

dence that any thing passed between Napier and Hannay that could make *Napier* liable. Whatever therefore their individual opinion might be, they saw no sufficient grounds upon this case to say judicially, that the decision of the Court below was wrong: that judgment ought therefore to be affirmed. Whether Haig might recover over from Napier was another question. He might have saved the demurrage by discharging the vessel immediately on her arrival at Leith.

May 17, 1813.

AGENCY.

evidence to  
make Napier  
liable.

Appeal dismissed, and interlocutors complained of affirmed.

Agent for the Appellant, CAMPBELL.

Agent for the Respondent, GORDON.

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IRELAND.

APPEAL FROM THE COURT OF CHANCERY.

FITZGIBBON, Esq.—*Appellant*.

SCANLAN, Esq.—*Respondent*.

FITZGIBBON holds a lease as trustee; lease expires, and he renews it for his own benefit. This not impeached for nearly 20 years from the time of renewal. Trustee held in equity to have renewed for benefit of his *cestui que trust*, and his representative ordered to account accordingly.

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IN the year 1773, Matthew Lane Scanlan intermarried with Elizabeth Fitzgibbon. At the time

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of his marriage, he was entitled to certain estates in the County of Limerick; that is to say, to the lands of Gortnacrehy, which he held for three lives, with a covenant for perpetual renewal; the lands of Ballylin, which he held for one life; the lands of Ballymacrory, which he held for two lives; and the lands of Duckstown, which alone were in question in this Appeal, and which he held for the remainder of a term of 31 years. The fortune of Elizabeth, the wife, consisted of a sum or portion of 2100*l.*, to which she was entitled under the will of her deceased father Thomas Fitzgibbon.

21st May  
1773. Marriage articles  
of Matthew  
Lane Scanlan,  
father of the  
Respondent.

By marriage articles dated 21st May 1773, M. Lane Scanlan, in consideration of his marriage and his wife's portion, for the purpose of securing a jointure for his wife, and making a provision for the issue of the marriage, covenanted with Standish Grady and Gibbon Fitzgibbon, (trustees,) that he would, within "the space of six months after the  
" date of the said articles, grant, settle; and assure  
" the lands of Gortnacrehy, with the appurtenances,  
" to the use of him the said Matthew Lane Scanlan  
" for his life, with remainder (subject to a jointure  
" of 150*l.*: a year for the said Elizabeth Scanlan, his  
" wife, during her life, if she should happen to  
" survive her husband, in bar of Dower) to the  
" first and other sons of the said marriage in the  
" usual course of family settlements, &c. and that  
" he would, within twelve months from the date  
" of the said articles, secure a sum of 2000*l.*, to  
" be paid within twelve months from his decease,

“ and as for the portions and provisions of the  
 “ younger children of the said marriage who should  
 “ be living at the time of his decease: and the said  
 “ Matthew Lane Scanlan thereby further cove-  
 “ nanted with the said Standish Grady and Gibbon  
 “ Fitzgibbon, their executors and administrators,  
 “ that he would pay all rents and arrears of rents  
 “ that then were, or that thereafter should become  
 “ due out of the lands of Gortnacreehy, Ballyma-  
 “ crory, Ballylin, and Duckstown, and every of  
 “ them; and also pay off and discharge all debts  
 “ and incumbrances that then did or thereafter  
 “ should affect the said lands, or any of them; and  
 “ that he would, at a certain time in each year, for  
 “ eight years, pay to them the said trustees a sum  
 “ of 200*l.*, to raise a fund for the purpose of paying  
 “ off a sum of 1500*l.* and interest, the portion of  
 “ Hayes Scanlan, the brother of the said Matthew  
 “ Lane Scanlan, which was a charge on the said  
 “ premises: and that he the said Matthew Lane  
 “ Scanlan would, from time to time, during his  
 “ life, renew the several leases of the said lands  
 “ which were renewable: and it was by the said  
 “ articles further declared and agreed, that all and  
 “ every new lease or leases thereafter to be taken  
 “ of the said lands and premises, or any part  
 “ thereof, should, from time to time, remain, con-  
 “ tinue, and be, to, for, and upon the several trusts  
 “ therein-before declared of and concerning the said  
 “ premises respectively.”

