

[Heard, 23d July, 1840. — Judgment, 6th Oct. 1841.]

(No. 21.)

ROBERT HILL and others, Appellants.

[*Lord Advocate — Knight Bruce.*]

WILLIAM PAUL and another, Respondents.

[*Attorney-General.*]

Deed. — Under a general conveyance in trust for creditors, of all “means and estate presently belonging to me,” with clauses suited to such a conveyance, *held*, that the future fees of a public office enjoyed by the granter, which was not in any way alluded to in the deed, were not carried by it.

Id. — A clause in a conveyance in trust for creditors binding the granter to execute such “farther deeds as may be judged necessary for more effectually carrying the purposes of the present trust into full execution,” is for farther assurance only of that which is *de facto* conveyed, and will not oblige the granter to execute a farther conveyance of other estate.

Pactum Illicitum. — *Public Officer.* — *Semble*, That an assignment by a keeper of a register of sasines, of the fees of his office in trust for his creditors, would be illegal.

2d DIVISION.

Lord Ordinary
Jeffrey.

Statement.

IN the year 1792, Hill was appointed keeper of the register of sasines for the county of Renfrew, &c. in conjunction with Fotheringham, with reversion to the longest liver. The proportion of emolument drawn from the office by Hill was, under a family arrangement, as alleged by him, payable to his mother for her life, and after her death to his unmarried sisters, so long as any

of them lived; a certain sum being deducted, “on account of the expense, trouble, and responsibility of recording, collecting fees, and other contingencies.”

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In 1830, Fotheringham died, and Hill became sole patentee of the office, but, as also alleged by Hill, on this event the proportion of fees became applicable to the same trusts as Hill's original share.

In March, 1835, the last of Hill's sisters died, his mother having died some time previously.

In the year 1826, Hill, having fallen into embarrassed circumstances, executed a deed on the 28th of October in that year, in favour of Paul, and M'Kersey deceased, as trustees for his creditors, under which Paul entered into possession.

Hill's name had all along appeared as keeper of the register in every almanac and county list, but whether Paul and the creditors were aware at the date of the trust-deed in 1826, that he held the office, did not appear.

In May, 1835, Hill opened a negotiation with Paul for a discharge by his creditors, and an allowance from the fees of his office was part of the consideration offered by him. This negotiation went off, and then Paul required Hill to account to him for the whole of the fees of the office, as falling under the trust-deed; this he did by letter written in July, 1835.

In August, 1835, Hill resigned the office, and a new patent was issued in favour of Graham and Hill's son, under reservation of an annuity of L.300 to Hill. The object of this was confessedly to secure the office to the son, by reason of Hill's infirm state of health.

In January, 1837, Paul brought an action to have it found that Hill was bound to account to him for the fees drawn by him from the death of his last sister, and

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that Graham and Hill's son were bound to pay over to him the whole fees which they had theretofore drawn, or might receive during the life of Hill, with conclusions for accounting and payment upon the footing of these declarations.

The deed under which Paul brought this action conveyed, "heritably and irredeemably, all and sundry
 "superiorities, lands and heritages, debts heritable and
 "moveable, and whole goods, gear, sums of money, and
 "effects, and, in general, my whole means and estate,
 "heritable and moveable, of whatever nature or de-
 "nomination, or wherever situated, presently belonging
 "to me; and in particular, without prejudice to the
 "said generality, all and whole," here followed a parti-
 "cular enumeration of lands conveyed, "together with all
 "right, title, and interest, claim of right, property, and
 "possession, petitory and possessory, which I, my pre-
 "decessors or authors, had, have, or any ways may
 "have, claim, or pretend to the lands and other
 "heritages, and others, generally and particularly
 "above disposed, or to any part or portion thereof;
 "surrogating and substituting the said trustees in suc-
 "cession in my full power, right, and place of the
 "whole heritable and moveable estates and effects
 "above disposed and assigned, with full power to
 "uplift and discharge the rents and feu-duties of the
 "said lands and others for crop and year 1826, in so
 "far as the same are still outstanding, and all future
 "crops and years, and also all arrears of rents and feu-
 "duties, due for bygone crops and years, to intromit
 "with the personal estate hereby conveyed, compound,
 "transact, and agree, or enter into arbitration con-
 "cerning the said lands and estate, real and personal,
 "or any part thereof, and generally to do every other

