NOTES OF CASES EXTRACTED FROM THE MANUSCRIPTS OF SIR SAMUEL ROMILLY; PART I

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EDWARD ROMILLY

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Trieste

NOTES OF CASES

EXTRACTED FROM THE

MANUSCRIPTS OF SIR SAMUEL ROMILLY.

With Notes

BY

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PART I.

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PREFACE.

AMONG the voluminous legal notes and papers left by Sir Samuel Romilly, are eight duodecimo volumes, entitled "Notes of Cases in Equity." These volumes consist of reports of cases, the number of which is above eight hundred; some of the cases are reported very shortly, others at considerable length. In addition there are references to a ninth volume, which cannot now be found. Notwithstanding the title, one entire volume (the fourth), and parts of others, are composed of cases in the Courts of Common Law. The greater part of the Notes appear to have been made by Sir S. Romilly himself, and relate to cases decided between Michaelmas, 1779, and the end of the year 1794. Some cases are given ex relatione, and those in the third volume are of earlier date, and seem to be copies of or taken from other manuscripts. These Reports were liberally contributed by Sir S. Romilly, and many are to be found verbatim in different collections of Reports and other works—often without acknowledgment. In particular, nearly all the cases relating to tithes are so to be found in Gwillim's work on Tithes.

In consequence of the length of time since the cases were decided, a large number have lost much of their interest, but many of them appeared to me to be likely to be useful to the Profession. Some of these I have accordingly selected, and I have ventured to add some comments of my own, on the general principles of law which they illustrate. The marginal notes are, in many cases, taken from the indexes of subject matter made by Sir S. Romilly.

6, NEW SQUARE, LINCOLN'S INN,
May, 1872.

NAMES OF CASES REPORTED.

Since these sheets were in print, the decision in *Holloway* v. *Webber*, p. 32, has been affirmed by the House of Lords, nom. *Martelli* v. *Holloway*, 19 April, 1872.

NOTES OF CASES.

FOLEY *v.* BURNELL.

[IN DOM. PROC.]

[27*th April*, 1785.]

Devise of real estate to A. for life, remainder to Trustees to p. c. r., remainder to A.'s first and other sons in tail male, remainder to B. for life, remainder to Trustees to p. c. r., remainder to B.'s first and other sons in tale male, remainder over, and then a bequest of plate and furniture in the house to be held and enjoyed by the several persons who should respectively and successively be entitled to the use and possession of the house in nature of heir looms, to be annexed and go along with the house for ever. A. had a son who died a few days after his birth. The plate vested absolutely in A.'s son as tenant in tail, and from him was transmitted to A. his father, and in A.'s hands was liable to an execution at the suit of his creditors.

For the state of the case, see (1 B. C. C., 274).

THE plaintiffs appealed from the decree of the Lords Commissioners; and after the case had been argued in the House of Lords (*see the arguments*, 4 Toml. P. C., 319), Lord Chancellor *Thurlow* moved that the two following questions should be proposed to the judges:—

1. Whether Edward Foley had such an interest in the plate and furniture, mentioned in the will of Lord Foley, as rendered it liable in his hands to an execution at the suit of his creditors.

2. Whether the applicants had such an interest in the said plate and furniture as barred such execution.

These questions were accordingly proposed to the judges, who this day delivered their opinion.

HEATH, J.—By the words of this will it appears to me that the plate was devised to the son of Edward Foley, only upon contingency, and that it was never intended to vest in him till he should be in the actual receipt and enjoyment of the rents and profits of the house and lands. The plate and furniture are devised to be held and enjoyed by the several persons who from time to time shall respectively and successively be entitled to the use and possession of the houses, &c. The words use and possession have two senses, the one technical, and the other popular. If this be confirmed according to the popular sense, it is conclusive as to the lessor's intention. The infant son of Edward Foley never was in the use and possession of the house in succession after his father. It is objected that, according to this construction, the personal estate will be locked up longer than the real, because, when the son attained twenty-one, a recovery of the real estate might have been suffered. I answer, that the different words by which the personal and the real estate are devised, show a different intention with respect to them in the testator. He knew that at some time the plate must vest absolutely in some person, and he was desirous to postpone that time as long as he could; but the real estate might, by possibility, continue for ever in that course which he had limited. If a recovery had been suffered, the separation of the real and personal estate would not have proceeded from the effect of the devise, but from the collateral act of the parties. It is said that the testator intended to limit a perpetuity of his personal estate, and that that intention, being contrary to law, could not take effect. I answer, it shall be effectuated as far as the law will permit, and that the absolute property shall not vest in any one, till a son of Edward Foley is in the actual possession and enjoyment of the estate. I am of opinion that the sheriff could not

take the plate in execution, for, where a man has only a limited property in personal estate, it cannot be taken in execution at the suit of his creditors: Dalt. Sheriff, 127.

EYRE, B.—If this were only a devise of the plate to the successive possessors of the house, without reference to the title under which they would come into possession of the houses, I should think that the absolute property would not vest till some person was actually in possession of the houses; but this is not the case; the testator meant to limit the same estate and interest in the furniture and plate as he had before limited in the house. The words have an obvious reference to the former limitation of the real estate, and should receive the same construction as if the limitation of the real estate had been in terms applied to the plate and furniture. It is true that the testator devises only the enjoyment of the plate; but that furnishes no objection, because a devise of the enjoyment of personalty for ever would give the absolute property; and this is an enjoyment of the property for ever, though parcelled out in different limitations. I don't think the testator used the words "use and possession," as applied to any particular time, or any other particular event. He certainly meant that the bequest should take effect immediately; for he meant that there should be an immediate possession of the house. The words taken with the context are sufficiently apt to describe the persons to take the plate to be the same as were to have the real estate; and though a lawyer might know that these words would give a tenant in tail an absolute property in the plate before he came into the possession of the house, yet the testator probably was not aware of it. Supposing, then, that this devise is to be construed with reference to the limitations of the real estate, as no remainder can be limited of personal property after an estate tail, I think that this plate, upon the birth of the son of Edward Foley, became his property, subject to the preceding uses which had been limited of it.

It has been argued that though the interest in the house vested in Edward Foley for life, with remainder to his son