, "I detest divorce." It should, perhaps, be added here that the Anglo-Saxon Church seems to have recognized divorce and made special provisions as to the devolution of property in case of divorce (Æthelbert, § 79; Theodore's "Pœnitential," xix., §§ 18, 20, 23.) *See also* Cnut's Law 54, which gave the husband all the property in the event of the wife's infidelity. *See also* the evidence of Sir David Brynmor Jones (Minutes of Evidence, Q. 43,137 *et seq.*).

2. *The Latin and Greek Churches.*

78. The Western Church, subsequent to its rupture with the Eastern Church in 1054 A.D., adhered to the indissolubility of marriage, both in principle and in practice, subject to the relief afforded by decrees of nullity for causes not recognized by any other Church as sufficient.

79. But the Greek Church, the Eastern division of Christendom, although holding equally with the Western Church that marriage is a sacrament, has acted throughout on the principle that marriage is not indissoluble. Dr. Luckock, formerly Dean of Lichfield, put the matter thus: "At the beginning of the eleventh century [1030 A.D.] . . . Alexius, Patriarch of Constantinople, drew up a series of

canons on the dissolution of marriage; and these have been considered binding ever since. They are as follows:

"(1) The Priest who gives the marriage blessing to a woman divorced from her husband is not to be condemned if the man's conduct was the cause of the separation.

"(2) Women divorced from husbands whose conduct was the cause of separation are blameless, if they wish to marry again; and so are the Priests who give them the blessing on the union; the same rule applies to men.

"(3) The man who marries a woman divorced for adultery, whether he has himself been married before or not, is an adulterer, and must submit to the penance of adulterers.

"(4) The Priest, who gives his blessing on second marriages for those who have dissolved their marriage by mutual consent, which is not sanctioned by the laws, shall be deprived of his office."

These rules are translated by Dr. Luckock from John Selden's *Uxor Hebraica, seu de nuptiis et divortiis ex jure civili, id est, divino et Talmudico veterum Hebræorum*, Book III., chapter 32 ("Seldeni Opera Omnia," vol. ii., p. 855 [ed. 1726], where the rules are set out in Greek and Latin).

3. *The Protestant Reformers, British and Continental.*

80. To some Protestants, neither the opinions of the Reformers (whether Episcopalian, Presbyterian or Lutheran, whether English, Scottish, French, German, Swiss, Dutch, or Scandinavian) nor of the

great divines and scholars, like Erasmus, who, although remaining in the Church of Rome, concurred with the Reformers in their views in favour of the dissolubility of marriage, nor of the Greek Church seem to be of any importance compared with the opinions and practice of certain of the early Fathers and of the post-Tridentine Roman Catholic Church. In a recent work entitled the "History of Divorce and Marriage" by the Rev. H. J. Wilkins, D.D., 1910, published since this Commission began its labours, and referring to some of the evidence given before it, I find that practically every writer since the Reformation in favour of the lawfulness of divorce is ignored, except Dr. Hammond (1644), Bishop Cosin, and Milton; and Mr. Watkins (whose work, while it is valuable for its collection of extracts from numerous early writers, decrees of councils, etc., appears to assume the historical truth of the narratives in Genesis of the Creation and Fall, pp. 2, 3, and 25) prints the following paragraph, at p. 394 of his book: "From the time of Gratian, the teaching of the *Decretum* (published about 1140) on the subject of divorce and remarriage was practically the teaching of the whole Western Church. The controversy was, in fact, closed and, for the purpose of this treatise, it is useless to pursue the investigation farther. For the past 700 years the historic Churches of Western Christendom have declined to recognize remarriage after divorce." This view is not followed in this memorandum.

(1) *English.*

81. At the Reformation it may be inferred from the preparation of the abortive *Reformatio Legum Ecclesiasticarum* that those concerned in its pre-

paration were in favour of the dissolubility of marriage on several grounds. And there certainly has been from that time a strong party in the Church of England agreeing with the views of the continental and Scottish divines on the dissolubility of marriage, but differing from them and from each other in regard to the causes on account of which marriage might be dissolved. That party construed the expression " for better or worse " introduced into the Anglican marriage service as applying to the ordinary incidents of life—for instance, such as sickness or death, poverty or wealth; while those who have preferred the doctrine of indissolubility have considered that that expression equally compelled the subsistence of the marriage tie in adultery, even where no self-respecting person could be expected to continue co-habitation, and in desertion, where the continuance of co-habitation had been permanently rendered impossible.

82. No action for divorce was brought in the English Courts till the passing of the Divorce Act of 1857. It has been said that divorce *a vinculo*, admittedly incompetent before the Reformation, must have remained so after the Reformation, seeing that no statute was passed (till 1857) making it competent. But in Scotland, where before the Reformation the same rule of indissolubility attached as in England, divorces for adultery were granted from the Reformation without any statute authorizing them.

83. Further, the 250 Acts of Parliament granting divorces, passed year by year for at least 150 years prior to 1857, while fought on the merits, were not resisted on the ground that marriage was *ipsa natura* indissoluble.

84. It is not necessary for present purposes to set out the passages from the works of the English Reformers. But it may be remarked generally that whatever opinions may possibly have been held by individuals in the Reformed Church, there are recorded opinions of English Reformers in favour of the lawfulness of divorce. Reference is made to Sir Lewis Dibdin's valuable memorandum.

(2) *Scottish.*

85. If the opinions of English Reformers and the post-Reformation history of divorce in England cannot be set aside, neither is it reasonable to ignore the views held in Scotland at the Reformation, and the post-Reformation law and practice of that country. Yet in the learned work, already referred to, by Dr. Luckock, while the law of the United States and the British Colonies, and of Germany, Belgium, Switzerland, Denmark, and Austria are discussed, no reference whatever is made to the fact that in Scotland for 350 years the working of a law allowing divorce for adultery and desertion has been put to a practical test among a population, the conditions of whose life more nearly resemble those of the people of England than the conditions obtaining in any other country in the world. Generally speaking, the Scots Reformers were more in accord with the Reformers of France, Germany and Switzerland than were the English Reformers, but I do not think it necessary for the purposes of these notes to go in detail into their writings at present, except to say that so far as their writings show they were unanimously opposed to the doctrine of the absolute indissolubility of marriage.

86. For more than three centuries adultery and desertion have been grounds of divorce in Scotland. John Knox in his "First Book of Discipline" confines the remedy of divorce to cases of adultery, but in April, 1573, a statute was passed declaring wilful desertion for four years to be a ground of divorce. It is understood that although the statute may have been passed partly to serve the personal interests of the Duke of Argyle, Chancellor of Scotland, it was accepted in Scotland as conformable to Scripture, and as demanded by public policy.

87. The Westminster Confession of Faith was adopted by the Church of Scotland in 1647 and ratified by Act of the Parliament of Scotland in 1690. That confession was mainly the work of English divines, most of them members of the English Universities. Fourteen were Doctors of Divinity, and the Assembly included Arrowsmith and Tuckney, Professors of Divinity at Cambridge, Dr. Hoyle, Professor of Divinity at Oxford, and such scholars as Twisse, Lightfoot, Coleman, Edmund Calamy the elder, Godwin and Gataker among the English clerical members, and Gillespie and Rutherford among the Scottish. During part of the sittings, John Selden was one of the English lay members.

88. Chapter 24 is headed "Of Marriage and Divorce." Articles 5 and 6 run thus: "5. Adultery or fornication committed after a contract, being detected before marriage, giveth just occasion to the innocent party to dissolve that contract. In the case of adultery after marriage, it is lawfull for the innocent party to sue out a divorce, and, after the divorce, to marry another, as if the offending party were dead. 6. Although the corruption of man be such, as is apt to study arguments, unduly to put

asunder those whom God hath joyned together in marriage, yet nothing but adultery, or such wilfull desertion as can noway be remedied by the Church or Civil Magistrate, is cause sufficient of dissolving the bond of marriage, wherein a publick and orderly course of proceeding is to be observed, and the persons concerned in it, not left to their own wills and discretion in their own case."*

89. In the writings of Scottish divines, Presbyterian and Episcopalian, Established Church and Dissenting, from the Reformation down to the present day, divorce is alluded to as a remedy to be used only in the last resort; and, contrary to the view of many of the early Fathers, the duty of forgiveness, even in the case of unfaithfulness, is inculcated. But there seems to be no passage in which the legal right of the innocent spouse to obtain divorce *a vinculo* is said to be contrary to Scripture, or otherwise excluded; nor is any case known, during the 350 years from 1560 to 1910, in which any member of the Protestant Church in Scotland has been subjected to discipline, or refused the privileges of the Church, for having availed himself or herself of the remedy of divorce *a vinculo* provided by the law of Scotland for adultery and desertion; or for having remarried, subsequent to divorce. The sin of the guilty spouse, apart from any question of divorce, involved Church censure and refusal of the sacraments, and the practice was and is, for Scottish ministers, Presbyterian and Episcopalian, to refuse

* *See* "Act ratifying the Confession of Faith and settling Presbyterian Church Government," June 7, 1690 (the laws and Acts made in the second session of the first Parliament of our high and dread Sovereigns William and Mary, Edinburgh, 1690). Also the Acts of the Parliament of Scotland, vol. x., p. 128 (May 26, 1890).

to remarry the divorced guilty spouse, at all events to the paramour.