“ thing requisite and necessary for making the same
 “ effectual, which I could have done before granting
 “ hereof.” The purposes of the trust were declared to
 be to the end that the trustees should “ enter into the
 “ immediate use and possession of my whole heritable
 “ and moveable means and estate, above conveyed, with
 “ power to sell and dispose of my said lands and others,
 “ or such parts and portions thereof, as to the said
 “ trustee acting for the time shall appear proper and
 “ expedient, and that either by private sale, or public
 “ voluntary roup, and in wholesale or in parcels, and
 “ on such conditions, and at such prices, as the said
 “ trustee acting for the time shall think fit, or as he
 “ shall be directed to do in these particulars by the
 “ majority of my creditors in value present at a meeting
 “ to be called as before specified ; as also with power to
 “ the said trustee to sell and dispose of such parts of the
 “ woods growing upon the said lands, as the said trustee
 “ shall think proper, at such prices as can be obtained
 “ for the same, either by public roup or private bargain,
 “ and upon such previous advertisement as the said
 “ trustee shall think necessary, with power to him to
 “ receive payment of the prices of said lands, woods,
 “ and others, or to take bond for the payment of the
 “ same from the purchasers, with one or more cautioners
 “ reputed responsible at the time, and with power to
 “ the said trustee to make up and establish in my per-
 “ son all necessary titles to the said lands and estates,
 “ and for rendering effectual such sales, with power to
 “ the said trustees to grant dispositions, discharges, and
 “ other writings necessary, with all clauses needful, to
 “ the purchasers of said lands and others, and that
 “ simply so as that the purchaser shall be noways con-
 “ cerned with the application of the price thereof, nor

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“ the said lands be burdened or affected with any of the
 “ debts, conditions, or provisions herein contained; as
 “ also with power to output and input tenants, and grant
 “ tacks of the said lands, if necessary, for such periods
 “ as may be consistent with the object of this trust,
 “ which is the speedy payment of my debts; also with
 “ power to the said William Paul, or other trustee
 “ acting for the time, in so far as I, the said Robert
 “ Hill, am concerned, but always with the previous
 “ approbation and authority of the majority in value of a
 “ general meeting of my creditors, to be called as after
 “ specified, to compound, transact, or agree, submit,
 “ and refer, any questions, disputes, and differences
 “ which may arise betwixt them, and every other per-
 “ son or persons, touching the execution of this trust-
 “ right, or any other matter concerning the premises,
 “ and particularly all claims and demands of whatever
 “ nature, either competent to me, and now hereby
 “ assigned, or which may be made against me or my
 “ estate; which transactions and submissions, with the
 “ decreets-arbitral, one or more, to follow thereon, are
 “ hereby declared valid and effectual; as also, with full
 “ power to the acting trustee to sue and insist in all
 “ actions, and to do every act, matter, and thing, he
 “ shall judge necessary or proper for effectually securing
 “ my said creditors, and obtaining to them payment of
 “ their debts: and the prices and produce of the lands
 “ and other estates, real and personal, generally and
 “ particularly above conveyed, with the accrescing
 “ interest of the same, rents, mails, and duties of said
 “ lands, are hereby directed to be applied by the said
 “ William Paul, or other trustee acting for the time;
 “ and by acceptation hereof, he shall be bound and
 “ obliged to apply the same, in the first place, for the

“ payment of public and parochial burdens, and other
 “ charges that shall be necessary for the support of the
 “ estates, lands, and others above disposed, and for the
 “ charges and expenses of management in executing
 “ this trust, as such charges and expenses shall be from
 “ time to time ascertained by the said trustee, with a
 “ suitable remuneration for his trouble.” — In the second
 place, for payment of the granter’s debts. “ Declaring
 “ always, that neither the tenants nor possessors of my
 “ said lands, nor the purchasers of my said estate, real
 “ or personal, from the trustee, shall be anywise con-
 “ cerned with any of the conditions of this trust, or
 “ accountable for the application and disposal of the
 “ said rents, prices, and produce of my said lands and
 “ effects, real or personal, but the simple discharge of
 “ the said William Paul, or other trustee acting for the
 “ time, or any other person properly empowered by
 “ him, shall be a sufficient exoneration to the tenants
 “ or purchasers, to all intents and purposes, under the
 “ exception of prior securities, as before and after men-
 “ tioned: And I hereby authorize and empower the
 “ said William Paul, or other trustee acting for the
 “ time, to name and appoint factors and overseers,
 “ cashiers and agents, to act under him in the manage-
 “ ment of my said estates, and in the sales of the said
 “ lands and effects, and for recovering the rents, prices,
 “ and produce thereof: And it is farther declared, that
 “ notwithstanding the general powers before stated,
 “ bestowed upon the trustee acting for the time, yet it
 “ shall be in the power of the majority of my creditors
 “ in value to give directions to the trustee of the time
 “ and mode of disposing of my said heritable property,
 “ and he, the trustee, shall be obliged to follow such
 “ directions: And it is farther provided, that in case