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Scanlan neglected to pay the annuity of 200*l.*  
 and to secure the 2000*l.* for the younger children,  
 and Gibbon Fitzgibbon (surviving trustee) in 1776

1776, Fitzgib-  
bon surviving

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trustee, enters into possession of the lands of Duckstown, &c. &c.

1780. Fitzgibbon, the trustee, takes a renewal of the lease of Duckstown, for his own benefit.

entered into the possession or receipt of the rents and profits of the lands of Gortnacreehy, Ballylin, and Duckstown, and continued in such possession till 1780, when the lease of the lands of Duckstown expired. These lands being advertised in the public papers to be let, Fitzgibbon made a proposal to the agent of Lord Courtnay the proprietor to take a renewal of the lease on his own account, stating at the same time, "*that he would not have it understood, that he meant by taking the farm in question to become a trustee for Mr. Scanlan.*" The proposal was accepted, and, Fitzgibbon having died intestate in August 1781 or 1782, a lease for 31 years was, in pursuance of the proposal, executed to his widow and administratrix.

1793. Death of Scanlan the father.

Matthew Lane Scanlan died in 1793, leaving two sons and two daughters, having by his will directed that of the 2000*l.* portion, 1000*l.* should go to his younger son the Respondent, and 1000*l.* to his daughters between them. The eldest son died in 1795, unmarried, and without issue.

1795. Death of his eldest son.

Bill in Chancery by Respondent, the only surviving son, and his sisters, to have the benefit of the lease of the lands of Duckstown, &c. &c.

The Respondent and his sisters, on the 18th May 1799, exhibited their bill in Chancery against the widow and legal personal representative of the deceased Fitzgibbon, and against two other defendants, Bourke and Bouchier, who were tenants of the lands of Ballymacrory, under leases or agreements for leases alleged to have been unduly obtained from Matthew Lane Scanlan in his life-time, stating the matters before mentioned, and praying (among other things), that the leases to Bourke and Boucher might be set aside, and (in substance) that the leases both of the lands of Ballymacrory, and

Duckstown, might be rendered available for payment of the 2000*l.* portion, there being (as was alleged) no other fund for that purpose.

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The Defendant Barbara Fitzgibbon, by her answer, insisted that the deceased, Gibbon Fitzgibbon, had become lessee of the lands of Duckstown for his own use and benefit, and not as trustee for Matthew Lane Scanlan; and the said Barbara having died intestate before any further proceedings, the suit was revived against the Appellant, who became representative both of Barbara and Gibbon Fitzgibbon, and also against the Respondent's sisters, who had refused to proceed further as Plaintiffs.

Defence of the Representative of the trustee, that he procured the lease for his own benefit.

Issue having been joined and witnesses examined, the cause was heard before Lord Chancellor *Ponsonby*, who on the 20th June, 1806, decreed as follows:—“ That the Plaintiff was entitled to the benefit of the renewed lease of March 1780, and that the Defendant should accordingly execute an assignment thereof to the Plaintiff, and that it be referred to one of the Masters to take an account of the rents and profits of the lands in the said renewed lease mentioned, from the 25th of March 1780, and let the rent reserved by any lease which the Plaintiff shall appear to said Master to have bonâ fide made of said premises, be the quantum wherewith to charge the Defendant for any part of the lands so leased; and the said Barbara Fitzgibbon having in her answer in her life-time, as administratrix of Gibbon Fitzgibbon deceased, in the pleadings mentioned, admitted assets of him sufficient for payment of so much

20th June, 1806. Decree.

