the consideration for the sum of £1000 lent by Mr Low is given in the shape of a share of profits; and (2) that the surplus profits are divided between the first parties and the second party, it being explained that the share coming to Mr Low is to be applied in repayment of an old debt. These two conditions are therefore such as are declared by Act of Parliament not in themselves to constitute partnership, and when we come to inquire what other conditions there are which, taken along with these, will amount to partnership, I can find none. One of the points insisted on by counsel is that the parties had been at pains to state in very clear terms, and in more than one of the articles of the agreement, that Mr Low was not to be responsible for losses or to incur any other liability than the loss of his £1000. I think the argument to which I have referred rests upon what seems to me to be a confusion of ideas in applying to the construction of a contract a principle which is often applied quite legitimately to the consideration of evidence. If a witness is continually protesting that he has not committed himself to something, that is an element which may lead to the suspicion that he has done it and is anxious to get out of it. But where the question is not one of evidence, but of the construction of a written document, why should the statement of the parties that they do not intend to subject one of their number to the liabilities of a partner not have the same effect accorded to it as any other statement in the deed, the question always being, what is the meaning of the words used to express their intention? The pursuer's counsel also made a point on the 5th article which they say involves the unnecessary surrender of a contract right if Mr Low is not a partner. I agree with Lord Kinnear in his observations on this article as well as in all the rest of his Lordship's judgment, and I shall say nothing more on this head except this, that I think nothing could be more reasonable on the part of a person lending his money as a friendly loan, seeing that he is debarred from all control of the business than that he should stipulate that after a suitable interval the books should be examined and he should be allowed to do what he can to get something out of the assets of the estate. I fail to see that there is in this article the slightest indication of intention to constitute partnership, though there are expressions which are perhaps open to criticism.

Being clearly of opinion that Mr Low is not a partner under the agreement, it is not necessary for me to enter into the question of the trustee's title. But I may say that if that point were gone into, I think the trustee would find difficulty in establishing a title to call on anyone outside the trust to contribute towards the fund for distribution. While a deed of partnership provides for further contributions, the trustee, no doubt, has the right to enforce the obligation. But there is no obligation under this agreement to contribute anything beyond the original sum of £1000. Mr Low's estates have not been sequestrated; he is assumed to be solvent, and so there is neither a relation of contract nor a proprietary interest, so far as I can see, on which the trustee can base his title.

In the clause of the Partnership Act constituting the special law of Scotland on this subject, all that is said is that the firm is a separate person in law, but that a partner is liable to be charged to meet the obligations of the firm. Now, sequestration is not a process for rendering a party liable to meet the obligations of a firm; it is a process for attaching the assets of those who are members of the firm, and who have been made bankrupt, and I am unable to see how this sequestration is to be converted into an active title for the purpose of putting persons under the trust who are not named in the trustee's appointment.

The LORD PRESIDENT and LORD ADAM concurred.

The Court adhered.

Counsel for the Pursuers—Asher, Q.C.—Dundas. Agents—Dundas & Wilson, C.S.

Counsel for the Defenders—C. S. Dickson — Macfarlane. Agents — Henderson & Clark, W.S.

HOUSE OF LORDS.

Monday, July 13.

(Before Lords Herschell, Watson, Macnaghten, Morris, Shand, and Davey.)

CARRUTHERS *v.* CARRUTHERS' TRUSTEES.

(*Ante*, vol. xxxii. p. 587, and 22 R. p. 775).

Trust—Trustee—Personal Liability—Scope of Immunity Clause—Culpa lata—Neglect to Audit Factor's Accounts in Accordance with Truster's Directions—Proof of Loss—Onus.

Where there has been *culpa lata* on the part of trustees and loss to the trust-estate which it might reasonably be concluded would not have been incurred apart from the trustees' failure in duty, the *onus* lies upon them to show that the loss would equally have been incurred if they had performed their duty.