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“ the trustee or trustees above named in succession,
 “ shall not have sold and disposed of the lands and
 “ others above conveyed, or such part thereof as may
 “ be necessary for the payment of my debts, and other-
 “ ways fully executed the trust hereby committed to
 “ them, within the space of two years from this date,
 “ that then it shall be in the power of my said credi-
 “ tors, or the majority of them, according to the value
 “ of their debts, who shall convene at a meeting to be
 “ called for the purpose, after advertisement in such
 “ newspapers, and for such times as they shall think
 “ proper, to require and compel the said trustee or
 “ trustees, or either of them, for the time, to denude
 “ or give up all management in virtue hereof, which the
 “ said trustee or trustees shall be holden and obliged to
 “ do, in favour of such other trustee or trustees as
 “ shall be named for that purpose by said creditors, or
 “ majority of them, according to the extent of their
 “ debts; and declaring, that the whole debts and sums
 “ of money, principal, annualrents, and penalties if
 “ incurred, due at and preceding the date hereof, shall
 “ be real burdens upon the said lands and estates, to
 “ affect the right and property thereof in favour of such
 “ of my present creditors as shall accede hereto
 “ allennarly, and that in real security for payment of
 “ such debts, and that preferably to any future debts to
 “ be contracted, or deeds to be granted by me, the said
 “ Robert Hill, or my heirs; and that these presents
 “ shall continue in force and subsist as a real right over
 “ my said lands and heritages, and every part thereof,
 “ as a corroborative and collateral right in security of
 “ payment to the creditors acceding, to the extent of
 “ the debts that are or shall be justly due to them by
 “ any obligation or ground of debt granted by me, the

“ said Robert Hill, or my predecessors whom I repre-
 “ sent, preceding the date hereof, without hurt or pre-
 “ judice, nevertheless, to the priority or due preference
 “ of any securities already granted, or affecting my said
 “ estates at and preceding the date hereof, albeit this
 “ deed of trust may be rendered ineffectual for the
 “ purposes hereby intended: But declaring always, as
 “ it is hereby expressly provided and declared, that the
 “ real burdens upon the said lands and others created
 “ by these presents, shall nowise hinder or affect the
 “ power of the said William Paul, or other trustee
 “ acting for the time, to sell, convey, renounce, and
 “ discharge by himself alone, without the concurrence
 “ of me or my said creditors or others, and the said
 “ lands and others shall be freed and disencumbered of
 “ the said real burdens hereby created, and of the hail
 “ conditions of this trust, by the renunciation, convey-
 “ ance, discharge, or other deed granted by the said
 “ trustee acting for the time in the execution of this
 “ trust, in like manner and as fully as if the said real
 “ burdens and others had never before been created, or
 “ the said creditors had separately executed formal
 “ renunciations thereof, excluding always from the
 “ effect of this provision and declaration the heritable
 “ securities granted by me prior to the date of these
 “ presents; which securities are to remain as entire as
 “ if these presents had not been granted or acceded to,
 “ and are only to be discharged and renounced by
 “ those in right of the same, notwithstanding any clause
 “ herein that may appear to the contrary. And
 “ farther, it is provided and declared, that albeit the
 “ trustees above named shall fail to accept, or shall
 “ die before the execution of this trust-right, yet, never-
 “ theless, the same shall noways cease or become void