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“ of said rents as was received in his life-time, and  
 “ the Plaintiff, as administrator of said Barbara,  
 “ admitting assets of her sufficient for payment of  
 “ so much of said rents as were received in her  
 “ life-time, let the Defendant, in one month after  
 “ confirming the Master’s report, pay to the Plain-  
 “ tiff the sum to be reported due on foot of said  
 “ rents and profits, and decree the Plaintiff entitled  
 “ to his costs in this cause so far as same respects  
 “ said lease of the 25th of March 1780 to this day  
 “ inclusive; and as to the remainder of the costs  
 “ of the suit, let the parties abide their own costs.”

The decree was affirmed on a re-hearing on the 2d February 1807, with this variation, “ that the  
 “ Plaintiff should indemnify the Defendant against  
 “ the covenants in the renewed lease,” and the Appellant was ordered to pay the costs of the re-hearing. From this decree the Appellant appealed to the House of Lords, and contended that it ought to be reversed or varied, for these reasons:

1st, That Gibbon Fitzgibbon was not a trustee in settlement of 1773, with respect to said lands of Duckstown, neither was there any thing in that settlement that can make him be so considered; that upon the expiration of the lease of said lands at Duckstown upon 25th March 1780, it was as competent to said Gibbon Fitzgibbon to become tenant of such lands as if they had not been mentioned in the settlement; said lands having been advertised by Lord Courtnay in the public newspapers to be let to the best bidder, as appears by the evidence in the cause.

2d, That Courts of Equity in decreeing an account

of mesne profits have been always governed by special circumstances, and whenever a Plaintiff has been guilty of default in not asserting his title sooner, courts of equity have uniformly restrained the accounts to the time of filing the bill. That even supposing the decree right in declaring the new lease a trust for the Respondent as such administrator as aforesaid, yet the account of mesne profits ought not to have been carried back to 25th March 1780, the date of the lease, nor beyond the 18th May 1803, the time when the Respondent took out administration to his father, and when, for the first time, he sustained a character to entitle him to sue as his personal representative.

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3d, That said Respondent having filed his bill after so long an acquiescence, ought not to have been decreed the benefit of the new lease, nor to an account of the mesne profits, as he cannot be considered in any other or better situation than said Matthew Lane Scanlan, whose personal representative he is, and by whose laches he ought to be bound.

4th, Appellant contends and humbly insists, that he ought not to pay costs, in as much as he was bound as trustee for the next of kin to defend their rights, and that in a case like the present, he could not have acquiesced in the claims of the Respondent without the sanction of the Court; he submits that instead of paying costs he was entitled to costs, so far at least as same sought to impeach the lease of Ballymacrory made by said Matthew Lane Scanlan to said Bourke and Bouchier, the Appellant having no concern whatsoever with said lease or

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said lands, neither ought the Appellant to pay the costs of the re-hearing, because the former decree on the re-hearing was altered in a material point, namely, by directing the Respondent to indemnify the Appellant against the covenants contained in said lease of 25th March 1780, and more especially as Respondent did not by his bill offer such indemnity.

It was contended on the part of the Respondent that the decree ought to be affirmed,

1st, Because Gibbon Fitzgibbon, by whom this lease was renewed, had no interest whatever in, nor any connexion with, the original lease and the lands in question, but as a trustee under the marriage articles of the 21st May 1773, which articles he had as a trustee executed, and the trusts of which he had undertaken to perform, and which he, as such trustee, obtained the possession; and by those articles it was expressly stipulated and declared that all new leases to be taken of the settled estates, of which the lands of Duckstown were a part, should remain, continue, and be, to, for, and upon the several trusts of those articles: and

2d, Because upon the established principles of equity, independently of the express covenants and agreements contained in those articles, Gibbon Fitzgibbon could not put off his character of trustee, and repudiate the trusts he had undertaken to perform, and by any dealing with the trust property acquire an interest therein or derive a benefit to himself, to the prejudice of those for whom he was a trustee.



*Sir S. Romilly*, and *Mr. Raithby* for Appellants; *Sir A. Piggott* and *Mr. Roupell* for Respondent.