A truster conveyed his whole estate to trustees, who entered on office in 1879. They were empowered to appoint one of their own number or other person as factor for the trust-estate, and were directed to require the factor to lay before them within one month after 31st December in each year an account of his intromissions, "with the whole vouchers thereof, to be by them examined, audited, and (if found to be correct) approved of." In virtue of this provision the trustees allowed one of their number to act as factor with remuneration. For two years the ac-

counts were annually delivered to the trustees and audited. No further account was delivered till 1888 for the period between 15th May 1882 and 29th February 1888. A fourth account was delivered on 1st June 1890, which was admitted to be correct, and which showed, as at 1st June 1890, a balance in favour of the factor of £61 odds. No further accounts were delivered to the trustees. During the remainder of 1890 sums of money were received by the factor, which, after allowing for the balance due to him, left in his hands a sum of £104, 2s. 7d. due to the trust-estate. There was at the same time interest due by the trust on certain heritable bonds affecting the lands belonging to the trust-estate which was not paid by the factor. In 1891 further sums were received by the factor on account of the trust-estate, and at the end of 1891 he absconded leaving the whole of these sums unaccounted for.

In an action at the instance of a beneficiary under the trust, *held* (*reversing* the judgment of the Second Division) that the trustees had been guilty of *culpa lata* in failing to require the delivery of the accounts annually for audit in accordance with the truster's express direction, and that they were liable to make good to the trust-estate the sum of £104, 2s. 7d. which would presumably have been applied in payment of the interests due had the factor been required to deliver his accounts for audit at the end of year 1890, but not for the further sums misappropriated by him in 1891 prior to the period for delivery of the annual accounts for that year.

The case is reported *ante, ut supra.*

The pursuer appealed *in forma pauperis.*

At delivering judgment—

Lord Herschell—My Lords, this is an appeal from an interlocutor of the Second Division of the Inner House affirming the interlocutor of the Lord Ordinary. The controversy between the parties arises out of the provisions of a trust-deed by which certain property was vested in trustees for the benefit of the truster during his life (he died on the 7th of April 1879), and afterwards upon trusts which it is not necessary to enter into beyond saying that if there has been money lost to the trust estate by reason of any acts of the respondents of which the appellant has a right to complain, she has a sufficient interest and title to enable her to sue here and to require that the money may be made good to the trust fund.

The trust-deed contained this provision—"With full power to my said trustees to appoint factors either of their own number or other fit persons for uplifting the rents and interest of my said estate, and to hold him liable to them for all omissions, errors, or neglect of management, and for his own personal intromissions with my said estate; and I do hereby direct my said trustees under this settlement, annually, within one month after the 31st day of December in each year, during their administration, to cause their factor to make up an account of the intromissions had by him by virtue hereof in the course of the year ending on that date, and to lay the same with the whole vouchers thereof before them, to be by them examined, audited, and (if found to be correct) approved of." Then there is a further provision that in the event of their being dissatisfied with the management of the estate by the factor they may remove him and appoint a new factor in his place.

My Lords, nothing is said in that clause about the appointment of one of their number as the factor with the remuneration to him for his services, but I think there can be no doubt that the intention of the truster in giving the power was to enable them not only to appoint one of their own number the factor, which they could have done without any such power, but also to appoint one of their own number as factor and to pay him remuneration, which without such express power it would not have been competent for them to do. It gave them, therefore, in my opinion, that power which they would not have possessed at common law without the express provisions of the trust-deed.

But the truster whilst empowering his trustees to leave in the hands of one of their number the entire collection of the rents and the disposal of them, at the same time guarded that provision with this further one—that the other trustees should at least once in every year, within one month from the termination of the year, examine and audit the whole of the last year's accounts, require vouchers, and see that the accounts had been properly kept and that the money had been properly received and properly applied. The trustees appear to have largely disregarded this provision. The first account delivered comprised the items of account between the date of the truster's death in 1879 and the 31st of January 1881. The next account comprised the items between the 31st of January 1881 and the 15th of May 1882. No other account was delivered until February 1888, and then that included the accounts of nearly six years. In the month of June 1890 an account was made out showing the condition of the trust estate down to that period. Some controversy arose as to how far this account was seen or in the possession of, the trustees, but it is not in my view material, and therefore I do not enter upon that conflict of view. It is enough to say that it is common ground that down to June 1890 there had been no improper dealing with the trust funds, that at that date there was a sum of £61, 5s. 3d. due to Mr Hall Grigor, and certain other accounts were outstanding. Mr Hall Grigor was not in express terms appointed factor, but he had been, by the manner of dealing with him and the manner in which the accounts were rendered, clearly appointed factor and allowed a remuneration for his services. No question is raised as to his having been a factor duly appointed under the trust-deed, and therefore there is no

dispute that it was the duty of the trustees to have examined his accounts more frequently than they had done. But, as I have said, down to June 1890, although there had been a breach of duty on their part in that respect, the trust estate had in no way suffered.