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“ therethrough ; but this present trust-right, and the
 “ infestments to be taken in virtue hereof, and all that
 “ may follow hereon, shall stand and subsist as a secu-
 “ rity to the creditors whose debts have been contracted
 “ at or preceding this date, and who shall accede to
 “ these presents ; and it shall be competent and lawful
 “ to the said creditors, or major part of them, according
 “ to the amount of their debts, real or personal, and not
 “ per capita, nor according to the number of persons
 “ present, at a general meeting to be called, as after
 “ specified, for that purpose, to choose from time to
 “ time a trustee or trustees in succession, for executing
 “ this trust, and the trustee or trustees so to be chosen
 “ shall be as fully invested in right of the whole lands
 “ and others hereby conveyed, and all the powers hereby
 “ committed to the trustees before named, as if they had
 “ been expressly appointed trustees by these presents ;
 “ and I oblige myself, if it shall be judged necessary, to
 “ grant all necessary deeds for renewing these presents
 “ in favour of such new trustee : Farther, it is provided
 “ and declared, that the said William Paul, Lindsay
 “ Mackersey, and any other person or persons who may
 “ hereafter be named and appointed trustees in manner
 “ before mentioned, after having accepted of, and
 “ acted under this present trust-deed, shall be bound
 “ and obliged, before voluntarily denuding of the trust,
 “ to give three months’ previous notice of their inten-
 “ tion so to do in writing, to me, the said Robert Hill,
 “ or my heirs, and to the creditors at a meeting to be
 “ called for that purpose : And farther, declaring, that
 “ how soon, and whensoever my said creditors shall be
 “ satisfied and paid of their debts, and the said William
 “ Paul, or other trustee acting for the time, shall be
 “ lawfully and amply indemnified of all engagements

“ which shall have been entered into by them for the
 “ purposes of the trust, then the said William Paul, or
 “ other trustee acting for the time, shall be obliged to
 “ make up and fit a final account of their intromissions
 “ with, and management of, the said trust-funds, and
 “ the balance thereof, and the remaining lands, heri-
 “ tages, and other trust-estate, shall be paid over and
 “ reconveyed by the trustee acting for the time, to me,
 “ the said Robert Hill, and my heirs and assignees :
 “ And likewise reserving to my creditors all actions and
 “ diligences competent against me, the said Robert
 “ Hill, for such balances of the said debts as may
 “ remain owing after deduction of such dividends
 “ thereon as may be realized from my means and
 “ estate hereby conveyed, but not until after the pre-
 “ sent trust shall have been brought to a termination.
 “ And farther, I bind and oblige myself, and mine
 “ aforesaid, to grant and to execute; at any time when
 “ required, such farther deed or deeds as may be judged
 “ necessary by my said trustee or trustees, or by a
 “ majority in value of my said creditors, for the more
 “ effectually carrying the purposes of the present trust
 “ into full and complete execution.” The deed then
 contained obligation to infest, procuratory of resignation,
 and the following clause of assignation, and clause of
 warrandice : — “ Moreover, I do hereby make and con-
 “ stitute my said trustees, in trust for the uses and
 “ purposes foresaid, and their disponees, my cessioners
 “ and assignees, not only in and to the whole writs,
 “ rights, and evidents, title-deeds, and securities, old
 “ and new, concerning the said lands and others above
 “ disposed, with the whole clauses of warrandice, and
 “ other clauses, tenor, and contents thereof, and all
 “ that has followed, or is competent to follow there-

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“ upon ; but also in and to the rents, mails, and
 “ duties, customs, and casualties, due or payable for or
 “ forth of the said lands, for crop and year 1826, and
 “ all arrears of preceding crops and years, and in and
 “ to the tacks of the said lands, and whole prestations
 “ therein contained incumbent on the tenants thereof,
 “ and all diligence and execution of the law compe-
 “ tent to follow thereupon ; surrogating and substituting
 “ my said trustees in my full right and place of the
 “ whole premises, with full power to them to do every
 “ thing requisite for completing and establishing the
 “ absolute right and property of the said lands and
 “ others, and titles to the same, in their persons, and
 “ for making the rents thereof effectual, in the same
 “ manner, and as fully and freely in all respects as I
 “ could have done myself before granting these pre-
 “ sents : Which lands and others above disposed, with
 “ this disposition thereof, and resignation and infest-
 “ ments to follow hereupon, and assignation to the
 “ writs and evidents, I bind and oblige me and my
 “ heirs to warrant to my said trustees, for the uses and
 “ purposes foresaid, and to their assignees, at all hands,
 “ and against all deadly, and the assignation to the
 “ personal estate, and the rents, mails, and duties of
 “ my said lands, from my own proper facts and deeds
 “ only ; and I specially empower the said William Paul,
 “ or other trustee acting for the time, to call for and
 “ receive the whole foresaid writings and evidents from
 “ all persons whatever, in whose custody and keeping
 “ the same may be.”

