precise amount of his loss, he should have no damages at all. June 23, 1813.

CONTRACT.—WHERE DAMAGE IS ADMITTED, COMPENSATION MUST BE GIVEN.

The judgment of the Court below reversed, and cause remitted with the above findings.

Agents for Appellant, SPOTTISWOODE and ROBERTSON.
Agent for Respondent, RICHARDSON.

IRELAND.

APPEAL FROM THE COURT OF CHANCERY.

HUNT and others—*Appellants*:
MAUNSELL—*Respondent*.

JOHN GRAHAM had in his life time granted two annuities, or rent charges, to Ann Maunsell, the Respondent, stated to be in consideration of services; after his death his representatives applied the whole of his property in discharge of incumbrances and debts, to the exclusion of the Respondent's demands. A sum of about 11,000*l*. had been applied in discharge of incumbrances, *subsequent* to the date of her annuity deeds, and she filed her bill against the representatives of Graham, to compel them to discharge her claims, upon the ground that they were answerable to the extent of the above sum, which she stated to have been misapplied. The representatives (Appellants) answered, that the grant of the annuities was voluntary, and ought to be postponed to all just debts, or *pro turpi causa*, and therefore void. The only evidence as to the consideration was that of a servant in Graham's family, who said, he believed that the Respondent and Graham cohabited as man and wife—his wife being alive at the time. The Master of the Rolls directed an inquiry as to the consideration, but the Chancellor on appeal altered this decree, thinking probably that there was no sufficient evidence upon which to found an order for inquiry. This decision of the Chancellor was, however, reversed by the House of Lords. It was insisted June 14, 1813.

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at the bar that the bill might have been dismissed, on the authority of *Priest v. Parrott*, 2 Ves. 160.

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J. Graham, 19th Dec. 1752, conveys his estates to trustees, to secure (among other things) 3000*l.* for the younger children of the marriage.

JOHN GRAHAM, of Platten, in the county of Meath, deceased, in pursuance of marriage articles previously entered into on his marriage in his minority with Dorothy Sophia Graham, in 1752, being then of age, conveyed his estates to trustees in trust, to the use of himself for life, remainder to his first and every other son in tail, reversion to himself in fee, on failure of issue male; and also for the purpose of securing a jointure of 300*l.* *per annum* for his wife, and 3000*l.* for the younger children of the marriage. One son William, who died a minor and unmarried, and one daughter, Elizabeth Gertrude, were the only issue of the marriage.

14th March, 1767, Graham granted to the Respondent two annuities of 40*l.* and 72*l.*

Graham, the father, by indentures dated 14th March, 1767, granted to the Respondent, Ann Maunsell, who it appeared resided with him in his house after a separation had taken place between himself and his wife, two annuities, the one of 40*l.* the other of 72*l.*, chargeable upon certain parts of his estates, and said to be in consideration of services performed by the Respondent to the grantor.

26th Sept. 1767, Graham gives the Respondent two leases for lives.

He subsequently, in the same year, gave her two leases for lives of a certain portion of his lands, the one for her own life at a pepper-corn rent, the other for the lives of two persons named in the indenture, at a rent of 1*l.* 10*s.* renewable for ever on payment of 2*l.* rent, and a pepper corn fine.

20th Feb. 1770, Bond from Graham to secure a further provi-

In 1770 Graham executed his bond, dated 20th February in that year, to his daughter, conditioned for the pay-

ment of 2000*l.* at his death, as an additional provision for her. On this bond judgment was entered up in the Exchequer, in 1772. In March 1771, the Respondent surrendered her leases in consideration, as was stated, of 400*l.* paid her by Graham. By an indenture dated 22d July, 1773, in consideration of the Respondent relinquishing all claim to the aforesaid annuities of 40*l.* and 72*l.*, and certain arrears said to have accrued due thereon, and also, as was stated in the indenture, in consideration of the surrender of the above-mentioned leases, Graham granted her an annuity of 100*l.* for her life, to which was to be added an additional annuity of 100*l.* for her life from the period of his death, in case she survived him; which annuities were charged, and to be charged, upon certain of his lands in the indenture specified.

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sion of 2000*l.* to his daughter Elizabeth Gertrude, on which judgment entered in Easter term 1772.

Two other annuities of 100*l.* each granted to Respondent.

John Graham died on 17th April 1777, having previously made his will, dated 22d January 1776, by which he devised all his real estates, (except the lands of Knock Island of the yearly value of 20*l.* which he devised to the Respondent, besides bequeathing her a legacy of 1,200*l.*) subject to the payment of his debts and legacies, to Graves Chamney, Esq. his heirs and assigns, for ever, and appointed him sole executor and residuary legatee. Chamney proved the will, and having entered into the receipt of the rents and profits of the real estates, and possessed himself of the personal property, he applied the produce in payment of the judgment and simple contract debts of the testator, exclusive of the widow's jointure, and the sums due to Elizabeth Gertrude the testator's daughter under

Will of J. Graham, 22d Jan. 1776, by which his lands devised to Graves Chamney, &c. &c.