My Lords, during the year 1890 sums of money were received by Mr Hall Grigor, which, after allowing for the balance of £61 odd that had been due to him, left in his hands a sum of £104, 2s. 7d. Now, this sum of money he obviously ought to have applied in the payment of certain ground rents or the interest on heritable bonds on the land which formed part of the trust-estate, which were at that time, and had been for a considerable time, due. This sum of money never was in any way applied to trust purposes by Mr Hall Grigor. During the year 1891 he received further sums on account of the trust estate; and at the end of 1891 he absconded leaving the whole of these sums of money, due from him to the trust, unaccounted for.

Now, the first question is, whether the appellant is entitled to an order that the respondents should make good to the trust-estate the sum of £104, 2s. 7d. About the breach of duty on their part in not requiring the delivery of accounts at that date, and auditing them, there cannot be two opinions. But it is said that the trustees are protected by the clause of immunity which is now to be taken as inserted in all trust-dispositions against omissions on their part, that the non-requiring of delivery of and auditing accounts was an "omission," that the clause of immunity protects them against it, and therefore they cannot be made liable in respect of it. My Lords, it is well settled that the clause of immunity to which I have referred does not protect in a case of *culpa lata* or gross negligence. The first question therefore which I proceed to consider is, whether in this case there was *culpa lata* on the part of the trustees.

Now, they were entrusted with a power which they had not at common law, which I have already alluded to; but the truster whilst he enabled them thus to employ one of their number as factor, insisted upon a check on the proceedings of that factor. It was the very thing which in that case he left the other trustees to do, to exercise that check by an annual audit. Nothing can be more emphatic than the terms of that provision, and it was clearly made a condition of their leaving the trust receipts and expenditure to one of their number as factor that they should exercise that supervision. My Lords, can it be said under those circumstances that where the trustees fail to exercise that check, and taking advantage of the power given them to leave the trust management to another, do not supervise the action of that other in the manner expressly directed by the truster, there has not been *culpa lata* on their part? I entirely concur with Lord Rutherfurd Clark in thinking that such conduct on their part constitutes *culpa lata*. It is admitted that if that view be correct, the immunity clause does not protect the trustees. Then what is the extent of their liability? They are liable, as it seems to me, for all the results naturally flowing from the breach of duty on their part, and I think where this *culpa lata* is shown, and it might be reasonably concluded that the trust would not have suffered as it did if the duty had been observed, it lies with the trustees to show, if they seek to absolve themselves on that ground, that no benefit would have accrued to the trust if they had discharged their duty, and that the loss would have been precisely the same, and must have been precisely the same, whether they did so or not. I do not think they are entitled to insist upon the Court speculating as to whether it is not possible that even if the trustees had done their duty the loss would equally have resulted. In the present case I own I have a strong impression and belief that if they had called for accounts in January 1891 or at the end of 1890, in order that they might be audited in the course of January, when they received these accounts, this £104 would have been applied in the payment of the outstanding ground rents, and that the accounts would not only have appeared upon the face of them to be perfectly proper, but would have been perfectly proper; and that £104 would have been applied in discharge of the liability of the trust, and therefore would not have been lost to the trust-estate. If that be so, then this £104 has been lost to the trust in consequence of the failure of the trustees to do their duty—a clear, obvious, and expressly imposed duty which they had failed to discharge.

My Lords, the only other question is, whether the further sums which were received by Mr Hall Grigor, the factor, in the course of 1891, and misappropriated by him, can be recovered against the trustees. The case there seems to me to be very different. If the conclusion is a probable one that the accounts delivered in 1891 would have been in order, and all would have appeared to have been properly paid, then there would be nothing to excite the suspicions of the trustees, and they would have been acting with perfect propriety if during the rest of the year 1891 they had left the matter as theretofore in the hands of Mr Hall Grigor, in which case he would have received the moneys, the time for audit would not have arrived, and he would have misappropriated them before the trustees had any opportunity of ascertaining that anything was wrong. Under those circumstances I do not see my way to hold the respondents liable for more than this sum of £104, 2s. 7d., which was in the hands of the factor prior to the termination of the year 1890. I think therefore that the proper course in the present case will be to reverse the interlocutors appealed from, and to declare that the respondents are bound to make good to the trust-estate the sum of £104, 2s. 7d. with interest from the 31st of January 1891. As regards costs, I think the appellant must receive the costs in the Inner House and also the costs in this

House, those costs to be taxed according to the rule laid down where the appellant sues *in forma pauperis*, and I move your Lordships accordingly.

