For these reasons I concur with Lord Salvesen in thinking that the deliverance of the Commissioners is erroneous.

The LORD PRESIDENT intimated that LORD KINNEAR also concurred.

The Court reversed the determination of the Commissioners, and remitted to them to discharge the assessment, ordered repayment of the income tax paid on the sum of £9000, and decerned.

Counsel for the Appellants—Sandeman, K.C.—Spens. Agents—Skene, Edwards, & Garson, W.S.

Counsel for the Respondent—The Solicitor-General (Hunter, K.C.)—Umpherston. Agent—Philip J. Hamilton-Grierson, Solicitor of Inland Revenue.

Thursday, July 14.

FIRST DIVISION.

[Lord Cullen, Ordinary.

GRACIE *v.* GRACIE AND ANOTHER (ALEXANDER'S TRUSTEES) AND OTHERS.

Arrestment—Validity—Description of Debt—Arrestment of Trust Funds in the Hands of Trustees—Furthcoming.

Arrestments of trust funds were used in the hands of the two surviving trustees by delivering to each of them a schedule of arrestment, which bore to "lawfully fence and arrest in the hands of you, the said A B, as one of the surviving trustees under the trust-disposition and settlement of X Y, the sum of £350 sterling, more or less, due and addebted by you as trustee foresaid" to the common debtor. In an action of furthcoming at the instance of the creditor it was objected by the common debtor that the arrestments were inept, in respect that no sum was due by the individual trustee, even as trustee, to the common debtor, and that the description of the debt was therefore insufficient. *Held* (*rev.* judgment of Lord Cullen, Ordinary) that the debt was sufficiently described and that the arrestments were good.

Observations (*per* Lord Kinnear) on the method of arresting trust funds in the hands of trustees.

John Leburn Gracie, coal exporter, Newcastle-on-Tyne, raised an action of furthcoming against himself and Charles Archibald Gracie, surviving trustees under the trust-disposition and settlement of Miss Margaret Alexander, Springhill, Peebles, *arrestees*, and James Alexander Gracie and John Gill, S.S.C., assignee of the said James Alexander Gracie, under assignations dated 25th May and 1st June 1908, *defenders*, in which he sought to follow out certain arrestments which he had used in the hands of himself and his co-trustee of certain legacies due under Miss Alexander's will to the said James Alexander Gracie.

The schedule of arrestment for the pursuer bore that the messenger-at-arms, "by virtue of a summons containing warrant to arrest, signeted 16th May 1908, raised at the instance of John Leburn Gracie . . ., pursuer, against James Alexander Gracie . . ., defender," did "lawfully fence and arrest in the hands of you, the said John Leburn Gracie, as one of the surviving trustees under the trust-disposition and settlement of Miss Margaret Alexander, Springhill, Peebles, . . . the sum of Three hundred and fifty pounds sterling, more or less, due and addebted by you, as trustee foresaid, to the said James Alexander Gracie, defender, or to any other person or persons, for his use and behoof, . . .: Together also with all goods, gear, debts, sums of money, rents of lands and houses, and every other thing presently in your hands, custody, and keeping, as trustee foresaid, pertaining and belonging to the said James Alexander Gracie, defender, all to remain in your hands as trustee foresaid, under sure fence and arrestment, at the instance of you, the said pursuer. . . ."

The schedule of arrestment for Charles Archibald Gracie was in similar terms.

The principal debtor James Alexander Gracie lodged defences in which his assignee Mr John Gill, who was sisted as a defender, concurred by minute.

The defenders pleaded, *inter alia*—"(1) The arrestments founded on being invalid and ineffectual to attach, and not having attached, any part of the trust estate held by the said John Leburn Gracie and Charles Archibald Gracie as the surviving trustees of Miss Margaret Alexander and due to the said James Alexander Gracie, the defenders should be assoilzied with expenses. (2) There being no funds in the hands of either trustee due to the debtor at the date of the alleged arrestments, the arrestments did not attach anything, and the defenders should be assoilzied with expenses."

The *facts* of the case appear from the opinion of the Lord Ordinary (CULLEN), who on 15th January 1910 assoilzied the compearing defenders from the conclusions of the summons.

Opinion.—"The pursuer John L. Gracie is a creditor of James A. Gracie for the sums decerned due to him by the latter in an action in this Court raised on 16th May 1908.

"James A. Gracie is a beneficiary under the will of the deceased Miss Margaret Alexander, in terms of which he became entitled to two legacies of £100 each on the death of his mother, which occurred on 29th April 1908. The trustees under the will are the pursuer John L. Gracie and Charles Archibald Gracie.