Chamney applies the produce in payment of judgment and simple contract debts, *exclusive* of the claims of the Widow, Daughter, and the Respondent.

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under her father's marriage settlement, and upon the bond above mentioned, and also exclusive of the claims of the Respondent.

In November 1786 Elizabeth G. Graham filed her bill in Chancery against G. Chamney, the Respondent, and others, praying "an account of what "was due to her in respect of the aforesaid sums "and a sale of the lands charged therewith for the "payment thereof, and an account of the personal "estate of John Graham, and of prior incum-"brances." Chamney in his answer set up *the claims of the Respondent, in respect of her annuities, in preference to the judgment debt of E. G. Graham.* The cause was heard on the 6th December 1790, when it was decreed "that an account should "be taken of the real and personal estates of John "Graham, of his debts and legacies, and of the in-"cumbrances affecting the lands, of what sums were "paid and what remained unpaid, and what was due "to E. G. Graham in respect of the sums aforesaid."

Chamney sets up the Respondent's claims in preference to the judgment debt of the daughter.

10th October 1794, Master reports that Chamney had applied upwards of 11,000 in discharge of incumbrances subsequent to the judgment debt of the daughter, and in payment of simple contract debts.

The Master reported that up to 1st November 1793 Graves Chamney had received out of the estates in question 32,399*l.* 7*s.* 3*d.* and had applied to the discharge of incumbrances *prior* to the judgment debt of the Plaintiff E. G. Graham 20,649*l.* 4*s.* 6*d.* and in discharge of *subsequent* incumbrances 10,377*l.* 18*s.* 2*d.* and in discharge of simple contract debts 896*l.* 15*s.* 9*d.* leaving a balance in the hands of Chamney of 475*l.* 8*s.* 10*d.* and that there was due to the Plaintiff 3,165*l.* in respect of her provision under the marriage settlement, and 4001*l.* 19*s.* 8*d.* in respect of her judgment debt.

Before further proceedings Graves Chamney died,

having previously made his will, and devised and bequeathed his real and personal estates to the Appellants, against whom the cause was revived, and the same was heard on the report and merits on 6th July 1795, when it was ordered and adjudged among other things, "that the Plaintiff's debts should "be paid, and that if necessary the lands of John "Graham remaining undisposed of should be sold "for payment thereof, without prejudice (in case "that fund should be insufficient) to her claims "against the estate of Chamney, as far as respected "the sum he had applied in payment of debts created "subsequent to her incumbrance." The remaining lands were accordingly sold, including those of Knock Island (which had been devised to the Respondent), and the produce applied to, and exhausted in, the discharge of incumbrances; and after the whole of Graham's property had been applied to the payment of his just debts, a considerable sum (as alleged by the Appellants) remained due and unpaid.

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Death of Graves Chamney, who had devised his estates to the Appellants.

In February 1799 the Respondent filed her bill in Chancery, stating that the sum of 11,750*l.* 2*s.* 9*d.* had been misapplied by Graves Chamney, inasmuch as the same had been applied to the discharge of incumbrances which were subsequent to the date of her deed of annuity, and therefore praying that the said sum of 11,750*l.* 2*s.* 9*d.* might be brought into the Bank of Ireland to answer her demands, or that the estates of Graves Chamney should, after account taken, be sold for that purpose. The Appellants answered, that there was not any good or valuable consideration given for the annuities, and

11th February 1799, Bill by the Respondent, praying that the sum of 11,750*l.* 2*s.* 9*d.* said to have been misapplied, should be brought into the Bank of Ireland by the Appellants to answer her demands.

Answer, that there was no consideration

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that they ought to be postponed to all the just debts of John Graham; and one of the Appellants, (Athanasius Cusack) stated in his answer "that he had heard and "believed, that the Respondent, at the time of the "execution of the annuity deed, lived and cohabited "with the said John Graham, his wife being then "living, and that the annuity was intended as a "recompence for the said service." From the cross examination of a witness produced by the Respondent herself, it in fact appeared, or was rendered highly probable, that, though the wife of John Graham had survived him, the Respondent and he had, for many years before his death, cohabited together as man and wife. On the 19th May 1804 the Master of the Rolls decreed "*that it should be "referred to the Master to inquire and report whe-"ther the Respondent gave any valuable consider-"ation for her annuities, and what was the nature "and amount of such consideration, if any, &c. &c.*"

19th May 1804. Decree of the Master of the Rolls directing an inquiry as to the consideration,