LORD WATSON—My Lords, I agree in the judgment which has just been moved by my noble and learned friend.

I am not altogether satisfied in this case that what was done or left undone by the trustees amounted to a mere "omission" on their part. They have from the outset of the trust many years ago administered it through one of their own number appointed as their factor, and remunerated for his services in that capacity out of the trust funds. At common law the trustees had no power to take that course. Under the trust they had power to do so, but subject to this very plainly expressed condition, that there should be an annual and regular audit of the factor's accounts. With that audit the trustees practically dispensed. That is said to have been a mere matter of omission, and in one view that may be taken of it, it was a mere matter of omission, but the result, and the necessary result, was that the course of their administration as actually conducted was sanctioned neither by the common law of trusts nor by the provision of the deceased's deed. I certainly am not prepared to hold that an active course of administration which cannot be defended or justified either on the ground of its being consistent with the common law, or on the ground of its being consistent with the provisions of the trust-deed, can be regarded as a mere "omission."

But it is unnecessary in this case to go any further than the character of the act, even on the assumption that it ought to be treated as a matter of omission. The immunity clause of the Act of 1861, or a similar immunity conferred by the terms of a trust-deed, does not afford a protection to trustees against any act or omission which according to the law is regarded as constituting *culpa lata*. My Lords, I think the acting of the trustees in this case did amount to *culpa lata*. I should be very sorry to hold that the systematic disregard of a check enacted by the testator in his trust-deed — a reasonable check — and in some cases, as the experience of the present action has shown, a necessary precaution, does not constitute *culpa lata*.

My Lords, upon the amount of damage, I do not think it necessary to say anything. I entirely agree with the observations which have been made by the noble and learned Lord on the woolsack in regard to that part of the case.

LORD MACNAGHTEN, LORD MORRIS, LORD SHAND, and LORD DAVEY concurred.

Ordered—"That the interlocutor appealed from be reversed. That it be declared that the respondents are bound to restore and make good to the trust estate the sum of £104, 2s., 7d. with interest thereon from the 31st of January 1891. That the respondents do pay to the appellant the costs in the Inner House and the costs of the appeal to this House, such latter costs to be taxed in the manner usual in the case of appeals *in forma pauperis*."

Counsel for Appellant—A. S. D. Thomson. Agents—Ranger, Burton & Frost, for Finlay & Wilson, S.S.C.

Counsel for the Respondents—Craigie. Agents—Robins, Hay, Wattis, & Lucas, for Mackenzie & Black, W.S.

Thursday, July 16.

(Before the Lord Chancellor (Halsbury), Lord Watson, Lord Herschell, Lord Morris, and Lord Shand.)

HIGHLAND RAILWAY COMPANY *v.* GREAT NORTH OF SCOTLAND RAILWAY COMPANY.

(*Ante*, vol. xxxii., p. 275.)

Arbitration — Award — Admissibility of Extrinsic Evidence to Control Award—Ambiguity.

By agreement to refer, the Highland and Great North of Scotland Railway Companies submitted to the decision of an arbiter the following question:—"Whether the proviso of section 82 of the Highland Railway Act 1865 applies to traffic exchanged under the Great North of Scotland Act 1884 between the two companies at Elgin, or whether the receipts of such traffic are to be divided between the two companies respectively, in accordance with their respective mileage, and under the rates of the Clearing House?"

The arbiter in his award found "that the proviso of section 82 of the Highland Railway Act 1865 . . . does not apply to traffic exchanged under the Great North of Scotland Act 1884 between the two companies at Elgin," and further, "that the receipts of such traffic are to be divided between the two companies respectively, in accordance with their respective mileage, and under the rates of the Clearing House."

In an action raised by the Great North of Scotland Railway Company for implement of the award, the defenders moved that they should be allowed a proof of the following averment:—"The terms 'traffic exchanged under the Act of 1884 between the two companies at Elgin,' occurring in the question submitted to" the arbiter, "do not include, and were not intended to include, passenger traffic. This was explained to" the arbiter, "and he and both the parties acted in the whole proceedings before him on the footing that no question as to the division of passenger traffic receipts was submitted to him, and he accordingly decided no question as to the division of passenger traffic receipts."

The Second Division (*aff.* the judg-