Hill pleaded as a preliminary defence, among others, that the trust-deed did not give any title to pursue the action.

The Lord Ordinary, (Jeffrey,) after hearing parties,

pronounced the following interlocutor, adding the sub-joined note¹ as to this part of the case: — “ The Lord
 “ Ordinary, having heard the counsel for the parties
 “ on the preliminary defences, repels the defence or
 “ objection to the title of the pursuer, founded on the
 “ allegation, that the trust-deed in his favour did not
 “ convey any of the profits or emoluments of the office
 “ then vested in the trustee, which occurred subse-
 “ quently to the date of that trust-deed: And, 2do,
 “ In respect that all the other defences pleaded as pre-
 “ liminary, either depend on disputed matters of fact,

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¹ “ *Note.* — The question of title is not without difficulty. But the
 “ Lord Ordinary is of opinion, that the defender, Hill, being at the date of
 “ the trust vested in a life office, which he executed by deputy, and which
 “ yielded large though fluctuating annual profits, is to be regarded as the
 “ owner of a life annuity, which, he apprehends, would clearly have been
 “ carried, by the general conveyance of his whole moveable property and
 “ estate of every description, to his trustee. That he was under a previous
 “ obligation to account for a part, or even the whole of these profits, to his
 “ sisters during their lives, would not bar the effect of this conveyance, as the
 “ radical right to them was still in his person, as incident to the office itself,
 “ of which he was the only holder. If such previous obligation was onerous
 “ and unchallengeable, it was still but a temporary burden upon his primary
 “ right; and that being onerously conveyed to his trustee, such conveyance
 “ would take effect as soon as the burden was worked off, just as the convey-
 “ ance of a fee, under the burden of a liferent, would vest the radical right in
 “ the disponent from the first, though its actual enjoyment must be postponed
 “ till the liferent was run out. If the whole profits were not so pledged to
 “ the sisters, or if their right was not onerous, the form of the action seems
 “ sufficient to make the defender, Hill, still account for them to the pursuer.

“ As to the objections raised on the terms of the act 49 Geo. III. cap.
 “ 126, as to the sale or brokerage of offices, the Lord Ordinary is satisfied
 “ that it has no application to such a case as the present. The provisions in
 “ the 11th section of that act, are plainly referable only to the case of a party
 “ privily stipulating for a share (or the whole) of the profits of an office,
 “ which, by his resignation or instrumentality, is obtained or secured for
 “ another, and not to that of one who, like the present pursuer, is seeking to
 “ vindicate for their true owners, profits actually drawn by persons, who, in
 “ law and justice, are bound to account for them to others. At all events,
 “ this is a question upon the construction of a public statute, which must
 “ form, if insisted on, an important part of the discussion on the merits of the
 “ case, and could not with any propriety be disposed of as a preliminary and
 “ exclusive plea.”

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“ or are involved in the merits, reserves and supersedes
“ the consideration of them till the cause comes to be
“ discussed on the closed record: And, in respect the
“ defenders state they do not mean to acquiesce in this
“ judgment, finds them liable in expenses, allows an
“ account to be given in, and remits the same to the
“ auditor of Court for his taxation and report.”

Reclaiming notes were presented against this interlocutor, on which the Court, before farther answer, appointed the parties to give in minutes of debate “ on
“ the question, whether to any or to what effect and
“ extent the emoluments of the office referred to were,
“ or could be, carried by the trust-conveyance to the
“ pursuer libelled on.”

On advising the minutes, the Court pronounced the following interlocutor on 15th November, 1838:—
“ The Lords having resumed consideration of this note,
“ with the minutes of debate and the other proceedings,
“ adhere to the interlocutor complained of, and refuse
“ the desire of the notes, reserving all questions as to
“ expenses.”

The defenders in the action appealed against the interlocutors of the Lord Ordinary, and of the Court.

Appellant's
Argument.