90. During the period when the Church of Scotland was established under Episcopal Church government, that is to say, from 1610 to 1638, and from 1660 to 1688, the law as to divorce remained unaltered, and no proposal was made for its alteration. At that time, there was a body of learned divines in Aberdeen connected with the University, known in ecclesiastical history as "The Aberdeen Doctors." Of these, John Forbes, D.D., of Corse (1593-1648), Professor of Divinity in the University, was the most eminent. He wrote in Latin, and his reputation was European; his "Irenicum amatoribus veritatis et pacis in Ecclesia Scoticana" was warmly commended by Archbishop Ussher. Forbes was a strong Episcopalian, and when the Presbyterians came into power, suffered the loss of his Professorship rather than sign the National Covenant of 1638, and exile rather than sign the Solemn League and Covenant of 1643. His views on divorce are to be found in his "Theologia Moralis, libri decem, in quibus precepta Decalogi exponuntur, et casus conscientiæ explicantur." That work, written in Latin, contains a learned citation of authorities, and a discussion of the whole question of divorce in relation to the teaching of the Old and New Testaments, and the views of the early Christian Fathers, and also from the point of view of civil polity. Forbes maintains the lawfulness of divorce both for adultery and desertion. See the passages from the Theologia Moralis printed on pages 456 and 457 of the evidence, vol. ii., at the end of Professor Paterson's examination.

91. The same attitude has been taken in Scotland among divines of dissenting communions, Presbyterian and Independent.

(3) *Continental Reformers.*

92. The views of some of the principal reformers are given very fully in the interesting evidence of Professor Whitney, and it is not necessary in these notes to refer more fully to them. Without exception they all—Lutheran, Calvinistic, Zwinglian—allowed divorce for adultery, most of them allowed divorce also for desertion, and some of them also allowed divorce for other causes; and whenever they allowed divorce they allowed remarriage.

4. *English Divines and Scholars, Anglican and Nonconformist, from the Reformation to the end of the Eighteenth Century.*

93. It has been said by some that the Church of England has always asserted that divorce is contrary to Christ's teaching, and, therefore, that marriage, or at least marriage between Christians, is *sua natura* indissoluble. Thus Dean Luckock writes: "Though the East subsequently fell away from the teaching of antiquity, and though at times the Latin Church in Provincial Synods may have accepted some questionable canons, yet the Anglican branch has approached very near to a uniform consistency all through her lengthened history."

94. What is meant by the Church of England, or the "Anglican branch"?

1. If its constitution is meant, as contained in its constitutional documents, absolute indissolubility as distinguished from normal permanency is not in its Articles or Prayer Book. Some witnesses founded on Canon 107, the effect of which has been variously stated, and it must be remembered that the Canons do not *proprio rigore* bind the laity, but bind the

clergy and the law officers of the Ecclesiastical Courts (Bishop, On Marriage, Divorce, and Separation, Ed. 1891, sec. 103). Canon Hensley Henson states his concurrence with the view enunciated by Dr. Hammond, Chaplain to Charles the First—namely, that the terms of the Canon presuppose that marriage is not indissoluble by the law of the Church of England; but see the memorandum of Sir Lewis Dibdin on this point. As to the Prayer Book, the words of the marriage service were referred to, but they certainly have not in practice been read as negativing the right to divorce on the ground of adultery, which has been treated in England as a good ground for divorce for two or three centuries, and similar words have been used in the marriage service of the Churches in Scotland, where divorce, both for adultery and desertion, has been allowed for some 350 years.

2. "The Church of Scotland" may be used as synonymous with the general assembly of that Church, which is a legislative and judicial body representative of clergy and laity, and recognized by the law as entitled to express the opinion of the Church. But "the Church of England" cannot be used in that sense, for it has no such body. So far as the Church can express itself through the Convocations of York and Canterbury, and through Church Congresses, the indissolubility of marriage has never been affirmed. The deliverances of the Lambeth Conferences of 1888 and 1908 are inconsistent with the indissolubility of marriage being a part of the constitution of the Church of England.

95. But if by the Church of England be meant its leading dignitaries, scholars and preachers, the dissolubility of marriage has been as fully maintained as its indissolubility. It is sufficient for the purposes of

these notes to refer to the division of opinion amongst the Bishops, expressed in the debates on the Bill of 1857, and in support of dissolubility, to Bishops Joseph Hall (1574–1656), Jeremy Taylor (1613–1667), John Cosin (1594–1672), Gilbert Burnet (1643–1715), and Archdeacon Paley (1743–1805).

96. The views of English Nonconformist scholars and divines like John Owen (1616–1683), Richard Baxter (1615–1691), and John Milton (1743–1805) have generally been in favour of allowing divorce, at least for adultery. *See also* the evidence of the Nonconformist ministers who have appeared before the Commission and the resolutions passed by certain churches.

Different Conclusions of Theological Writers.

97. I have briefly examined the views of theological writers from age to age, and I think that no one can fail to be struck by the fact that, starting from the same sources, they have reached totally different conclusions; some that, according to Christ's teaching, marriage is to be regarded as indissoluble, others that it is dissoluble on one ground; others that [it] is dissoluble on two grounds; others, again, have gone further and admit other grounds. The result of this distracting diversity of opinion is manifest in the difference in the laws adopted in various countries. This diversity, it seems reasonably clear, arises mainly from differences in the interpretation of Christ's teaching as recorded. I think it is impossible, after a study of the numerous writings, for anyone who examines them to-day not to feel how these writers of former days have been affected by the mere letter of the records, and how they have been unable to take a wide view of the circumstances of

the origin and nature of the records, and the state of belief and knowledge which prevailed at the time of the foundation of Christianity; and how, in endeavouring to place their interpretations on the records, they have been not unnaturally influenced by the condition of society in their own day, by the existence of abuses which have passed away, and by their opinions on matters as to which their conceptions were affected by their own state of knowledge and the beliefs which then prevailed. Writers, prior, say, to the last half century, had not the advantages which we possess; and they were hampered and hindered in forming just and sound conceptions by the want of them. Even to-day there are to be found writers and others who seem unable to realize the difference of attitude towards problems of life existing to-day and in times which preceded the research of the past century, and who still seem as if they lived in the Middle Ages.

98. Criticism and discoveries have taught us much that was inconceivable by writers of past times. Although some critical work was undertaken by John Spencer and Thomas Hobbes, it was not until about a century ago that any real progress was made in the critical study of the Old Testament. The progress which has now been made may be gathered from the extracts from Dr. Driver's work on Genesis above set out. Those who would appreciate the steps in that progress may consult the article by Mr. Stanley Arthur Cook, in the "Cambridge Biblical Essays," where the works of De Wette, Ewald, Graf, Williamson, Robertson Smith, and others are reviewed, and in which Mr. Cook remarks that "we have Israelite science and history, the details of which prove to be neither scientific nor historically

authentic" (p. 64). The same book of essays also contains one entitled, "Our Lord's Use of the Old Testament," which deserves close study. I have already gone somewhat fully into the reference to the Old Testament account of Creation in the accounts of Christ's teaching on divorce, and will only add that throughout all the works of the writers on this subject which I have been able to examine I have noticed how much they depend upon interpretation of sentences in the accounts, and how they do not seem to me in any way adequately to consider the context, and what were the foundations on which rested so much of what was recorded in those accounts.

Some Further Points.

