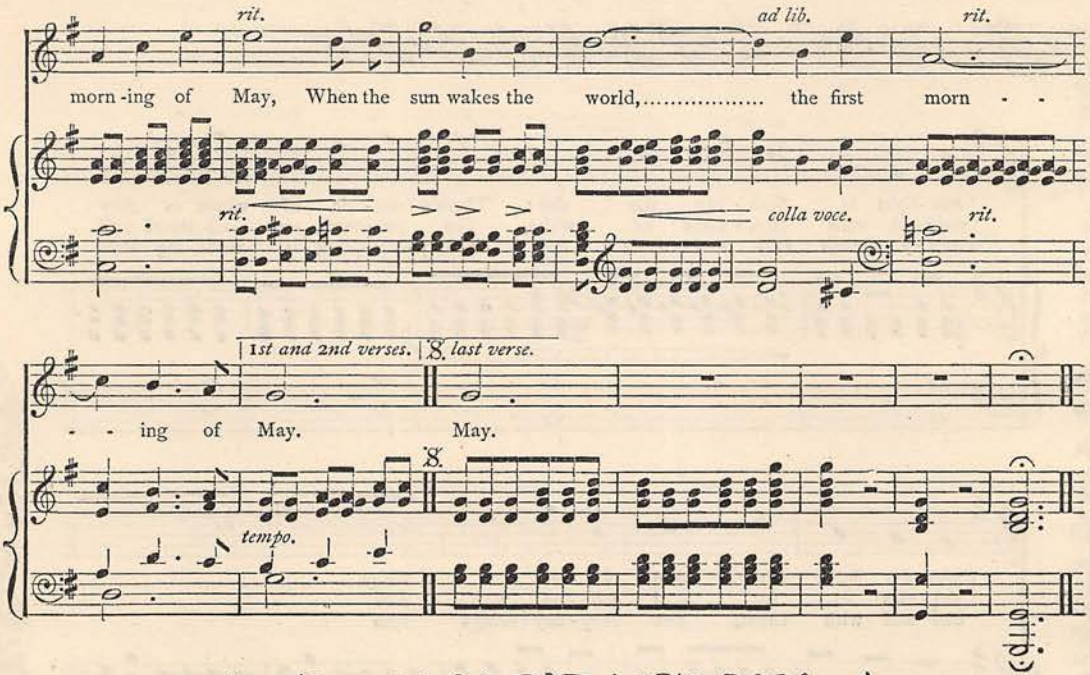

"IN CHANCERY."—POPULAR PAPERS ON ENGLISH LAW.

BY A SOLICITOR.

CAMDEN and other learned authors have said that the Chancery had its name originally from "certain bars laid one over another cross-wise, like a lattice, wherewith it was environed to keep off the press of people, and not to hinder the view of those officers who sat therein; such grates or cross-bars being by the Latins called *cancelli*."* In the Chancery there were formerly two powers or courts, the one "ordinary," the other "extraordinary." The former was a common law court, called the "petty-bag side," and its proceedings were according to the unwritten law and the statutes of the realm; and the latter was a court of equity, proceeding according to equity and good conscience. The common law side was altogether abolished or fell into disuse many years ago, and the modern Court of Chancery (now called the Chancery Division of Her Majesty's High Court of Justice) is, or was till quite lately, purely a court of equity, and had its origin as follows:—

It appears by the Saxon laws of Edgar's reign, that there was then a power vested in the king to moderate the rigour of the law according to equity and good conscience; and a similar law existed in the time of Canute, the Dane. The Court of Chancery, as a fixed court, however, did not arise before the reign of Richard II., for Lord Coke says that the first decree in Chancery was made in the cause, John de Windsor *v.* Richard le Scrope, in 1394. The equity side of the Court of Chancery—or, in other words, "the Court of Chancery," till recently existing—is believed to have begun in Edward III.'s reign. When the Courts of Chancery and King's Bench ceased to be ambulatory, and became settled in a certain place (in the fourth year of Edward III.), the king committed to his Chancellor, together with the charge of the Great Seal, "his only legal, absolute, and extraordinary pre-eminence of jurisdiction," &c. But the writ or proclamation, 22 Edw. III., directed to the Sheriffs of London, seems to have given it an establishment; for the king commanded that all business, relating as well to the common law of the kingdom as to such by special grace cognisable by him, should be prosecuted

* Sir Edward Coke, on the other hand, traces the word to the Chancellor, who takes his name, *Cancellarius*, from his cancelling the king's letters-patent when granted contrary to law, which is the highest point of his jurisdiction.

before the Chancellor. And this delegation afterwards received the sanction of an Act of Parliament—36 Edw. III. By the operation of the Judicature Act of 1870, as already stated, the Chancery Division of the High Court of Justice has taken the place, at least in name, of the old court; but for brevity's sake I propose to adhere to the original title in this paper.