"On 18th May 1908 the pursuer, on the dependence of the said action at his instance, executed arrestments in the hands of himself and the said Charles A. Gracie as trustees of Miss Alexander, and the present action of furthcoming has been

brought by him against said trustees by way of following out said arrestments. The action is defended by James A. Gracie the common debtor, and also by Mr John Gill, S.S.C., who has been sisted as a defender in respect of his interest under an assignation by James A. Gracie in his favour, whereby James A. Gracie assigned to Mr Gill the said two legacies of £100 each. The assignation was granted on 25th May 1908, and was intimated to Miss Alexander's trustees on 11th June 1908. No objection is taken to the validity of the assignation or the intimation thereof.

"The question raised in the case is whether the arrestments used by the pursuer on 18th May 1908 are valid. If they are, the pursuer's right thereunder is preferable to Mr Gill's right under his assignation. If they are not valid, Mr Gill's assignation carries the fund to him.

"The arrestments were executed by serving a schedule of arrestment on each of the two trustees of Miss Alexander *qua* trustee. So far the mode of execution appears to be correct. The difficulty arises from the fact that the schedule of arrestment in each case describes the subject of arrestment as being 'the sum of £350 stg. more or less, due and addebted by you as trustee foresaid to the said James Alexander Gracie.' The subject of the arrestment is thus in terms described as a fund due to James A. Gracie by the particular trustee on whom the schedule was served. The objection taken is that the fund now sought to be made furthcoming, consisting of the two legacies, is not one due to James A. Gracie by any one trustee but by the body of trustees. I have come to the conclusion that this objection is well founded. Questions as to the validity of arrestments are questions *strictissimi juris*. An arrestment must accurately describe the arrestee in whose hands the subject of it is fenced and arrested. In the present case it is true that the right of James A. Gracie to the fund sought to be arrested—the two legacies—is a right which is independent of the *personnel* of those who as trustees or otherwise happen to be for the time the administrators of the trust estate. But it is equally true that when proceedings are taken by the legatee or those claiming through him for enforcing payment, it is necessary for the efficacy of such proceedings that they be directed against the persons who as the existing administrators are at the time under obligation to pay. It is, I think, a good test of the validity of the arrestment to compare it with the demand in the action of furthcoming. The conclusion in the action is against John L. Gracie and Charles A. Gracie as the trustees of Miss Margaret Alexander, and as such bound to pay the legacies. But the schedule of arrestment in each case describes the subject of arrestment as what is due to James A. Gracie by the individual trustee on whom the schedule was served. The summons and the arrestments do not square. The summons correctly describes the existing obligants in the money but the arrestments do not. I am accordingly of opinion that the arrestments are ineffectual to found the action."

The pursuer reclaimed, and argued—Arrestment in the hands of trustees was a competent method of attaching the interest of a beneficiary in a trust—M'Laren on Wills and Succession, ii, 850; Bell's Prin., sec. 1482. What was attached was the obligation of the trustee to account *re* his obligation as a trustee—Bell's Com. ii, 71. This principle had been given effect to in a long series of cases—*Grierson* v. *Ramsay*, 1780, M. 759; *Kyle's Trustees* v. *White*, November 14, 1827, 6 S. 40; *American Mortgage Co. of Scotland, Ltd.* v. *Sidway*, 1908 S.C. 500 (*per* Lord President, p. 504), 45 S.L.R. 390. It would be incompetent for a creditor to sue one of two trustees, because he would not have called all parties, but a majority and quorum would be sufficient—*Black* v. *Scott*, January 22, 1830, 8 S. 367—nor was it necessary to call the representatives of a deceased trustee—*Pearson* v. *Houston's Trustees*, January 29, 1868, 6 Macph. 286. The terms of the schedule did not negative the suggestion of the obligation being joint. There was no difference between the obligation due as one trustee and the obligation due by the body. Trust money was money paid into the affairs of each trustee—*Oswald's Trustees* v. *City of Glasgow Bank*, January 15, 1879, 6 R. 461 (*per* Lord President, p. 466), 16 S.L.R. 221; *Commercial Bank of Scotland* v. *Sprot*, May 27, 1841, 3 D. 939, *per* Lord Maekenzie, p. 940, and *per* Lord Fullerton, p. 941. In the present case the schedule had been served according to general practice.

Argued for the defenders (respondents)—The arrestments were bad, in respect that the debt attempted to be described had not been properly described. The test was—Assuming an arrestment had been executed against one trustee, would it be competent to bring a furthcoming against that one without the other? Each arrestment in the present case was a complete act standing by itself, and had no reference to the existence of other trustees. There was nothing to show that the sums in the different schedules were the same though the amounts were the same — Campbell's Law of Citation, 158; *Hay* v. *Dufourcet & Co.*, June 19, 1880, 7 R. 972, 17 S.L.R. 669; *Parnell* v. *Walter*, February 5, 1889, 16 R. 917, 27 S.L.R. 1. There might be a case where money was due by a person as a trustee which was not due by his fellow trustees. If a trustee had obtained a secret commission, or had wrongously retained some trust funds, then he would be liable as a trustee—*Watt* v. *Roger's Trustees*, July 18, 1890, 17 R. 1201, 27 S.L.R. 904. This was sufficient to show that there were cases in which such a misdescription as this would apply, and for which an arrestment in the terms of the present schedule would be the only competent method. In matter of arrestments the Court had always acted *strictissimi juris* — *Henderson's Trustees and Others*, May 20, 1831, 9 S. 618; *Graham* v.