The Appellant.— I. The deed in the respondent's favour does not contain any mention of the office in question, and the respondent, on his own shewing in his summons, was not aware of the appellant, Robert Hill's, right to the office at the time the deed was executed. However unlikely that ignorance might be, considering the nature of the office, it is sufficient, coupled with the want of any words in the deed mentioning the office,

or suitable to embrace it, to shew that the office itself did not pass, either expressly or by some necessary implication, supposing it to be capable of passing. If such had been the intention of parties, there would have been provision made for discharge of the duties, but the deed contains none, and as little are there any express terms for conveying the emoluments of the office. An arrear of fees might pass under the words “means and estate,” but there were not any arrears at the date of execution of the deed payable to Robert Hill, and the fees which were thereafter to arise could not, at the date of the execution, be “means and estate presently belonging” to the granter. The general words of the conveyance being subjoined to particulars enumerated, cannot be made to apply to particulars of a different nature from those enumerated; Ersk. III. 4, 9; Cunningham v. Livingstone, Mor. 11660; Ross, Mor. 14948, and Peebles, Mor. 5019; Fife v. M’Kenzie, Mor. 2325; Fraser, Mor. app. clause II.; Waddel, Mor. 5022.

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II. The obligation upon Robert Hill to grant supplementary deeds was not intended to operate of itself any conveyance, but merely to make effectual the conveyance in the prior part of the deed, by obliging the granter to do what might be necessary for that purpose. The action is not in form to compel implement of this obligation, but proceeds on the assumption that a valid conveyance had been made out and out.

III. The office itself might come within the terms “means and estate presently belonging to me;” but an office of the nature of keeper of a register, in which seriously responsible duties have to be performed, and

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which the public have an interest to have duly performed, is not adjudgeable; *Wilson v. Falconer*, Mor. 165. The grounds of that decision were implied delectus personæ in the nomination to the office. If the office be not adjudgeable, if the law will not effectuate a judicial transference, there cannot, and for the same reason, be any voluntary transference or assignation; the office is then inalienable; *Davis v. Marlboro'*, 1 Swanst. 79; 49 Geo. III. cap. 136, is express. If the office itself is inalienable, are the emoluments of it assignable or adjudgeable, for to this the action of the respondent does in fact amount? The law presumes that the fees of an office are no more than are necessary for its due discharge, and while it will not permit the office to be transferred or attached, will not permit the fees of the office to be meddled with, or courts of justice to speculate as to what may or may not be sufficient, and thereby to endanger the due discharge of the duties; 49 Geo. III. cap. 134; *Palmer v. Bate*, 6 Moore 28, and cases there cited. But according to the respondents, the whole of the fees were assigned, for the deed carries either the whole or none, and nothing whatever was reserved for the party who was to perform the duties; the conclusions of the action are also to this extent, and are not restricted to the L.300 a-year reserved to Robert Hill by the new grant, or any sum less than the whole.

IV. At all events, whatever right might by possibility be passed by the trust-deed, as against Robert Hill, that deed cannot affect the office in the hands of Graham and Hill, junior, the new patentees, under their grant from the crown. They were not parties to the trust-deed, and while the grant stands unreduced, the office is theirs,

and as little can the pursuer have any right to call them to account for the emoluments of the office, beyond the L.300 a-year, payable to Robert Hill; any payment beyond that is expressly contrary to the 49 Geo. III. cap. 126.

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The Respondent. — I. The respondent does not make any claim to the office, though if he were making such a claim, it would not lie in the appellant R. Hill's mouth, to dispute it on the ground of the inalienability of the office, seeing that if carried by the trust-deed, he is bound to warrant the conveyance. It is the emoluments of the office which the respondent claims. If the office had been saleable, the words of the deed would have been sufficient to carry it and the emoluments; why, then, are they not sufficient to carry the emoluments without the office, which is not saleable? Though the office itself is not adjudgeable, there is nothing to prevent the rights and interests flowing from it to the holder from being adjudged; *Hunter v. Gardner*, 5 W. and S. 616. The emoluments arise not ex contractu with the parties using the record, but virtute officii; no doubt the fees in some sense are not due till earned, but they arise out of a right which existed at the date of the trust-conveyance, and the terms of that deed are sufficiently comprehensive to embrace that right. The purpose of the deed was a general conveyance for payment of creditors, any attempt to limit its terms by reason of any particular enumeration, is to go against its express object, and is excluded by the words "without prejudice to the said generality."

Respondent's
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II. The plan of the trust-deed was a general com-

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prehensive conveyance, implying the probability of supplementary conveyances of particular estates becoming necessary, and in this view the dispositive clause, and the obligation to grant all farther deeds necessary, must be taken as fully vesting the right.