The province of the Court of Chancery is to administer *equity*— a technical term not easy to define; but it is very briefly as follows:—"That *portion* of equity in the larger sense (*i.e.*, natural justice) which, though of such a nature as to admit properly of its being judicially enforced, was omitted to be enforced by our common law courts—an omission which was supplied by the Court of Chancery." Applications for redress used to be made to the king in person, assisted by his Privy Council, and were referred either to the Chancellor and a select committee, or by degrees to the Chancellor only. Sir Edward Coke, then Chief Justice of a court of law—the King's Bench—originated in 1616 the warmly contested question, whether a court of equity could give relief after or against a judgment at the common law. The king having decided in favour of the equity courts, Lord Bacon, as Lord Chancellor, made some attempt to regulate the procedure of the Court of Chancery; but it was not until Lord Nottingham's elevation in 1673 that any thorough scheme was set on foot. The last-named Chancellor has been called "the Father of Equity," from the judgment with which in nine years he constructed upon wide and rational principles the system of jurisprudence, which served as a model for his successors and gave a new character to the court. Lord Hardwicke also appears by his many elaborate decisions to have done much to advance and utilise the system.

The jurisdiction—in other words, the extent of its authority in giving decisions—of the Court of Chancery has been generally treated as belonging to several classes. Its original, and still its chief, power is *remedial* equity—that is, in cases where there is no remedy at law, equity has exclusive jurisdiction. This is so with trusts, for the most part; and also in many instances of accident, mistake, fraud, penalties, and forfeitures. For example, if a man sells an estate, knowing that he has no title to it, or that there are incumbrances on it of which the purchaser is ignorant: here is fraud, from which a court of equity will grant relief. The second division is *executive* equity, arising where the kind of relief afforded by courts of law is inadequate, but courts of equity can give the precisely appropriate relief. Thus, if two persons enter into a written contract, and one of them commits a breach of that agreement, a court of law can only give damages for the breach to the injured party, which in some cases may be no compensation to him, because he may wish the agreement strictly carried out; equity, however, steps in to his aid, and can enforce the "specific performance of the contract"—that is, can see that the very things are done which it was agreed should be done. Under this heading also come *trusts*, which have been classed as express trusts, both private and charitable (defined as "trusts which are clearly expressed by the author thereof, or may fairly be collected from a written document"), implied trusts ("founded on an unexpressed but presumable intention"), and constructive trusts, which are "raised by construction of equity in order to satisfy the demands of justice, without reference to any presumable intention of the parties." Equity's third great species of jurisdiction is called *adjustive*, rendered necessary again by the courts of law. They cannot do more than pronounce a positive judgment in a settled form, for either the plaintiff or the defendant, irrespective of the peculiar circumstances of the case; whereas courts of equity can adapt their decrees to all the various matters which may arise, and can take due care of the rights of all who are in any way interested in the property in litigation. This is especially noticeable in proceedings for administration of a deceased person's "estate"—that is, his property. The application for the assistance of the court is often made by the executor or administrator himself, but is more usually sought by creditors of the deceased. In all these proceedings the rights of the various persons interested are chiefly based on equitable claims, and the Court of Chancery has, of course, exclusive right to adjust them. Adjustive equity further takes cognisance of mortgages, pledges, and liens (in all of which transactions, as partly shown in one of my former papers, some party or other has equitable rights needing protection); apportionment and contribution, either of a benefit, or of an incumbrance, loss, or other liability; partnership, sureties, set-off, damages, and compensation (authority in which matters was originally given to the Court of Chancery by a statute of 1858); "election," or the choosing between two rights by a person who derives one of them under an instrument in which appears a clear intention that he should not enjoy both; "satisfaction," the making of a donation with the express or implied intention that it shall be taken as an extinguishment of some claim which the donee has upon the donor; and partition.

The care both of infants and of persons of unsound mind, who are unable to protect themselves, or have no other guardian, belongs to the sovereign as *parens patriæ*, the parent of the nation; and this prerogative seems to have been delegated to the Court of Chancery (not merely to the Lord Chancellor) from its first establishment. Hence springs the fourth branch of Chancery jurisdiction—*protective* equity in favour of persons under disability. The title of a paper appearing in a periodical some years ago—"Infants, idiots, lunatics, and married women"—shocked the gallantry of the one sex, and the *amour-propre* of the other; but it indicates with sufficient accuracy the classes of persons* who are "under disability" in the eye of the law, and over whom, therefore, Chancery exercises a fatherly superintendence. As regards infants, this