The Respondent acquiesced in the decree for nearly a year, and proceeded on it before the Master, who on the 23d October 1805, reported that there was neither valuable nor adequate consideration given for the annuities. But before the report was confirmed, the Respondent appealed to the Chancellor from the decree of the Master of the Rolls directing an inquiry, and his Lordship on the 14th November 1806 decreed "*that the said "decree so pronounced by the Master of the Rolls "should be, and the same was, thereby varied so "far as the same ordered an inquiry as to the "consideration paid by the Plaintiff, (Respondent,) "for the two annuities in the pleadings mentioned,*

14th Nov. 1806, Decree of Chancellor varying that of the Master of the Rolls,

" *and it was further ordered that it be referred* June 14, 1813.'
" *to one of the Masters to take an account of*
" *what was due to the Plaintiff, in respect of the* QUESTION OF COMPETITION BETWEEN CREDITORS.
" *said annuities, and that the said Master should*
" *also take an account of the estates, real and*
" *personal, of Graves Chamney deceased, &c. &c.*"

Against this decree of the Chancellor the Appellants lodged their appeal. Appeal from the Chancellor's decree to the House of Lords.

Sir S. Romilly (for the Appellants.) The question was, whether or not the Master of the Rolls was right in ordering an inquiry to the consideration for which the annuity was granted. It might perhaps have been insisted in the Court below, that the bill should be dismissed, upon the authority of the case of *Priest v. Parrott*, where Lord Hardwicke held, that though an annuity given to a woman as *præmium pudicitiæ* might generally be supported, yet where the man was married, and the woman knew it, it could not. He therefore submitted that, even if the bill had been dismissed, their Lordships would not have reversed the judgment. But the Court below, however, had not gone that length. The Master of the Rolls only directed an inquiry, and he could not conceive why that decision had been reversed by the Chancellor. The demand might possibly be partly for *val. con.* and partly not, yet the creditors for *val. con.* must be preferred to the voluntary claimants, and how was all this to be ascertained and settled, except by an inquiry before the Master? and he therefore submitted that the Master of the Rolls was right, and the Chancellor wrong. 2 Ves. 160.

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Mr. Bell. There were two questions to be considered: 1st, Whether this was such a bond as there was reason to believe ought to be set aside, or at least postponed to the *bona fide* creditors; for if it was, an inquiry was necessary. 2d, Whether any thing had been before done that ought to prevent such inquiry. As to the first point, there was no evidence of service, but this cohabitation, and the case of *Priest v. Parrott*, remained unshaken.

In regard to the 2d, there did not appear any thing in the state of the property that ought to prevent the inquiry. The fund upon which the present claim was made, had been actually applied, and the question was whether it had been properly applied; so that the matter stood as between her and other creditors. Then what was the nature of the debt? It was doubtful whether she could claim against creditors or any other person. The Court could not know what directions to give until it saw what was the real nature of these securities.

Mr. Richards (for Respondent.) The question was, whether the Court would either presume that the security was void as being given on an improper consideration, or voluntary, and to be postponed to creditors. A voluntary grant was good against the person of the executor, and the grantee might sue the grantor. If in 1767 a voluntary grant was made and not *turpi causa*, and if the arrears had accumulated from that time till 1773, and these were given up in consideration of another annuity, then it would not be permitted to the grantor or

executor, to say that the consideration was not a good one. Assuming for a moment that the annuity of 1773 was given for a good consideration, it was as good against the Appellants, as against the original grantor whom they represented. Now, in the suit commenced by the daughter, Chamney the devisee of the grantor insisted upon the grants of 1767 and 1773 to the Respondent, as grants for valuable consideration, and the Appellants therefore were estopped from saying that the grant was void, or not for valuable consideration. She had been treated as an incumbrancer, and the validity of her claim insisted upon as such. They said that the grant was voluntary; but he contended that if the grant of 1767 was voluntary, that together with the arrears formed a sufficient consideration for the grant of 1773. But they said the grant of 1767 was for a base consideration, and therefore there could be no arrears. There was not, however, the least imputation against the grant of 1767. Mr. Graham's wife might be alive, and this woman might cohabit with him, but was the Court to presume that this was an unlawful cohabitation? But suppose it were; was there any evidence of her knowing that he was married? None, and that circumstance took it out of the reason of the case of *Priest v. Parrott*. If a grant was made to a woman before seduction, it was bad; if after, it was good as a voluntary grant. If this deed had a vice, it was not upon the face of it; and did not appear in any way that could enable the Court to touch it. No such fact had been proved in evidence, and indeed they did not attempt to give any evidence in

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chief. They had only cross-examined a witness of the Respondent's, who said *he believed* that this woman had cohabited with him in an unlawful way, but did not specify at what time; so that, even if this testimony were good as far as it went, still it was worth nothing. This was not to be tried by *belief*, but according to the facts. There was no cross bill filed against her to set aside the deed; and she said it was given for lawful services. It was incumbent on them to prove the contrary if they denied this; for a grant was to be taken most strongly against the grantor, whom the Appellants represented here. The Master of the Rolls ought not to have directed an inquiry, as no ground was laid for it. Mrs. Maunsell came with an instrument good upon the face of it, and upon the validity of which the party on the other side had before insisted upon oath. What right then had the Court to throw a cloud over a grant upon which the parties had cast no imputation?