99. Before stating the general conclusions at which it seems possible to arrive, it is desirable to refer to a few other points which bear more or less on the question of principle. The first has been already noticed. It is that those, or some of those, who base their views upon Divine teachings in the Scriptures confine the application of these principles, so far as they are based on religious grounds, to persons who are baptized Christians—that is to say, persons who are baptized with such baptism as the Churches can recognize as valid. It is not necessary for the purpose of these notes to enter upon a consideration of the interesting problems which arise from these views as to marriages contracted between Christians and non-Christians, and as to the position of converts or those who depart from the Church. These will be found very fully considered by various writers, amongst others Mr. Watkins.

100. A second point is that these views are applied to Christians, whether the marriage has been entered

into before the Church with a religious ceremony or in any other form; in fact, no difference in this respect is made between a civil and religious ceremony, and this is because a religious ceremony has not, except where the ruling of the Council of Trent has been adopted, been regarded as essential. I think we may rely on the evidence on this point of the first 1,000 years of Christianity being correctly summed up by one of the writers already mentioned thus:

> " (1) That where a marriage has been celebrated by Christians with the usual civil forms, there being no bar which, by Christian rule, would hinder the marriage, it was accepted as valid, and no priestly benediction was required as a condition of validity.
>
> " (2) That notwithstanding from the early stage of Christianity the priestly benediction was a usual accompaniment of marriage between Christians, there can be no doubt that prior to the Council of Trent, in the sixteenth century, priestly solemnization was not required by the Canon law as a condition of validity " (Watkins, p. 101).

101. This has always been the case in Scotland, and was the case in England until the passing of Lord Hardwicke's Act in A.D. 1753. I may add, however, that there was a difference of opinion upon this point in the House of Lords in 1843–4 in the case of Regina v. Millis, 10 Cl. and F., p. 534; but the more modern view is that the statement above is correct, as was indicated in 1865 by the judgment of Mr. Justice Willes in the case of Beamish v. Beamish, 9 H.L.C., p. 274, and upon this point I refer to the evidence of

Sir Frederick Pollock. The materiality of this point would seem to be that the recognition of civil marriage must appear to involve the recognition of the right of the State to place its conditions upon the bond.

102. A third point is that the principle of indissolubility appears to be only applied by those who support it as applicable to a consummated marriage. Consummation is regarded as being essential to a complete marriage. The foundation for this view may be traced to the 2nd chapter of Genesis, and especially to the words which describe the man and woman as becoming " one flesh," which some appear to regard as a distinct divine ordering, and to have the consequence which is maintained by them, but which, if regarded as a mere inference drawn by an early Jewish writer from the fact of the creation of woman out of man would not lead to any necessity for arriving at such a conclusion. Dr. Skinner points out that " both in Hebrew and in Arabic ' flesh ' is synonymous with ' clan ' or ' kindred group ' " (" Genesis," p. 70). It may be suggested that we have here a reference to the Beena marriage, but I gather from the evidence of Mr. Abrahams that that form of marriage was probably at a different period from the date of the compilation of the early part of Genesis.

103. I have, in an earlier part of these notes, set out the comments of Dr. Driver and Dr. Skinner on the verse in Genesis in which the words in question occur, and show how they are quoted in St. Matthew and St. Mark in the accounts of the discussion which is there recorded, and it is very remarkable that, while we have these comments by very learned theologians and also, at the present day, the general considerations which I have ventured to present, there seem still to

be found persons who regard the 24th verse of the 2nd chapter of Genesis, which expresses the conclusion of a writer of the ninth century B.C. drawn from the poetic conception of the creation of woman from man, as "the utterance of God."* It seems probable that the words used in this verse have had a very powerful influence in the production of views with regard to matrimonial relations and as to the *copula carnalis*, as well as mutual consent, being essential to a complete and indissoluble marriage. It would be outside the purpose of these notes to examine this doctrine at length—a doctrine which gives effect to sexual connection after consent to a marriage, but which, while the act is of precisely the same nature and has the same physiological results, whether there be or be not such consent, would not hold that an act of intercourse in the latter case had any effect in uniting the parties, unless they adopt the view that the remarkable conclusion indicated in 1 Corinthians, c. 6, v. 16, is the consequence. I will only remark that it is probable that this doctrine led to the exercise of the power of the ecclesiastical courts to declare a marriage null on the gronud of impotence, though at the present day, according to the legal aspect of this matter, that deficiency is regarded as justifying a declaration of nullity on the ground that the party against whom the charge is made has entered into a contract which he or she is wholly unable to perform.

104. How much the primitive beliefs to which I have referred have affected the views entertained in former days and at the present time with regard to the matrimonial relationship may be judged by their introduction to a certain extent into the

* *Cf.* Watkins, p. 3.

Anglican marriage service, which consists in substance of two parts—the expression of the legal contract by consent of the two parties and the religious service by which it is blessed. In the latter, these beliefs will be traced in the address where the institution of matrimony "in the time of man's innocency" is referred to, and in the last two prayers where the creation of woman from man and the creation of "our first parents Adam and Eve" are mentioned. These are obviously taken from the account in Genesis, which has been accepted as the true statement of facts by compilers of the service, who evidently compiled it on that basis. To-day this basis must be rejected, though it is sought to treat the matters which the compilers regarded as matters of historical fact as merely symbolical. The service seems to be out of keeping with modern thought and to need reconsideration.

105. Another point which seems to require indicating is that when Christian Churches recognize marriage as binding on Christians in an equal degree, whether entered upon with or without a religious ceremony, and also hold that marriage is terminated by the death of either party, and that second marriages are admissible, the question arises whether they really can regard marriage as truly governed by religious considerations, using the term "religious" in its strict sense, or whether they ought to regard it as a relationship created for temporal purposes, which should be regulated by considerations of what is for the best interest of humanity, and whether the teaching of Christ must not be interpreted on the footing of this relationship, and regarded as inculcating faithfulness on a moral basis and not as laying down religious principles.

106. The last point is that the view has been presented that the Christian ideal of marriage is higher than that which the State may see fit to adopt. I think it should be observed first that if the teaching is to apply only to Christians, it seems difficult to understand the general reference in it to the male and female creation which was treated as embracing the ancestors of both Christians and non-Christians. And secondly, it does not follow from the mere fact of a male and female creation of man that the inference is that the union of man and woman should be monogamous, though this inference has been generally accepted by a large portion of the human race in its best interests. It would seem that teaching based on this inference should apply to all alike.

107. If, however, the teaching is to apply only to baptized Christians, is there any ground for holding that the ideal which a State should endeavour to maintain for its other members should be of a lower standard ? I conceive not. There is no reason why the State should not accept the well-expressed sentence of Modestinus, one of the five great *juris consulti* of the Roman Empire, as a definition of marriage, "Nuptiæ sunt conjuntio maris et feminæ et consortium omnis vitæ, divini et humani juris communicatio." The question appears to be what is the best method of attaining to the ideal ? Is it by declaring the marriage tie legally indissoluble in every case, notwithstanding the fact that events have supervened upon the marriage which have in fact ended the joint life, and notwithstanding that human beings are not ideal, and that adulterous relations may be formed, appalling sufferings and misery may be inflicted upon innocent people and

their children, and a general disregard of the law be developed by maintaining a legal tie when the actual tie has ceased to exist? Or is it better to recognize the deficiencies of human nature and their consequences and, in the interest of the parties, their children, and the State, to permit the dissolution of a legal tie when the whole objects of its formation have been frustrated?

108. In England, the Legislature, affected, no doubt, by that theological opinion which has permitted divorce for one cause only, has at present given a qualified answer, and one of the main questions to be considered is whether this meets the exigencies of life.

109. It is one of the most striking features of the evidence which has been taken by the Commission that theological difficulties have weighed little with the great mass of the witnesses, and among those who feel them there are differences of opinion. It seems to be not too much to say that with extremely few exceptions, the lay witnesses pass by questions of doctrine as if they concerned theologians rather than the practical legislator.

110. I cannot but feel that this leads to the inference that the prevalent lay opinion is not in accord with the more rigid views of certain sections of the clergy, and regards theological perplexities as theoretical or academical and not practical. This is specially illustrated in the evidence of several very important witnesses. The clerical witnesses, however, seem to assume the religious character of the questions, but I would refer to what I have above said as to whether the questions are to be considered as truly of a religious character or not. If theoretical and practical views could be reconciled in the manner

suggested later on, it would no doubt be a satisfaction to many who may feel some doubt whether their practical views are antagonistic to Church teaching, and yet are impressed with the necessity of entertaining those views in the interests of virtue and humanity.