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*Lord Eldon* (Chancellor). After stating the particular circumstances in the case which rendered the renewed lease a trust for Matthew Lane Scanlan, he said that this was a trust upon another ground. Where a trustee held a lease for the benefit of a *cestui que trust*, and made use of the influence which his situation enabled him to exercise to get a new lease, Courts of equity had said that he should hold it for the benefit of the *cestui que trust*; and to such a length had this doctrine been carried that where a trustee procured a new lease where it was perfectly clear that the lessor would never have renewed for the benefit of the *cestui que trust*, the rule was still adhered to that the trustee must hold it for the *cestui que trust*. But then it was said that he was not a trustee of the lease. Now, under the effect of this covenant the moment he entered on the lands he did so to hold them for the purpose of paying out of the rents and profits the annuity of 200*l.* &c. If there was any thing beyond what was necessary for that purpose, it remained in his hands for the benefit of Matthew Lane Scanlan. He was bound to have given up the possession when these sums were paid, or to have admitted that the surplus was received by him in right of Scanlan. In equity therefore he ought to be held a trustee, and to be considered as having renewed for the benefit of the *cestui que trust*. It was doubtful whether he himself had not acknow-

Judicial observations and Judgment.

Trustee of a lease renewing for his own benefit, considered as still holding for his *cestui que trust*, even where clear that lessor would not have renewed for *cestui que trust*.

Fitzgibbon a trustee of the renewed lease.

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ledged that he was a trustee. There was a caution too in the proceedings for the renewal, which afforded some reason to believe that this was not a case where the lessor would have refused to renew for the benefit of the *cestui que trust*, and at any rate the new lease must be held for his benefit.

Then if he were to be considered a trustee, it was fairly enough objected that he ought only to account for the advantages which he had actually received, and some directions ought to be given to settle that point.

Though no appeal allowed on matter of costs merely, that too may be considered where there is an appeal on other grounds.

In regard to the matter of costs, although an appeal would not be received merely on the subject of costs, yet it did not follow but the article of costs might be taken into consideration when there was an appeal respecting other matters. And it would be proper in this case to relieve the Appellant from the costs of that part of the suit in which he had no concern.

*Lord Redesdale* concurred with the Chancellor in every particular.

The judgment was in the following form:—

“ It is declared, that the Respondent, as administrator of Matthew Lane Scanlan his late father, on behalf of himself, and the several persons interested in the settlement of 21st May 1773, is entitled to the renewed lease of March 1780: And it is therefore ordered, that the Appellant do execute an assignment thereof to the Respondent, for the benefit of the persons so interested, subject to the further order of the Court of Chancery in Ireland: And it is further ordered, that the rent reserved by

“ any lease or demise bonâ fide made of the premises  
 “ be the quantum wherewith to charge the Appellant  
 “ in his own right, and as representative of Barbara  
 “ Fitzgibbon and Gibbon Fitzgibbon deceased, for  
 “ any part of the premises, so far as such rent shall  
 “ have been received by him or the said Barbara Fitz-  
 “ gibbon and Gibbon Fitzgibbon deceased respec-  
 “ tively: And it is further ordered that what shall be  
 “ coming due on such account, after deducting the  
 “ costs of the Respondent so far as the same relate to  
 “ the said lease, and the costs of the Appellant after  
 “ mentioned, be applied in the first place for the pur-  
 “ poses of the said settlement, and the surplus, if  
 “ any, be paid to the Respondent as administrator of  
 “ the said Matthew Lane Scanlan: And it is further  
 “ ordered, that the costs of the Appellant, with re-  
 “ spect to so much of the said suit as does not relate  
 “ to the said lease, be retained by the said Appellant  
 “ out of the money to be found due for the rents  
 “ and profits of the said leasehold premises: And it is  
 “ further ordered and adjudged, that subject to the  
 “ said declaration, orders, and directions, the said de-  
 “ cree complained of be affirmed: And it is further  
 “ ordered, that the Court of Chancery in Ireland do  
 “ give all necessary directions for carrying this judg-  
 “ ment into execution.”

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Agents for Appellant, RASHLEIGH, SON, and LEE.  
 Agents for Respondent, CANNON, and GARGRAVE.