Macfarlane & Co., March 11, 1869, 7 Macph. 640; *Burns* v. *Gillies*, January 27, 1906, 8 F. 460, 43 S.L.R. 322.

At advising—

LORD KINNEAR—This is an action of furthcoming from which the Lord Ordinary has assoilzied the compearing defenders on the ground that the arrestments on which the pursuer founds did not validly attach the debt. I am unable to agree with his Lordship. The pursuer had raised an action against a certain James Alexander Gracie, and on the dependence of that action arrested certain legacies which had been bequeathed to him in the hands of the trustees of the testatrix Miss Margaret Alexander. It is not disputed that a fund of this kind may be effectually arrested in the hands of trustees; but it is said that the arrestments used in the present case are bad on two grounds. The method of arrestment was that the messenger served a schedule of arrestment on each of the two surviving trustees, by which he purported to arrest in the hands of the arrestee as one of the surviving trustees under the trust-disposition and settlement a sum of "£350 sterling, more or less, due and addebted by you as trustee foresaid to the said James Alexander Gracie." Arrestments in these terms were used in the hands of both of the two only surviving trustees. The first point taken by the defenders is that this is not an effectual method of arresting a trust liability, because the trust estate is in the hands of the trustees jointly, and arrestments must be used in their hands as a collective body. It is true that the legal title of trustees in the trust estate is that of joint owners. But arrestment does not attach rights of ownership but personal liabilities; and I fail to understand how the liability of trustees as a collective body can be attached if not by putting an arrestment in the hands of each and all of them and forbidding each and all to make payment. The Lord Ordinary has held so far that the objection is unfounded, and I agree with his Lordship. The question would have been altogether different if service had been made on one or other of the trustees without using arrestments in the hands of each, because the effect of the arrestment is simply to interpel the debtor from making payment to his proper creditor, so that the debt may still remain in his hands subject to an adjudication in favour of the arresting creditor to be obtained in an action of furthcoming. The effect is entirely prohibitive, and if one trustee only out of several is forbidden to pay a debt due by the whole body, that may turn out to be an ineffectual prohibition as regards the other trustees. But if the arresting creditor interpels each and all, then the whole trustees are prohibited from making payment. There is no method by which payment could be made by the whole collective body without a breach of that arrestment.

But then the Lord Ordinary has sustained an objection of a different kind which is attended with more difficulty, viz., that the debt is not sufficiently described. The schedule describes the debt as a sum of £350 sterling, more or less, due and addebted by you as trustee foresaid; and his Lordship says—"The schedule of arrestment in each case describes the subject of arrestment as what is due to James A. Gracie by the individual trustee on whom the schedule was served." I cannot agree with this construction. The schedule begins with the narrative that the arrestment is used in the hands of the arrestee as one of a body of trustees, and says it is due by him "as trustee foresaid," that is, as one of a body of trustees. I think that sufficiently describes the debt as due by the trustees collectively. Nothing is said to suggest personal liability as distinguished from the collective liability of the trustees to make good the trust estate. An arrestment of debts due by trustees as such attaches liabilities that are to be made good out of the trust estate. A personal debt of the individual is not due by him in his character of trustee and is not payable out of trust funds. A debt of that kind will not be attached by an arrestment of debts due by the arrestee or trustee, and on the other hand an arrestment in these terms, since it does not touch the personal debts of the individual trustee, can affect nothing but debts payable out of the trust estate. It is said that the debt should not have been described in each arrestment as due and addebted by you as trustee, "but by you and the other trustees." But it is no part of a messenger's duty to trace out the strict legal character of the liability. All that he has to do is to identify the debt; and if a debt is described as due by one of the surviving trustees of a certain testator as such trustee, it follows of necessity that it is due by the others also. All that can be required of the messenger in this respect is to define the character in which the alleged debt is due by the arrestee so as to distinguish between trust debts and personal debts. It is said that a trustee may incur a personal liability which may not attach to his colleagues by a misapplication of trust funds or by an improper investment. But that is not a liability which belongs to him as trustee, but one which he incurs as an intromitter with trust funds against the terms of the trust, and it is not to be satisfied out of the trust estate in his hands but out of his own money. The debt which the arrestee is now required to make furthcoming is a debt due by the trustees as such, and is payable out of the trust estate in their hands. I am of opinion that the debt is sufficiently described as a debt of that character, and that each and every trustee is effectually prohibited from paying the debt until the arresting creditor's right is determined in the furthcoming. I do not understand that there is any other answer to the pursuer's demand in the furthcoming. I therefore think that the Lord Ordinary's interlocutor should be recalled.