111. The attitude of the lay witnesses referred to seems also to show what anyone with the experience of, say, the last forty or fifty years must have noticed, namely, the gradual but increasing decline of ecclesiastical ideas among the laity; further, there are those who maintain that the influence of the clergy over the intellectual life of the nation has been constantly declining.

Result of Examination into Question of Principle.

112. The result of my lengthy examination into the question of principle, so far as it is affected by considerations peculiar to Christians, is that, in the absence of any certain guidance from Scripture, and in view of the differences of opinion which have existed ever since the time of Christ among learned men in all branches of the Christian Church, the English people of the present day, not ignoring but untrammelled by appeals to the letter rather than to the spirit of Christ's teaching, or to the theoretical opinions rather than to the practice of early Christians, or to Roman Catholic views based on a dogma which is condemned by the Articles of the Church of England, may follow the course taken by all other non-Roman Catholic countries in the world. They may regard this most important and most difficult question as a matter of civil polity to be settled under the control of the great principles laid down

by Christ, on grounds of expediency, in relation to the present circumstances of the people and with due regard for the conscientious difficulties of the minority.

113. I am thus brought to the point that, on true Christian principles, we may arrive at the third alternative proposition above stated, namely, that marriage is dissoluble on some grounds in addition to adultery, and that its adoption is much assisted by the remarkably interesting and learned evidence of Dr. Sanday, Professor Inge, and other critics who have given evidence.

114. The question remains as to what conclusion should be reached if the questions to be considered are regarded from a purely human point of view. It is necessary to consider this because members of Christian Churches are not alone concerned, but the State has to consider the position of large bodies of its subjects who do not belong to any Christian communion and are not interested in the theological points which have been discussed. It was stated by Canon Hastings Rashdall that those who nominally belonged to the Church of England would probably be a small majority of the inhabitants of this country, though I suppose those who would claim to belong to some Christian body would be in a considerable majority.

115. Laws, which human communities make for themselves, if they are not founded on what are regarded as Divine commands, or are laid down by a dictator or other overriding power, will naturally be the result of human experience, which dictates to those who have to frame the laws what rules should be adopted in the general interest. Such experience will naturally be progressive, according to the length

of time during which it has been gathered, the increase of knowledge in all departments, and the general development of the community; but as it is gained, certain clear and definite principles emerge, and in the end become so well established that the community in general acts upon them, and is able to express them in distinct legislation.

116. It would be too long for the purpose of these notes to show in detail how the peoples of the world, unless controlled by some superior authority, have applied principles which they have acquired in this manner. I confine my remarks to the subject of matrimonial relations, and would only suggest that on this head Mr. Westermarck's "History of Human Marriage," in which he traces the origin of human marriage, is of very high value.

117. I shall content myself with pointing out certain results which have been reached in the Western world.

118. Marriage has been defined by various legal writers, but I am not concerned with technical definitions. Its substance is a relationship voluntarily entered into by a man and a woman for purposes which are well recognized, and such relationship is regarded as creating a status, resulting from the joint life which alters the position of the parties towards each other and the community.

119. Polygamy had generally ceased to exist in the Western world before the commencement of the Christian era, though it still prevails in many parts of the world, and although there is no law of nature which dictates that the union of man and woman should be monogamous or continuous, it may safely be inferred that, as civilization in the West advanced, it was found by experience that a monogamous union

was that which best promotes the interests of humanity, and no doubt this appreciation was intensified by the influence of Christianity.

120. It was, further, a reasonable consequence of a monogamous union that it should be regarded as for the best interests of the children of a marriage and of the parties and community that such a union, when once formed, should be continuous.

121. While, therefore, the marriage union could be freely entered into by parties competent to agree, States have considered that it could not be treated as an ordinary simple contract in which no one is concerned except the parties, and that it ought not to be put an end to at the simple will of the parties. States have considered that the children of a marriage are interested in the maintenance of the status of the parents which is created by it, and that so also is the community in general.

122. The result has been that it has been regarded as generally desirable that the incidents of the relationship should be regulated by the State, and that limitations upon its determination at the will of the parties should also be determined by the same authority.

123. It has followed, therefore, that from a purely civil point of view the relationship, when once constituted, has been regarded as continuous, and to continue unless circumstances have arisen which render its continuity practically impossible and frustrate its objects.

124. It is thus found that by a process of experience the same position can be reached as that which is arrived at by laying down a broad Christian principle of indissolubility, with exceptions to meet the necessities of human life.

125. If it can be properly maintained that a Divine law, if any such were in fact laid down for the guidance of human beings, and a human law arrived at as the result of human experience and passed with the object of promoting the highest morality and well-being of the people, would be in accord, such a proposition would go far to solve the problems which have perplexed the race.

126. My conclusion is that it can and ought to be so maintained.

I conceive that if this consummation, devoutly to be wished, were to result from the labours of this Commission, a great work would have been achieved, probably one of the greatest possible. It may well be asked, Should not any law, from whatever source it is derived, which has to deal with a subject in which the social, moral, intellectual, and spiritual welfare of men and women, their offspring, and society in general are concerned be framed in the best interests of all, and not be left to depend upon which of the conflicting opinions as to the meaning of certain doubtful passages in the Scriptures has most adherents? While the various sections of the Churches adhere with rigidity to opinions which they have derived in the manner which has been indicated, complete unanimity on the broad lines I suggest may not be possible, though the State may act upon them. But is it not reasonable to suggest that, in view of the remarkable evidence which has been given before this Commission, more especially that of the learned theologians and scholars, and of the general considerations collected in these notes, many opinions, still tenaciously held, require and ought to receive reconsideration?

127. If the result should be that, whether the

principle be reached by one mode or the other above suggested, legislation should be framed in the best interests of the morality and welfare of the people, then the question will be how the interest concerned and objects to be attained will be best secured.

128. In these notes I am mainly considering the principle to be applied, and I do not propose therein to go into the question of the application of the principle at any very great length. I will, however, proceed to direct attention to the following principal points.

129. Some maintain that independently of religious considerations, the interests concerned and objects to be attained are best secured by declaring marriage absolutely indissoluble. They seem to consider that hard cases may make bad laws, and that it is of less importance to regard the occasional failure and suffering than the stability of what is ordinary and normal, and that such stability may be seriously shaken by permitting marriage to be in any case dissolved, or by permitting extension of the grounds for dissolution. It is probably extremely difficult for such persons to realize how much they are influenced in holding these views by religious considerations.

130. On the other hand, it is strongly urged that those who hold these views do not sufficiently recognize the existing facts, those facts being that human beings are not ideal, that events occur which in fact end married life, that adulteries, desertions, cruelties, etc., take place, that dreadful misery is inflicted on innocent people and their children, and that a disregard of law takes place if release cannot be obtained, and that these matters do not occur in solitary instances, but to an extent which affects

large numbers of people; and, further, that the necessity for intervention exists, and has always been recognized even by ecclesiastical authorities who provide the inadequate remedy of separation in certain cases, and that the stability of society will be rendered firmer by mitigating the harshness of the law. In effect this contention is that the interests concerned and objects to be attained will be best secured by recognizing the general permanency of the marriage bond, and at the same time, recognizing how in actual human life the objects with which that bond is formed may be wholly frustrated with miserable and disastrous results.

131. Some of the witnesses called before this Commission have thought that additional grounds of divorce would tend to diminish the regard which should be entertained for the sanctity of marriage, and be therefore adverse to public policy; but another view to which the unhappy state of affairs spoken to by many witnesses, and in certain respects the painful accounts given by them as to the existing state of immorality, and the miseries of innocent parties and their children produced by adulterous connections, gross violence, drunkenness, desertion, etc., may lead, is that to maintain the legal tie of marriage in circumstances where joint life has become practically impossible, may reduce the idea of sanctity to mockery, and may cause the degradation of the regard which should be entertained towards the marriage tie if there are no means of being legally freed from it.

132. It may be noted that the evidence before the Commission is full of illustrations of the sad state of things which results from the impracticability of dissolving the legal tie when it has been dissolved *de*

facto, and it seems reasonable to expect that no improvement will take place without the establishment of a reasonable law sufficient to meet really serious needs, and that there is no danger by adopting such a course of adversely affecting the stability of the ordinary and normal, but rather that the strengthening of the regard for the marriage tie and morality should result.