* To these may perhaps be added common sailors. "Being so generous, credulous, and improvident a class of men that they require guardianship all their lives, equity treats them in the same light as young expectant heirs; and relief is generally afforded against contracts respecting their prize-money or wages, wherever any inequality appears in the bargain, or any undue advantage has been taken."

supervision chiefly relates to the appointment and control of their guardians, their education and maintenance, and the settlement of their property on marriage. Infants thus "before the Court"—that is to say, interested in their own right in any matter for the time being under the direction of the Court of Chancery—are "wards of Chancery:" a term, strictly speaking, applied to persons who are under a guardian appointed by the court. The dreadful consequences of the "contempt of court" incurred by a man who marries a ward of Chancery without the consent of the court (even though with the consent of the guardian) are known to most people; such an offender is liable to arrest, and punishment by imprisonment. As *parens patriæ*, the Chancery will even go further; for "where there is reason to suspect an improvident marriage, without its sanction, the court will, by an injunction, interdict not only the marriage, but also all communications between the ward and the admirer;" and if the guardian is suspected of any connivance he may be removed from his trust. Similar jurisdiction extends to idiots and lunatics, properly so called, and also to all persons who, from age or other misfortune, are incapable of managing their own affairs, and therefore are deemed of unsound mind, or *non compos mentis*. Married women are considered by the common law courts as having no separate being; for almost all purposes their legal existence is merged in that of the husbands. But courts of equity, in many respects, treat husband and wife as distinct persons; and by the Married Women's Property Act of 1870 this has been greatly extended. The subject will be treated here in a future paper, and so I pass on to the fifth and last division of Chancery power—protective equity, irrespective of disability.

This chiefly consists in issuing *injunctions*. A writ of injunction is "a judicial process whereby a party is required to do, or to refrain from doing, a particular thing." A suitor may even obtain an injunction to restrain proceedings in the common law courts; but in such a case the writ is not addressed to the court in which the proceedings are carried on, but to the parties. Then injunctions are often granted for protection from loss or injury, such as in cases of public or private nuisances, infringement of patents or copyrights, and so on. Other matters coming under this head of protective equity are purely technical, and would demand much space to make even the mention of them intelligible.

Having given this brief review of the ordinary divisions of equity, it may be well to glance at some of the principles upon which equity is administered by the court, known as *maxims*. Some of these are always quoted in Latin. Here is one: *Vigilantibus, non dormientibus, æquitas subvenit:* not capable of literal translation; but it means, generally, that those who have been careless of their own interests can look for no redress. Most of the other maxims explain themselves. "Equity will not suffer a right to be without a remedy:" here we recognise the general *raison-d'être* of courts of equity, and it appears also in the principle that "Equity will administer a due remedy where it cannot or could not be had at law." But equity, nevertheless, will not interfere where such legal remedy could be had. Again, "Equity follows the law," but only in a limited sense too fine to be here pointed out. "Where there is equal equity, the law must prevail:" that is, if the defendant has a claim to the protection of a court of equity equal to the claim which the plaintiff has to the assistance of the court, there the court will not interpose, but will leave the matter as it stands. Another general maxim is that "Equality is equity," or that "Equity delighteth in equality." A quaintly expressed rule is that "He who comes into a court of equity must come with clean hands," which needs no illustration to show its force; nor indeed does this maxim, "He who seeks equity must do equity"—that is, in the transaction in respect of which relief is sought. "Equity looks upon that as done which ought to be done" is a convenient principle where, for instance, it is of advantage to those intended to reap the benefit, that money directed by a will to be employed in the purchase of land, and land directed to be turned into money, shall be treated as already consisting of that species of property into which they are directed to be converted.

The foregoing are the principal maxims upon which equity jurisprudence is founded; and it is easy to see that, whatever may have been and still are its defects in practice, the Court of Chancery has never deserved the withering exaggeration with which Dickens referred to it: "Never can there come fog too thick, never can there come mud and mire too deep, to assort with the groping and floundering condition which this High Court of Chancery, most pestilent of hoary sinners, holds this day in the sight of heaven and earth." In his day, no doubt, the "popular prejudice" which he so indignantly disclaimed was in existence, while at the present time it has largely lapsed into indifference; and the imaginary charge of a "parsimonious public," so ridiculed by Dickens, was not without a substratum of truth, for Chancery business was far too great to allow of the then judicial staff disposing of it properly. This was shown clearly enough by the appointment in 1841 of two additional Vice-Chancellors, and the constitution of a Court of Appeal in Chancery in 1851. Even at this day we constantly hear of a "block" occurring in the Equity Courts, and it remains to be seen what effect the actual "fusion of law and equity," by the union of all judicial courts and offices under one roof in the new Palace of Justice, will have in enabling the judges and officers of the Chancery Division to keep pace with the ever-increasing demands of litigants.