Mr. Maddocks. They said on the other side, that when Mr. Chamney insisted upon the validity of this grant in a former suit, he mistook the fact or the law; but, upon the authority of *Lightbourn v. Weedon*, he doubted whether they could take advantage of that circumstance. No *turpis contractus* ought to be presumed, and services formed a good consideration. They had brought forward no evidence on the other side, to show that the consideration was unlawful, and the arrears upon a voluntary grant formed valuable consideration for another grant, as appeared from the case of *Stiles v. the Attorney-General*, upon which the present Master of

1 Eq. Ca. Abr. 21.

2 Atk. 152.

the Rolls had acted in *Gilham v. Locke*, 9 Ves. 612. The witness cross-examined by them spoke only as to his belief, and, at any rate, his evidence did not go either to 1767, or 1773. He had only spoken generally. Why, then, nothing had arisen out of the cause to form the ground of a reference; and, in reality, this was referring the *whole cause*, instead of any thing arising out of it, to the Master, which had never been done since the time of James the First.

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Sir S. Romilly (in reply.) The question here was, Whether any inquiry should have been directed, considering this as a case of competition between creditors? for the Appellants stood in the place of creditors who had been already paid, as there were no other assets to answer this demand, if it should be established. He still insisted that the bill might have been dismissed; for the witness, though he used the word *belief*, was speaking to a fact which he knew of his own knowledge, as far as knowledge could generally extend on such a point. The reference, under such circumstances, was quite in the usual course of the Court. With respect to the answer in the former suit, insisting upon the validity of Mrs. Maunsell's claim, as for valuable consideration, it was impossible to say that this was an admission for all purposes.

Lord Redesdale (after stating the case.) It appeared to him that the Master of the Rolls was in the right. This was a demand against the assets of Mr. Chamney, of the same kind as that which Mrs.

Judgment. June 16, 1813. The Master of the Rolls in the right.

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This was a question between creditors; and, in case of any objection being made, the assets could not have been distributed without inquiry.

Maunsell had against the assets of Mr. Graham; which, as was alleged on her part, was good against simple contract creditors, and against subsequent specialty creditors. So that this was in fact a question between creditors. If the demand was voluntary, it could not be set up against *bona fide* creditors. The direction of the Master of the Rolls was therefore quite of course, as the assets could not be distributed without inquiry if any objection was made. Even if the 11,000*l.* had been actually in the hands of the representatives of Mr. Chamney, if the objection were suggested, the debts ought not to have been paid without inquiry.

The only consideration appearing in evidence was a base one.

The Chancellor seemed to have thought, that there was not sufficient evidence of a want of valuable consideration; but he differed from him there, as the only consideration appearing in evidence, was her having lived with Graham in a certain situation which the law did not admit as a valuable consideration. The surrender on her part was admitted; and then it was said, that she, by giving up her former rights, had given a valuable consideration for the new annuities. That point, however, was open to her before the Master. It was no reason against an inquiry, which was quite of course. He thought, therefore, that the Chancellor's decision on that point ought to be reversed.

The objection, that valuable consideration had been given by Respondent, ought to have been

Lord Eldon (Chancellor.) He agreed in substance with what had been said by his noble and learned friend. A great deal of argument had been used, to show that the Respondent had given a valuable consideration. That was entirely out of place; as that objection ought to have been made

upon exception to the report. The only question here was, Whether there was any ground for inquiry? and he thought there was.

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It was accordingly ordered and adjudged, that the decree of the Court of Chancery, 14th November, 1806, varying the decree of the Master of the Rolls, 23d October, 1805, be reversed, &c.

made on exception to Master's Report. It was no reason against inquiry.

Agents, ODDIE, ODDIE, and FORSTER.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

SHARP and others—*Appellants.*

BURY and others—*Respondents.*

Instrumenta noviter reperta not a ground for setting aside a decree arbitral; especially if the want of timely discovery has been owing to the negligence of the party desirous of setting it aside.

May 17, 1813.

FORCE AND EFFECT OF A DECREE ARBITRAL.

THE Appellants, merchants in Glasgow, purchased from the Respondents, calico-printers in Manchester, goods to the amount of 6704*l.* 13*s.* 11*d.*, to be paid in bills at nine months. The goods were made up in two parcels, and the one sent to Liverpool for the purpose of being shipped for New York, the other to Glasgow to be sent to the West Indies. An invoice and box of patterns

August, 1799. Goods furnished by Respondents, to order of Appellants.