133. The real difficulty will be in arriving at the causes which the State should recognize as sufficient to justify its interference on the application of the sufferer on account of the frustration of the object with which the tie has been formed.

Suggestions for Arriving at a Proper Law.

134. The general principles by which causes for dissolution of marriages should be ascertained may be gathered from the foregoing observations, to which I add the following:

135. The State should consider what law should be laid down in the best interests of the whole community, and should be guided by two principles: (1) no law should be so harsh as to lead to its disregard; (2) no law should be so lax as to lessen the regard for the sanctity of marriage.

136. I will briefly make some suggestions as to the proper law to apply upon the basis of these principles. Starting with the fact that monogamy—that is, the union of one man with one woman—best secures family life, the interests of the children of the marriage, and the interests of the State, that the State is interested in its citizens maintaining proper standards for themselves, and especially in bringing into existence healthy children, and maintaining and

educating them, it may be observed that great importance should be attached to the proper formation of the marriage tie. A great deal of evidence has been given on this point, and it may be desirable that the Legislature should consider it, but for the moment I am only dealing with the principles upon which marriage may be dissolved, if at all.

137. It may then further be observed that, marriage having been properly formed, if the world were ideal there would be no necessity for any laws which would put an end to the tie; but we have to deal with human nature as it always has been, as it is, and in all probability will be. It is found that, for various reasons, some marriages become complete failures, and life together becomes either morally or physically, in some cases both morally and physically, impossible. Unless the unions formed by such marriages which have already ceased in fact can be dissolved in law, lives become hopelessly miserable, illegal unions are formed, immorality results, and illegitimate children are born. What course then should be taken? Some have suggested that it is desirable that no marriage should be dissolved, but that the utmost remedy which the parties should be allowed to pursue should be that of judicial separation if they cannot live together, thus leaving the marriage tie to exist. The evidence that has been given shows that this will not meet the difficulty.

138. The history in connection with this matter from very early times has been placed before the Commission. Attention has been drawn to the old powers of annulment, by which in Roman Catholic times escape from the tie was possible for nobles and rich people where the necessity arose; and to the private Acts of Parliament which were passed in

England; and a great body of evidence has been given as to the state of immorality which results, especially amongst the poor who cannot afford the present cost of divorce proceedings, from holding parties to a tie which has in fact been broken, though not legally put an end to. This is one side of the problem.

139. At the other extreme of the problem there is the suggestion which has been made, but made by very few witnesses, that dissolution of the tie by mutual consent might be permitted. The first observation to make upon this is that it does not seem to have met with favour from the great bulk of the witnesses who have been called, and would probably not meet with any general favour if suggested; and, secondly, it may be said that, in the present state of English society, or indeed of any society of a similar character, such a ground for dissolving a marriage would probably lead to disastrous results, analogous to those which history records were produced in the times of the Roman Empire. It is, of course, possible that some high minds are to be found amongst those who have written and advocated the power of dissolving a marriage on this ground, who might perhaps without danger be trusted with such a law, but would it be reasonably safe so to trust the great bulk of the community? It might perhaps work, under proper conditions, to insure deliberation and to prevent forced consents. The last Norwegian law shows how it is to be tried in that country. In practice it would probably prove to amount to divorce at the will of either party who could make the other's life unbearable in order to force a consent. It may be of interest to refer to the observations which were made by Sir James

Mackintosh, and also by Mr. Bishop, on the two extremes which I have pointed out. Those made by Mr. Bishop in his well-known work on Marriage, Divorce, and Separation will be found in vol. i., ed. 1891, chapter 3, sections 38 to 60, under the title "The Rights and Wrongs of Dissolution by Divorce," and will well repay a careful perusal. The following is an extract from Sir James Mackintosh's "History of England," vol. ii., p. 274: "It must be admitted that the intrinsic difficulties of the subject are exceedingly great. The dangerous extremes are absolute and universal indissolubility, which has been found to be productive of a general connivance at infidelity, and consequently, of a general dissolution of marriages on the one hand, and, on the other, of a considerable facility of divorce in cases very difficult to be defined—a practice, to say nothing of other evil consequences which would be at variance with the institution of marriage, intended chiefly to protect children from the inconstancy of parents, and next to guard women against the inconstancy of husbands who, if divorce were procurable for any but clearly defined and most satisfactory proved facts, would be enabled, as soon as they were tired of their wives, to make the situation of the helpless females so uneasy that they must consent to divorce. To make the dissolution of marriage in the proper case alike accessible to all is one of the objects to which in great cities and highly civilized countries it is hardest to point out a safe road."

140. Suppose, then, neither of the extremes are suitable, what other course is there ?

I have already referred shortly to what marriage is, the interests of the parties, of their offspring, of the State, and, of course, it is appreciated how the object

of marriage is to provide for the mutual society of the parties, for the procreation, bringing up, and education of children, the prevention of vice, and the general attainment of that family life upon which society rests. Those who refer to Scripture will find how all these considerations are summed up by the old writer in the 18th verse of the 2nd chapter of Genesis: "It is not good that man should be alone; I will make a helpmate for him."

141. Then are the interests of the parties, their children, and the State properly served, and the aforesaid objects attained where continuance of marriage relations, through supervening causes which frustrate the objects of marriage, has become practically impossible, by maintaining a legal tie when the tie is *de facto* ended? My own studies and experience, and a very careful consideration of the facts and evidence placed before the Commission, lead me to suggest that this question should be answered in the negative.

142. The question, then, seems to be, first, what the Legislature would be justified in considering as circumstances rendering married life practically impossible? At the present time in this country adultery is certainly so considered. But there are certain other causes which frustrate the objects of marriage even more than adultery in some cases. The Commission has had before it a great body of evidence which demonstrates this in a way which is impossible of contradiction. Even in 1857 this was recognized by some speakers on the Bill of that year; for instance, the Bishop of London said that he was prepared to maintain the opinion of universal Protestant Churches that, in some grave cases, marriage might be dissolved; and Mr. Gladstone at that

time remarked that "we have many causes far more fatal to the great obligations of marriage (than adultery): as disease, idiocy, crime involving imprisonment for life, and which, if the bond be dissoluble, might be urged as a reason for divorce." There are persons who have contended as grounds for dissolution of marriage mere disinclination of the parties to each other, usually termed incompatibility of temper or unconquerable aversion; but it may be suggested that the introduction of such a cause might endanger the stability of married life and lead to the relaxation of effort to continue it, and that such a cause might in fact lead to the termination of the marriage relationship by mutual consent for trifles which might be magnified in evidence to prove the case. This ground has been introduced in some foreign laws, and the advantages and disadvantages may need consideration.

143. In practical life certain grave causes have been generally recognized, and probably will continue to be recognized, as putting an end *de facto* to married life and as entitling or compelling a reasonable and right-thinking person to take legal action accordingly.

It is also desirable to consider what remedy should be applied in cases where such causes intervene; some urge that only separation should be permitted, others that a complete severance of the marriage tie should be allowed. This has been very fully dealt with in the evidence, and strong expressions from some writers are also to be found upon the subject. I think it may be taken that the great body of the evidence given is in favour of complete dissolution, though there is evidence the other way.

Result of Consideration of the Matter.

144. The result of this consideration of the matter is that it has to be determined whether to affirm or reject the proposition that there are certain grave causes which render married life practically impossible, and that the State is justified in interfering, at the instigation of the injured party, to put an end to the marriage tie on the ground of one or other of such causes. If the proposition is affirmed, it is then necessary to consider what are those causes.

145. I may make the foregoing observations clearer if I state the position thus: There is in human beings a sexual difference in approximately equal numbers of persons. The result has been that unions have been formed with certain well-recognized objects. The Western world has recognized that such unions should in the best interests of all concerned be monogamous, and that a monogamous union ought to be continuous until the death of one of the parties. Christian doctrine and Western human views of life are so far in complete accord. Experience of life teaches that causes other than death do in fact intervene to make continuous married life practically impossible, and the objects of the formation of the union are frustrated. It is useless to maintain a tie in theory which is broken in fact, when an attempt to maintain it leads to disastrous results to the parties, their children, and the State.