III. If Hill could be trustee for his sisters, why not for his creditors? He might unquestionably have made payments from time to time out of the emoluments towards discharge of his debts, why, then, may he not enable another to do so for him? It does not necessarily follow that what is not attachable is not assignable.

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LORD CHANCELLOR. — My Lords, I have considered this case with much anxiety, and am unable to concur in the judgment of the Court of Session, upon the point which, four out of five Judges, decided in favour of the pursuer, and am also of opinion, that the judgment cannot be supported upon another ground, which does not appear to have been the subject of much consideration below. The decision having been taken upon the preliminary defences, the statement in the summons is to be strictly attended to; it states, that Robert Hill was, at the date of the trust-deed, keeper of the register of sasines for the county of Renfrew, under a commission or appointment by the crown, and that he drew and applied the whole fees and emoluments for his own behoof, at least since the death of his sister Helen, in 1835, his brothers and sisters having and claiming, during their respective lifetimes, some share or interest in the fees and emoluments arising from the said office. It also sets out a letter of the 22d of July, 1836, in which the pursuer demands of the defender, an account and

payment of what he had received from the office, from the period of the death of his sister, Helen Hill. The pursuer's title is under a trust-deed for creditors, dated the 26th of October, 1826.

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It appears from this statement, that at the date of the trust-deed in 1826, Robert Hill was entitled for life to the office, but that the profits of it were to a great extent, if not the whole of them, applicable to other purposes, and that his prospects of any considerable income from it, were expectant upon the decease of his brothers and sisters in his lifetime. The first question, and that upon which the case was decided below, is, Whether the trust-deed included the profits, and it is competent in putting a construction upon that deed, to consider the circumstances in which the defender and his property were placed at the date of it. There is not in the deed any mention of the office, and it is matter of dispute, whether the pursuer and the creditors of Robert were aware that he held it. It is not very probable, that the persons with whom he was so connected, were ignorant of it, but still there is no proof that they knew it; had their knowledge of it appeared, it would have been impossible for the pursuer to contend, that there was any intention of affecting the future profits of the office by this deed. The peculiar circumstances of the property so intended to be affected, would necessarily have called for, and produced very special and peculiar provisions in the deed; but still, although the creditors might know nothing of this property, and therefore have entertained no intention respecting it, the terms of the deed might have been so general, and so calculated to include it, as to have been binding upon the defender, if there were no objection in law to his so dealing with the future profits of his office. In that case the general intention

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of passing all that the defender then had, or might at any time become entitled to, if expressed in the deed, would have supplied the want of any particular intention with respect to the office in question.

Now, it is not in dispute, that the office itself being held under the crown, and for public purposes, was not assignable; and the question is, Whether the future profits are included in the terms of the deed, for, whether the defender was entitled to any part of such profits in possession, or was as to the whole in expectancy only until the death of the survivor of his brothers and sisters, the whole which could have been the subject of assignment consisted of profits thereafter to arise, and not any property in possession — but the terms of the deed are, “ And in general my whole means and estate, “ heritable, and moveable, of whatever nature or denomination, or wherever situated, presently belonging to “ me.” — If the office had been assignable, it might have been included in these terms, it would have been “ means and estate presently belonging” to the author of the deed, and, of course, all future profits of the office would have passed as part of it. But as the office did not pass, how can these words be made applicable to profits thereafter to arise from the office which, it is admitted, continued with the original holder? Suppose there had been from this general description, some particular property excepted, could it have been contended, that future profits arising from such property were included? The office must be considered as excepted, because it was not by law assignable, which the parties must be supposed to have known.

If it were necessary to resort to other parts of the deed, to aid this construction of the terms used in describing the property intended to be included in it,

the particular enumeration which follows may most properly be used for that purpose. In fact, all the trusts and provisions of the deed are inapplicable to the future profits of the office. The trustees are to enter into "immediate possession and use of the whole estate, and arrears above conveyed, and to sell the same," and it contemplates the completion of the trust within two years, and in speaking of future "rents, prices, and produce," it confines itself to "rents, prices, and produce of my said estate and effects," — whereas the office, that is, the estate which was to produce the profits in dispute, is admitted not to be included in the deed, and therefore formed no part of the truster's "said estate and effects."

