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-

ment of Lord Wellwood) *refused* to allow the proof asked by the defenders, on the ground that the questions put to the arbiter and his award thereon were distinct and unambiguous, and *ordained* the defenders to implement the decree-arbitral.

On appeal the House of Lords *affirmed* this judgment, and *refused* to qualify it by an express reservation in favour of the appellants of a right to sue reduction of the decree-arbitral on grounds other than those pleaded in the present action.

Opinion reserved whether, apart from such reservation, such an action would be competent.

This case is reported *ante, ut supra.*

The defenders appealed.

At the conclusion of the argument on behalf of the appellants, counsel appearing for the respondents but not being called upon, their Lordships delivered judgment as follows:—

LORD CHANCELLOR—My Lords, I think for the decision of this case it is not necessary to enter into any detail. What has passed in the interlocutory observations between your Lordships and the learned counsel is sufficient to show that it is impossible that these interlocutors should be reversed. It seems to me that the case depends upon very short grounds indeed. Here is an award on the face of it perfectly good, dealing in express terms with the very subject which was submitted to the arbitrator in a written document which discloses without the least doubt what it was that was submitted to him. That written document submits to the arbitrator two questions—raising the questions in a very specific form, which were apparently the subjects in dispute in regard to a particular Act of Parliament.

My Lords, I am not going into particulars with respect to them, because it seems to me to be *luce clarius* that what was in dispute was decided by the arbitrator. Upon the face of the award the very thing submitted to him was decided by him. To my mind it is not susceptible of argument that the document discloses any ambiguity at all upon the face of it. In order to make it ambiguous we are asked to enter into the mind of the arbitrator, and to go upon various speculations as to what may have been intended by him, but upon the face of the award the very thing which was submitted to him has been decided. That is all I propose to say upon that matter, because it seems to me that although we have had it argued for some hours now it cannot be made more clear than the documents themselves make it.

My Lords, as to the other question which has been raised, assuming your Lordships affirm the interlocutors, all I wish to say is this—that if Mr Johnston has the right which he says he has, he has got it; but I will be no party to give him any additional right. The litigation such as it is has been conducted for a good many years. The award is ten years old, and I certainly do not consider that the condition of things is such that he ought to receive any encouragement from your Lordships' House for further litigation. The only thing we decide is the matter submitted to us. If that decision is nevertheless capable by another process of being made of no avail, I cannot help it, but I certainly would not by any reservation be a party to doing that which would first allow a cause to be brought to this House on appeal to be argued and decided in this House, and then give an opportunity of taking an additional proceeding afterwards which would render that judgment of no effect whatever.

I therefore move your Lordships that the interlocutors be affirmed and the appeal dismissed with costs.

LORD WATSON—My Lords, I am of the same opinion. It does not certainly occur to me that there is any such ambiguity appearing upon the face of this award as to entitle the parties to a proof for the purpose of clearing up its meaning. The terms of the document are to my mind quite plain and unambiguous. The criticisms that have been made upon its findings by the learned counsel who have addressed us for the Highland Railway Company, have no doubt raised, or been calculated to raise, some doubts, whether upon full consideration a better arrangement could not have been made by the arbiter; but really they amounted to nothing else than an impeachment of his findings upon the merits. They certainly did not in the least degree suggest the existence of ambiguity.

Upon the other point, my Lords, I think your Lordships are bound to dispose of this case, and ought to take the course of disposing of it. We have heard some statements at the bar, but upon examining the record I can find no statement whatever made on the part of the defenders which could raise a relevant case for setting aside or impeaching the award. They may have such a case, and it may be competent for them to state it. If, notwithstanding our decision in the present suit, they have a right, they may state it. I shall only say that I do not wish to convey a suggestion that in my opinion such a right exists.

LORD HERSCHELL—My Lords, I am of the same opinion.

LORD MORRIS—My Lords, I concur.

LORD SHAND—My Lords, it appears to me, as it does to your Lordships, that the agreement of reference and the award are quite unambiguous. The contract of reference refers to the arbitrator the question whether the proviso to section 82 of the Highland Railway Act of 1865 applies to the traffic exchanged under the Act of 1884. That word "traffic" includes in my opinion all traffic. The contention of the appellants is that it does not include passenger traffic, and that it does not include competitive traffic. I can see no foundation for such a contention. According to the plain meaning of the word "traffic," used without qualification in the contract of reference

and award, and the meaning of the word "traffic" as it is used in the statute in which the proviso is contained, it applies to and includes all traffic. Therefore upon the interpretation of this agreement of reference and the award I am of opinion that the limited construction for which the appellants contend is inadmissible, and that the pursuers are right and are entitled to succeed in their action.

My Lords, as to the other matter which has been adverted to, I agree in what has fallen from your Lordships as to this not being a case in which there should be any stay of proceedings or express reservation, of a right to bring an action of reduction especially after the lapse, of time and the protracted proceedings which have occurred since the Statute of 1884 was passed. On the other hand, it strikes me that there is force in the observation that this action deals with the interpretation of the award only, and it may well be pleaded that any decree following upon that interpretation is limited to the case of the award being regarded as effectual and operative. The defenders in this case may still be entitled to bring an action of reduction with the object of setting aside the award altogether on grounds which could not have been maintained in defence to the present action but which could only be urged and receive effect in an action at their instance. In such an action an entirely different question from that of interpretation of the agreement and award would arise for decision. As to what might occur if such an action were raised and the remedy to which the appellants might in that case be entitled, I desire to reserve my opinion.

Their Lordships dismissed the appeal with costs.

Counsel for Appellants—Littler, Q.C.—Johnston — Dundas. Agents — Martin & Leslie, for J. K. & W. P. Lindsay, W.S.

Counsel for Respondents—Lord Advocate—Cripps, Q.C.—Ferguson. Agents—Dyson & Co., for Gordon, Falconer, & Fairweather, W.S.

END OF VOLUME XXXIII.