146. According to modern critical opinion and for reasons already given, it may be asserted that Christian doctrines do not necessarily conflict with human principles on these points, and it is common knowledge that many of the community are not governed by the theological doctrines of any Christian Church,

or of a particular section thereof. And therefore the principle may be laid down for the guidance of the State that, while marriage should be regarded as normally indissoluble, it should be capable of dissolution if the continuity of the relationship has become practically impossible, so as to frustrate the objects with which it was formed.

147. Experience teaches that some grave causes generally recognized by the community do produce these results.

148. Parties entering into the married relationship may be regarded as contemplating its continuance notwithstanding many difficulties, but not that it shall be continued in theory when circumstances intervene which in fact put an end to it and which the world, acting by experience gained, recognizes as doing so.

The only difficulty, then, is in arriving at the causes which should be so regarded. The difficulty is more apparent than real. If two people were able to consider with fulness what their union meant as they stood to be married, they would be able to appreciate that they must contemplate in the circumstances a future extending over a number of years in which the usual vicissitudes of life *must be expected*, such as are brought about by increase or diminution of means, by illness, by family difficulties with children and otherwise; but would they naturally have in contemplation that either would absolutely break the vow of fidelity, would treat the other with such violence as to render joint life unsafe, would break up the home and leave for another part of the world, or would be placed shortly afterwards in a lunatic asylum or confined as a hopeless drunkard or criminal? The answer must be no. The world

at large takes, and has always taken, the same view of the facts, and so have churches though they have differed as to the remedy.

149. Take, for example, adultery—the unfaithfulness of a partner to the vow of fidelity: laws of all churches and States which need be considered recognize adultery as constituting not only a moral but also a legal wrong entitling the innocent party to legal relief. So they do in cases of cruelty. The ecclesiastical courts in England have always enforced separation at the suit of the injured party on the grounds of adultery and cruelty. Desertion is on a similar footing and since 1857 has been added as a ground in England. More lately habitual drunkenness has been added. The law in Scotland has already been noticed.

150. There are thus already four causes for which the community has recognized the right of one party to a marriage to a separation by order of court from the other *and to maintain that position through life.* There are two causes in which separation *de facto* is brought about which are analogous, for instance, to desertion—*e.g.*, long criminal imprisonments, and lunacy long continued and incurable; in both of these cases married parties are compulsorily separated. With regard to matters which are ordinarily contemplated as part of the experienced incidents of family life the community has not been willing to regard them as justifying its interference to separate married parties from each other.

151. In reality there is not much difficulty in stating what causes require consideration. The question is rather, What is the remedy? Divorce or only separation?

152. Both reason and the weight of opinion and

experience lead to the conclusion that judicial separation is an undesirable and inadequate remedy, and that where joint life has become practically impossible from certain grave causes dissolution of marriage should be permitted.

153. In concluding these notes I desire to observe that it may have to be considered whether the Legislature, while providing additional remedies for matrimonial wrongs, ought not to leave the State Church and other Churches a measure of liberty, to co-operate or not to co-operate with the State in carrying out these additional remedies, and also a measure of liberty to deal with their own members who avail themselves of these additional remedies as they think proper. Of course, if sound human principle and all theological doctrines were in accord, no difficulty in these respects would arise; but we have not yet, unfortunately, reached that position, though it is obvious from what has been stated that the opening for its attainment exists, and possibly some day the difficulty may be removed. With regard to the Established Church, it may be that in considering such liberty as aforesaid the question will arise how the opinions of substantial minorities may be safeguarded, for in view of the fact that there exist at least three definite opinions in that Church, it would be necessary to consider how far minorities are to be protected against a dominant majority so as to insure freedom of opinion and action for each body.

154. In concluding these notes I desire to observe that, however rigidly certain views may be held at present, we live in times of great changes of thought, that difficulties in the relation of Church and State which may occur if certain changes in the law take

place, might not be difficulties if Christian teaching and sound human principles came to be regarded in the future as being in accord, and that the present time may possibly afford an opportunity for the leaders of religous thought, which has not occurred before and may not occur again, of strengthening the relation between Church and State rather than weakening or severing it, especially when they remember the diversity of opinion which exists and the imperfect and slender materials upon which the more rigid opinions are founded. It may be that, at present, the prospect of attaining to greater unanimity of Christian opinion is somewhat remote, but the silent progress in general intellectual development which is continually taking place has already caused some opinions and beliefs which in an earlier age were regarded as sound and of high importance to be now considered unsound and irrational, and may in the future lead to more common accord among the Churches and their members respectively than now exists.

APPENDIX II

AN ADDRESS BY LORD GORELL

AT THE DISTRIBUTION OF PRIZES TO THE CADETS OF H.M.S. "WORCESTER."

(*July 28th*, 1910.)

I AM not quite sure that my better half has left me very much to say. She has really taken the words out of my mouth, but I should like to say for myself, if I may speak in the first person singular for the moment, that I have to thank the Chairman for so kindly asking me to address you, and for the kind words that have been said in referring to me. At the outset I desire to say what an immense pleasure it has given me to come here and distribute the prizes on this interesting occasion. I only wish I had been a boy myself so that I might have tried to receive one of them. They did not give such nice prizes when I was a boy, and it really makes me jealous when I see such beautiful prizes given away amongst you. My regret is that Sir Thomas Sutherland is not here. He is a very old friend of mine, and I am sorry he is not with us, and also that the cause should be such as it is. This requires him to attend carefully to his health. Now I should like also, if I may do so, to congratulate those who have the mangagement of this ship, the *Worcester*, and of the education of you boys. It strikes me very

forcibly indeed when one sees the arrangement, and when one hears all that has been said by the Chairman to-day, and sees these prizes given away, what good work is done by those responsible for the management and the education of those in their charge. I must congratulate them on the successful results which, so far as I can judge, they seem to have produced. I had intended, when I looked through the list of prizes, to refer to them at some little length, because they are so very striking; but in doing so I should only be detaining you. One cannot help observing that the prize given by His Majesty the King is one of the most interesting possible that a boy could want. I see on referring to the order or power under which it is given that it has to be given for qualities which commend themselves immensely to those who read over what they are. They consist of cheerful submission to superiors, self-respect and independence of character, kindness and protection to the weak, readiness to forgive offence, the desire to conciliate the differences of others, and, above all, fearless devotion to duty and unflinching truthfulness. That prize was founded by Her late Majesty, Queen Victoria. It was continued by King Edward VII., and, as the Chairman has already told you, it has been continued by King George. Can there be anything brighter in this world than for a boy to win that prize which shows he possesses the qualities included in the short paragraph I have read to you ? I certainly wish most heartily to congratulate Cadet Thomas on having won that prize. It would take too long to read through the list of other prizes given, but those which struck me as being extremely interesting are those which are resulting in the recommendation to

appointments in the Royal Naval Reserve, and also the prize given by the Orient Company, which has been won, as I understand, by an Australian boy. Also I should like to refer to one set more, and that is the set of prizes for good conduct. The boys who have won those prizes are Youl, Upton, Hayward, Musselwhite, Travers, Hayward, Steele, Ward, and Morgan, and I cannot help thinking that without going into any distinction, that it is a great honour to have won, amongst such a society as yours, the good conduct prizes.

I should like to congratulate Captain Wilson-Barker, the Headmaster, and other members of the staff of this great institution, for the good work which it strikes me they are able to accomplish in this ship. I see the examiner—I suppose he is appointed from outside the ship, in order to test the qualities of the boys—winds up his report by saying: "I think you may rest assured that the cadets on board the *Worcester* are receiving sound instruction in the various subjects and a good general education." That speaks, to my mind, volumes for the work being done by the Headmaster and those who have to assist him in the duties of the work on board this vessel. The work referred to is that of an institution which, I think, has for nearly fifty years been of a most useful character. I think it might be described as a national institution. The boys from it get a training which fits them for their proper position in various vessels of the Mercantile Marine. In saying that it conveys something of a very large character, because you have to remember what the British Mercantile Marine means. It means vessels proceeding to every part of the world. It means having to be in charge of men, with the responsibility

for their lives and the property on board. Officers have to uphold the character of the nation, the character of their owners, and the character of the foundations in which they received their training. I cannot conceive anything more interesting than to be engaged in the formation of the character of boys who have to go out into the world in this way, and who have to represent the various interests which are at stake when you speak of the Mercantile Marine. So long as our country can produce well-trained men who can hold their own, we need not have any fear of competition from the foreigners. It is interesting to note that forty boys from the *Worcester* have passed at different times into the Royal Navy. I understand there is some little difficulty at present, but probably that is only a passing matter. Then something like four hundred cadets have passed into the Royal Naval Reserve, whilst another forty have passed into the Hooghly Pilot Service. One whose memory must be preserved for ever in this ship, and who has some contemporaries here to-day, is that well-known Japanese Officer, Admiral Togo, who received the foundation of his education on this ship. We all know the results of that in the recent encounters that took place.