LORD JOHNSTON—The pursuer sought to arrest in the hands of trustees a legacy due to his debtor out of the trust estate. His debtor's *jus crediti* in the legacy was certainly arrestable. The only question is, Were the arrestments effectually laid on?

The ideal way of arresting in the hands of trustees is to find them present at a trustees' meeting and then and there arrest in their joint hands. This is rarely practicable, and therefore an equivalent must be found by arresting in the hands of the individual trustees what is due by them jointly. But to make such arrestment complete it must be laid on the hands of the whole trustees or at least of a quorum (*Black* v. *Scott*, 8 S. 367), else a *nexus* on the trust estate or that part of it due to the beneficiary is not effected, for there would remain a quorum of the trustees who would not be interpelled by the arrestment from paying away the fund. Now that course has been properly followed here. Arrestment has been laid on in the hands of the two surviving trustees. And no objection could be taken *ex facie* of the execution of arrestments. But objection is taken that the schedules of arrestment do not warrant the execution, and then that the arrestment was not in reality properly laid on, in respect that in each case the messenger said that he arrested in the hands of you the said A B "as one of the surviving trustees under the trust-disposition and settlement" of X Y "the sum of £350, more or less, due and addebted by you as trustee foresaid" to the common debtor. The ground of objection is that no sum was due and addebted by the individual trustees, even as trustee, to the common debtor, but only by the body of trustees of whom he was one jointly, and that therefore the schedule should have run "due and addebted by you the said A B and C D (naming his co-trustee) as trustees foresaid." I confess I think that this or some equivalent form of words would have been more logically consistent with the situation, and I should not by myself have been disposed to disturb the Lord Ordinary's judgment. But while everything relating to the execution of diligence must be critically examined, this objection may well appear to be hypercritical, as there is here, as I fully admit, the substance of a good arrestment. I therefore acquiesce in the judgment your Lordship proposes, and in which I understand Lord Salvesen concurs. I do so the more readily that it is desirable in a matter of this sort to recognise a definite form which secures the essentials of a good arrestment and may be a guide to practitioners.

LORD SALVESEN—I entirely agree with the opinion of Lord Kinnear.

The LORD PRESIDENT was present at the advising, but not having heard the case delivered no opinion.

The Court recalled the interlocutor of the Lord Ordinary, repelled the defences, decerned against the compearing defenders in terms of the conclusions of the summons, and *quoad ultra* remitted the cause to the Lord Ordinary.

Counsel for the Pursuer (Appellant)—Johnston, K.C.—Hepburn Millar. Agents—Forman & Bennet Clark, W.S.

Counsel for the Defenders (Respondents)—Morison, K.C.—Mitchell. Agents—Gill & Pringle, W.S.

Friday, July 15.

FIRST DIVISION.

[Lord Skerrington, Ordinary.

CALEDONIAN RAILWAY COMPANY *v.* GLENBOIG UNION FIRECLAY COMPANY, LIMITED.

Railway—Mines and Minerals—Fireclay—Railways Clauses Consolidation (Scotland) Act 1845 (8 *and* 9 *Vict c.* 33), *sec.* 70.

Held (*aff.* judgment of Lord Skerrington, Ordinary), in the circumstances of the case, that a fireclay which varied from 60 to 140 feet below the surface of the ground, and did not form part of the subsoil of the place in question, was a mineral within the meaning of section 70 of the Railways Clauses Consolidation (Scotland) Act 1845.

Opinion (*per* the Lord President) that the cases of *Great Western Railway Co.* v. *Carpalla United China Clay Co.*, 1910, A.C. 83, 47 S.L.R. 612; and *North British Railway Co.* v. *Budhill Coal and Sandstone Co. and Others*, 1910 A.C. 116, 47 S.L.R. 23, established three propositions—"(1) Each case is a question of fact and must be decided on its own circumstances; (2) whether a particular substance is a mineral or not must be considered in the light of whether at the date of the conveyance that substance was described as a mineral in the vernacular of the mining world, the commercial world, and landowners; (3) nevertheless, inasmuch as the words to be interpreted are those which define the exception to a grant, they must not, whatever their meaning in such vernacular, be so applied as to make the exception swallow up the grant, which would be the case if the substance in question forming the ordinary subsoil of the district were held to be a mineral and within the exception."

The Railways Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. c. 33) enacts—sec. 70—"The company shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them, except only such parts thereof as shall be necessary to be dug and carried away or used in the construction of the works, unless the same shall have been expressly purchased; and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands, unless they shall have been ex-