It seems, indeed, to have been felt that there was great difficulty in bringing the future profits within the terms used, but it was said, that the deed contained a provision for the trustees to grant such farther deeds as might be necessary, which obligation it was said, "per-
 fected the general one, although there was no specific conveyance of the emoluments of the office." It appears to me, that the provisions in question, cannot have any such effect; it is merely a clause for farther assurance of what was intended to be included in the prior grant, and was not intended to affect any property not included in it. If the description included the profits in question, no farther deed could carry it farther; and if the former description did not include it, this provision has no reference to it. The farther deed is "for the more effectually carrying into execution the purposes of the present trust."

If the only question had been what I have hitherto considered, I must have adopted the opinion of Lord Medwyn, opposed as it is to the high authority of Lord

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Jeffrey, (the Lord Ordinary,) Lord Glenlee, Lord Justice Clerk, and Lord Meadowbank; and finding upon this point, sufficient ground for reversing the interlocutors appealed from, the point which I am about to observe upon must not be considered as the ground of the judgment of this House, which I am the more anxious to have understood, because, as it does not appear to have been the subject of much consideration below, I should regret that the decision of this case, should, under those circumstances, preclude discussion in Scotland, if it should hereafter arise upon a point as to which this House has not had the benefit of the judgment of the Court of Session. The point to which I allude, is the legality of assigning the future emoluments of this office. It is a public office granted by the Crown for the benefit of the subject, to which, or to some other, for the same purposes, a large class of the subjects of Scotland must resort, and are compelled to pay certain sums for the duty performed, which constitute the profits of it. The parties resorting to this office, not only have an interest in the due performance of those duties, but have a right of action against the holder of the office, if, from any neglect of his, they sustain damage. Whether the emoluments exceed what may be considered necessary for the due performance of those duties, and to meet this responsibility cannot be matter of inquiry in this suit. It must be assumed, that the public are not taxed higher than is necessary to secure to them the due performance of the duties of the office, and the officer's responsibility in case of any demand arising against him. What then would be the effect of this deed, if it included the future profits of the office? Certainly, to deprive him of all the profits of it, after discharging the necessary expenses; for the Court cannot have any right to restrict the generality

of the terms used by an implied exception of what may be necessary for the officer's subsistence.

That such an assignment would be held to be illegal and void in England, is not the subject of doubt. No two cases can be more similar than this case and that of *Palmer v. Bate*, in 2d Broderip and Bingham, 673.

The cases there cited, supersede the necessity of my referring to others, except that I may mention Lord Eldon's observations in *Davis v. Duke of Marlborough*, as I do not find them referred to in the former case. Is there then any difference between the laws of the two countries upon this subject? The rule is established upon principles of public policy, applicable equally to both; but where is the decision that established, that all the future profits of an office which cannot itself be assigned, may be transferred by the holder of the office to his creditors. Erskine, in Book II, title 12, section 7, says, "That offices of trust conferred during pleasure, or for life upon personal regard, cannot be appraised or adjudged;" and in Book III, title 6, section 7, he says, "The King's pensions are not arrestable, because they are alimentary, and, indeed, all salaries annexed to offices, in so far as they amount to no more than a reasonable allowance, for the decent support of those who are named to them, ought, upon the same ground to be accounted alimentary."

The principle therefore upon which the English decisions have proceeded, is to be found in the law of Scotland, as might well be expected, but it happens that the very case now under consideration, has received a judicial decision by the Court of Session. In *Wilson v. Falconer*, on 7th December, 1759, reported in Morrison, 165, it was decided, that the office in question was not adjudgable by creditors, and the effect of the deci-

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sion was totally to repel the creditors' claim. Lord Kaimes, indeed, seems to have thought, that an adjudication of the emoluments would have been competent. The decision, however, did not recognize that declaration, and the principle upon which it was founded, is as applicable to the emoluments as to the office itself. I will not pursue this subject farther, because it is not the ground upon which I intend to propose to the House to reverse the judgment of the Court below. What I have said will, I hope, secure attention to the point, if it should hereafter arise for decision.

I therefore move your Lordships to reverse the interlocutors appealed from, to sustain the preliminary defences, and dismiss the action, and to find the appellant, the defender, entitled to the expenses of the suit below.

Judgment.

Ordered and adjudged, That the interlocutors complained of be reversed. And it is farther ordered and adjudged, that the appellants are entitled to the expenses of suit in the Court below.

ARCH. GRAHAME, Agent.