Some of you may wonder what on earth a gentleman standing up in a frock-coat, and whom you may probably consider to be a "land-lubber," has got to tell you. I have made in my time a great many voyages. Possibly you may think there is nothing in that, for a great many passengers make voyages, and some of them display a remarkable lack of intelligence in the way they ask questions of the captain, when they get a chance. They will ask such questions as these: "Why do you say port when you

want to go to starboard ?" and "How ma y sharks do you catch with that line you have over the stern ?" Then there is another class who pose as knowing a great deal more of navigation than anybody on board the ship. You will hear them explaining to the other passengers when one of the officers is "shooting the sun." Such a passenger, when asked how they do it, will say, "You bring the sun slowly down three times to the horizon and then you say it is noon." So you may be a passenger and yet learn very little. But I have stood on the bridge (a privilege granted me by many companies) beside the master, through storm, tempest, and fog, and all the other troubles to be met with in ocean navigation. I can tell you it is a great satisfaction to feel that you are in the hands of a man whose training has fitted him for his post, and who can be relied upon to deal with any difficulty in emergency, and in whose hands you feel your life is safe. I have also done something myself which gives me some little qualification to address those concerned with the British Mercantile Marine. For nearly seventeen years I had the privilege to sit in the Admiralty Court in this country. I need scarcely say that a landsman is in a difficulty in dealing with nautical cases, but he always has someone from the Trinity House to tell him which end of the ship is going first. It is interesting to learn that on the list of *Worcester* boys there are four of the Elder Brethren with whom I have had the privilege of sitting, and they have kept me straight. They are Captain Marshall, Captain Bell, Captain Crawford, and Captain Golding. I feel, therefore, to some extent associated with the *Worcester*. I am thankful the training these men had has kept me straight.

The unfortunate part of the Admiralty Court business is that one is always associated with the accident side of life. One is engaged in salvage and collision cases. One always sees the seamy side, and it is a very seamy side at times. But it also has the advantage of showing to one something of the character possessed by seamen. I want to tell you a story of an event which occurred in 1902. That was a case which illustrated the importance of being cheerful in difficulties. If you are students of Dickens you will know the character of Mark Tapley, who grew happier and happier the more difficulties he had to face. He was as thoroughly cheerful in hard difficulties as if in a comfortable life ashore. The particular case to which I refer relates to a small German vessel coming home from Mexico. There were only eleven of her crew by the time she got within 200 miles of Queenstown. She had been out 166 days. She was covered with barnacles, and had no food on board except half a barrel of biscuits, and that was full of weevils and worms. The captain was ill in bed with scurvy, and the crew were all down with the same disease. Then a British steamer came along. One of the officers volunteered and went on board the ship to see what could be done. He found the state of affairs which I have described, and he also found a mad dog on board, and further that the cargo—it was logwood or fustic, I think—was full of scorpions. So he had as lively a ship to go on as you could well imagine. The first idea was to tow this German barque to Queenstown, but the tow-rope broke and they had to give it up. Then this officer said he would do it all alone. He stuck to the ship for fourteen days. I have here an extract from his log, which reads

thus: "So here we are, captain dead, mate dead, second mate I am afraid dying, steward sickening, and every other member of the crew more or less affected. Fresh food for only another two days" (they had put some on board). "Ship with barnacle-covered bottom in flat calm, nothing at all in sight—how's that for Eldorado, Mark Tapley?" That officer brought that ship into port and he got a big award for doing it. I cannot say that he was a *Worcester* boy. I only read this to show you what it means when you have a strong character developed by education and training. You will face your difficulties like a man, and never be frightened at them. You will be able in difficulty, in stress, in storm, and in trouble of every kind to say: "How's that for Eldorado, Mark Tapley?"

If you do that, and bear that in mind, you will make fine sailors. I have only one other point; I should like to say the higher the training the better the training, and the finer the class of officer in our ships, the less accidents happen. It is generally found that the prevailing quantity of accidents happen where you get men of doubtful capacity, doubtful power, and doubtful training. That is one of the most important points to bear in mind when you train first-class officers for our Mercantile Marine. Not only will they do their navigation quickly and well, but they will do it with greater safety. The training that you ought to get on this vessel has its relationship to the Empire. Those who are leaving here are trained to help in this way. When they leave I am sure they will feel that they must do their utmost to keep up the reputation of the country and of their old ship, the *Worcester*. They will have to discharge their duties as officers

on board vessels carrying valuable lives and property. They may be responsible in time for the charge of some of those great Atlantic liners with thousands of passengers on board. It is a tremendous thing to have charge of a steamer of 20,000 or 30,000 tons, with many lives on board and a vast amount of property. You have to face such responsibility by the training you get now, by the training of your intelligence and of your navigational powers, and, above all, by your character. Probably this idea of the principle which should animate young men was never better put than by our present Sovereign when, as Prince of Wales, he distributed the prizes on the *Worcester*. If anybody can give advice worth listening to, from a nautical point of view, it is the King. He then said that the two principal points you should keep before you were these: "I should say above all things, be loyal—be loyal to your King, be loyal to your country, be loyal to your ship." The other principle is: "Be thorough. Whatever you do, do it as well as you can. Put your whole heart and soul into the work. The sea service is, to my mind, the finest service which any man can adopt, and the particular branch you have chosen affords an ample field for your ambition." You cannot do better than think of those principles. If you carry them out, no matter whether you succeed or fail, you will have done your duty. I hope every boy in front of me will have a successful career. I am sure you deserve it. But it is not for everyone to succeed. Some of you may come to the top of the tree and others may not. Whatever is the result of your going out into life, when you come to the close of your life, you ought to be able to say: "I feel I have done my duty."

INDEX

PRINTED IN GREAT BRITAIN BY
BILLING AND SONS, LTD., GUILDFORD AND ESHER

WORKS BY ARTHUR C. BENSON

THE HOUSE OF QUIET. An Autobiography. *21st Impression.*

THE THREAD OF GOLD. *16th Impression.*

FROM A COLLEGE WINDOW. *20th Impression.*

THE UPTON LETTERS. *18th Impression.*

THE SILENT ISLE. *4th Impression.*

ALONG THE ROAD.

THE ALTAR FIRE. *5th Impression.*

BESIDE STILL WATERS. *4th Impression.*

AT LARGE. *2nd Impression.*

RUSKIN: A Study in Personality.

JOYOUS GARD.

THE ORCHARD PAVILION.

FATHER PAYNE.

THE CHILD OF THE DAWN.

THE LEAVES OF THE TREE: Studies in Biography. *2nd Edition.*

THE GATE OF DEATH. A Diary. *3rd Edition.*

THY ROD AND THY STAFF. *3rd Impression.*

WHERE NO FEAR WAS.

ESCAPE, and other Essays.

WATERSPRINGS. A Novel. *3rd Impression.*

PAUL THE MINSTREL, and other Stories. With a new Preface.

HUGH: MEMOIRS OF A BROTHER. With Portraits and Illustrations.

LIFE AND LETTERS OF MAGGIE BENSON. With Portraits and Illustrations.

THE LETTERS OF QUEEN VICTORIA. A Selection from Her Majesty's Correspondence between the years 1837 and 1861. Edited by ARTHUR C. BENSON and VISCOUNT ESHER. With 16 Portraits. 3 vols.

POEMS: Selections from the Poetry of Charlotte, Emily, Anne, and Branwell Brontë. Edited, with an Introduction, by ARTHUR C. BENSON. With Portraits.

WORKS OF ROBERT BROWNING

POETICAL WORKS

COMPLETE EDITION. Edited and Annotated by the Rt. Hon. Augustine Birrell, K.C., and Sir Frederic G. Kenyon, K.C.B. 2 volumes, with a Portrait in each.

INDIA PAPER EDITION. In 1 volume.
In 2 volumes.

POCKET EDITION. In 8 volumes (size $4\frac{1}{8}$ by $6\frac{1}{4}$ inches), printed upon India Paper, with a Portrait in each volume. Bound in Cloth or in Leather. The 8 volumes in gold lettered case, in Cloth.

UNIFORM EDITION. Containing Portraits and Illustrations. 17 volumes.

SELECTIONS. Crown 8vo. and Pocket Edition.

THE BROWNING LOVE LETTERS. The Letters of Robert Browning and Elizabeth Barrett Browning. 2 volumes. Also New Edition on Thin Paper, 2 volumes.

LIFE AND LETTERS OF ROBERT BROWNING. By Mrs. Sutherland Orr. Edited, with a Preface by Sir Frederic G. Kenyon, K.C.B. With Portraits.

BROWNING: How to Know Him. By W. L. Phelps.

THE BROWNINGS FOR THE YOUNG. Edited by Sir Frederic G. Kenyon, K.C.B.

WORKS OF ELIZABETH BARRETT BROWNING

POETICAL WORKS

COMPLETE in 1 volume, with Portrait.

UNIFORM EDITION. In 6 volumes.

POCKET EDITION. In 3 volumes. Printed upon India Paper, with a Portrait in each. Cloth and Leather.

SELECTIONS. First Series. Second Series.

POEMS. Cloth and Leather.

THE LETTERS OF ELIZABETH BARRETT BROWNING. Edited, with Biographical Additions by Sir Frederic G. Kenyon, K.C.B. With Portraits. 2 volumes.

ELIZABETH BARRETT BROWNING IN HER LETTERS. By Percy Lubbock. With Portrait.

The Life and Works of CHARLOTTE BRONTË and her Sisters EMILY AND ANNE BRONTË

HAWORTH EDITION.

In seven volumes, with Introductions by Mrs. Humphry Ward, and Illustrated with Portraits and Views of places described in the books. A facsimile of the title page of the first edition is included in each volume. Large Crown 8vo.

1. **JANE EYRE.** By CHARLOTTE BRONTË.
2. **SHIRLEY.** By CHARLOTTE BRONTË.
3. **VILLETTE.** By CHARLOTTE BRONTË.
4. **THE PROFESSOR.** By CHARLOTTE BRONTË and **POEMS,** by CHARLOTTE, EMILY, and ANNE BRONTË, and the REV. PATRICK BRONTË.
5. **WUTHERING HEIGHTS.** By EMILY BRONTË. **AGNES GREY.** By ANNE BRONTË.
6. **THE TENANT OF WILDFELL HALL.** By ANNE BRONTË.
7. **THE LIFE OF CHARLOTTE BRONTË.** By MRS. GASKELL. With an Introduction and Notes by CLEMENT K. SHORTER. With Photogravure Portraits and other Illustrations.

POPULAR EDITION.
7 volumes (as above). Small Post 8vo.

POCKET EDITION.
7 volumes (as above). Each with Frontispiece. Small Fcap. 8vo.

POEMS : Selections from the Poetry of Charlotte, Emily, Anne and Branwell Brontë. Including some Poems hitherto unprinted. Edited by A. C. BENSON, with Portraits and 2 Facsimile MSS.

SPRINGTIME AND OTHER ESSAYS

By SIR FRANCIS DARWIN, F.R.S. Contents: Springtime—The Names of Characters in Fiction—Thomas Hearne—Recollections—Instruments of Music—Sir Joseph Hooker—The Names of British Plants—A Great Hospital—Sir George Airy—Sydney Smith—Dickens' Letters—A Procession of Flowers.

7s. 6d. net.

HEREDITY

By J. ARTHUR THOMSON, M.A., LL.D., Regius Professor of Natural History in the University of Aberdeen. With Coloured and other Illustrations. 3rd Edition. "This is certainly the best modern book on heredity to recommend to the student and the intelligently curious."—*Science Progress.* 16s. net.

THE STUDY OF ANIMAL LIFE

By J. ARTHUR THOMSON, M.A., LL.D., Regius Professor of Natural History in the University of Aberdeen. With many Illustrations. 4th Edition.

6s. net.

SIR JOSEPH DALTON HOOKER, O.M., G.C.S.I.

THE LIFE AND LETTERS OF. By LEONARD HUXLEY. Based on material collected and arranged by LADY HOOKER. With Illustrations. In Two Volumes. 2nd Edition. The long life of Sir Joseph Hooker covers the whole of the scientific renaissance. Pre-eminent in botany, as Traveller and Explorer he was hardly less eminent. 36s. net.

ANIMAL LIFE

By F. W. GAMBLE, D.Sc., F.R.S., University of Birmingham. With many Illustrations. This work is written in the first instance for those who wish to learn or teach such a survey of the animal pageant as can ally itself with observation and experiment; and in the second place for those who wish to organise their knowledge of animal life. 6s. net.

THE RECENT DEVELOPMENT OF PHYSICAL SCIENCE

By W. C. D. WHETHAM, M.A., F.R.S., Fellow of Trinity College, Cambridge. With Illustrations. 4th Edition. The author has sought to express the results of recent physical investigations in a form which "might prove useful to students of science in general" and "also appeal to those who, with little definite scientific training, are interested in the more important conclusions of scientific thought."

7s. 6d. net.

VARIATION, HEREDITY, AND EVOLUTION

RECENT PROGRESS IN THE STUDY OF

By R. H. LOCK, M.A., Sc.D., sometime Fellow of Gonville and Caius College, Cambridge. With a Biographical Note by BELLA SIDNEY WOOLF (Mrs R. H. LOCK). 4th Edition. Revised by LEONARD DONCASTER, Sc.D., F.R.S. With portraits and diagrams. The object of this book is to describe the connection between the new science of Genetics and those ideas which have long been summed up under the expression Darwinism.

JOHN MURRAY, ALBEMARLE STREET, LONDON, W. 1

By J. ELLIS BARKER

ECONOMIC STATESMANSHIP. The Great Industrial and Financial Problems Arising from the War. Second Edition, very greatly enlarged. "A work of reference, a dictionary of finance, which no journalist or politician should omit to place on his shelves."—*Saturday Review.*

MODERN GERMANY: Its Rise, Growth, Downfall and Future. Sixth Edition. Entirely re-written and very greatly enlarged. "We are always glad to welcome what may be called a bird's-eye view of the conditions prevailing in continental countries, and this must be especially the case with regard to Germany. Much useful information is contained in these pages."—*Spectator.*

THE GREAT PROBLEMS OF BRITISH STATESMANSHIP. Second Edition. "Mr. Barker is always well informed, and he brings wide reading and great industry to bear upon these questions, which are at the moment of such vital importance, and all that he says is worth attention."
—*The Times.*

THE FOUNDATIONS OF GERMANY. Very Greatly Enlarged Edition. "I know of no other man, living or dead, who has so effectively drawn aside the curtain that conceals from the English-speaking people the naked truth about the Hohenzollern and his subjects."—*Referee.*

GREAT AND GREATER BRITAIN: The Political, Naval, Military, Industrial, Financial and Social Problems of the Motherland and Empire. Second and Enlarged Edition. "A work so comprehensive must necessarily touch a multitude of points of controversy; but few persons interested in its subject could read it without learning something and having their ideas cleared."—*Scotsman.*

BRITISH SOCIALISM: An Examination of its Doctrines, Policy, Aims, and Practical Proposals. "No review could do justice to this admirable book; the reader should buy or borrow it and study it for himself. It bears directly on almost every problem of modern legislation and of modern life."
—*Daily Mail.*

THE RISE AND DECLINE OF THE NETHERLANDS: A Political and Economic History. "There is nothing in any language like it, and when all is said it remains one of the most striking additions recently made to the political library."—Mr. J. L. Garvin in the *Fortnightly Review.*

GERMANY'S ANNEXATIONIST AIMS. By S. GRUMBACH. Translated, Abbreviated, and Introduced by J. ELLIS BARKER. "Of the greatest value for a judgment of the present. A most valuable book of reference. The book becomes a guide to the study of Germany; a very useful piece of work which should be widely known."—*The Times.*

JOHN MURRAY, ALBEMARLE STREET, W. 1.

Back End Papers.

olume
m the
NENT
ARY
f
Book Club
l is
R SALE

Subscribers wishing to purchase copies of this book, new or second-hand, should write to the Manager, as other copies are available or will be quickly obtained.

W513