ENGLAND.

APPEAL FROM THE COURT OF CHANCERY OF THE GREAT SESSIONS OF WALES FOR THE COUNTIES OF CARMARTHEN, PEMBROKE, AND CARDIGAN, THE COUNTY OF THE BOROUGH OF CARMARTHEN, AND TOWN AND COUNTY OF HAVERFORDWEST.

KENSINGTON (Lord)—*Appellant*.
PHILLIPS (John)—*Respondent*.

March 3, 27, 1817.

LEASE FOR LIVES.—AGREEMENT.—SPEC. PER.

AGREEMENT in writing in 1800, between A. and B. for a lease to B. of a farm belonging to A., for three lives generally, no particular lives being named. C. purchases the farm from A., subject to the agreement, and receives rent from B., who occupied the farm under the agreement till 1808, when B. discontinued the payment of rent, because C., who had not seen the agreement till 1807, then refused to perform it. Bill by B. in 1809, for a specific performance, naming the lives of three of the tenant's children, and decreed accordingly in the Court below; and the decree affirmed in the House of Lords, with some variations respecting the performance of previous conditions by the tenant.

Lord Eldon, C., observing—"The estate was purchased "subject to the agreement; and the equity of the case is, "that the agreement should have been made good at the "time of the purchase; and though it is objected that the "naming of the lives now renders the performance a different thing (which is the case) from what it would have "been if the lives had been originally named, since "lives might then have been named, which might have "dropped by this time, yet it is clear that the parties "were going on as if the one had been entitled to performance, and the other had been bound to perform; "so there seems to have been a mutual default. I have

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" said these few words, because I am anxious that this " should not be understood as a decision, that under " such an agreement as this, a party may lay by as long " as he pleases, and then apply with effect for a specific " performance. It is only on the particular circum- " stances of the case, taking it out of a general rule, " that the decision is founded."

Notwithstanding the alterations made in the decree, as to the conditions to be performed by the tenant, he was allowed 100*l.* costs, the Appellant not having called for the proper provisions in that respect below; and the tenant having been considerably harassed with expenses, in the course of the suit, and with actions for use and occupation.

Bill filed 1809.

THE bill in this case, filed in the autumn of 1809, by the Respondent, Phillips, against the Appellant, Lord Kensington, in the Court of Chancery of the great sessions for the counties of Carmarthen, Pembroke, &c. stated that, in 1800, Susannah Meares who had then an estate for her life in a farm called Haroldstone in the parish of Haroldstone-west, in the county of Pembroke, with power to grant a lease or leases thereof for three years, agreed to execute a lease for three lives of this farm to Phillips, at the rent at which the same should be valued by Charles Hassall: and the valuation having been made and reduced into writing, the agreement was written at the foot of the valuation in these words:

Agreement for lease for three lives, without naming the lives.

" 8th July, 1800, agreed to let the above to John " Phillips, on lease for three lives, at the yearly rent of " 140*l.*; subject to such allowances, conditions, and " restrictions, as to ploughing and otherwise, as shall " be advised and directed by Mr. Charles Hassall; " the repairs of the farm and premises of Harold-

"stone-west being first made and completed, pur- March 3, 27, 1817.
"suant to the covenant for that purpose contained
"in the last existing lease thereof." The agreement LEASE FOR LIVES.—AGREEMENT.—SPEC. PER.
was signed by George Meares (who was entitled to the reversion in fee of the farm) as agent for his mother, Susannah Meares, and by the Respondent. Phillips, who had previously occupied the farm under a lease, which expired in 1800, continued to occupy under the agreement, and paid rent to Susannah Meares. The mother died in 1802; and the son, George Meares, having come into possession, sold and conveyed the lands, subject to the agreement, Sale subject to the agreement.
to Lord Kensington. Phillips paid the rent to his Lordship up to Michaelmas 1808, and then discontinued the payment, the Appellant having refused to perform the agreement, and having given the Respondent notice to quit, and brought an ejectment against him: and the bill prayed that Lord Prayer for spec. per. specifying the lives.
Kensington might be directed, by decree of the Court, to execute to Phillips a lease of the farm for the lives of three of his (Phillips's) children, Elizabeth, Lettice, and Martha; that the covenants might be settled and declared, the Plaintiff (Phillips) submitting to perform the agreement on his part; and for an injunction. Lord Kensington in his answer Answer.
admitted that he purchased, subject to an agreement for a lease, but had not seen the agreement in question till 1807; and submitted to the Court, whether the agreement was in its nature one of which performance could be demanded with effect, especially after such a lapse of time, without any tender of a lease or draft. Witnesses were examined, from Evidence.
whose evidence it appeared that some improvements

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Decree, 27th August, 1812.

had been made by Phillips on the farm since 1800; and that it was understood by the parties to the agreement, that the lease was to be for the lives of three of the tenant's children.

The Court, on the 27th August, 1812, declared that the Respondent was entitled to a specific performance of the agreement in the said bill mentioned, bearing date the 8th July, 1800; and they ordered and decreed the same to be specifically performed accordingly: and the Respondent by his said bill submitting to perform the said agreement on his part, and upon the Respondent making and completing the repairs of the farms and premises at Harroldstone-west, in the said agreement mentioned, pursuant to the covenant for that purpose contained in the last existing lease thereof, it was ordered, that the Appellant should make and execute to the Respondent a proper lease of the premises comprized in the said agreement, for the joint and several lives of Elizabeth Phillips, Lettice Phillips, and Martha Phillips, in the said bill mentioned, according to the terms of the said agreement: and it was ordered, that such allowances, conditions, and restrictions, as to ploughing and otherwise, respecting the due and proper mode of cultivating the said farm, as should be advised and directed by Mr. Charles Hassall in the said agreement named, should be inserted in the said lease: and it was further ordered, that it should be referred to the Register of the said Court to settle such lease, in case the parties differed about the same: and it was ordered, that the Respondent should execute a counterpart of such lease: and it was further ordered, that it should be referred

to the said register to tax the Respondent his costs of that suit, and that the same, when taxed, should be paid to the Respondent by the Appellant: and it was further ordered, that the injunction granted in that cause should be continued.

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From this decree Lord K. appealed.

Sir S. Romilly and *Mr. Hart* (for the Appellant.) This decree cannot be right; for nothing is more settled than this, that, when a party comes into a Court of Equity for a specific performance, he must show on the face or from the terms of the agreement itself, what the interest is which he claims. The agreement says, "a lease for three lives," but what three lives? It is not more certain than a lease for years without stating the number of years. And this is the more important, as the interest is, in its nature, one which must depend on contingencies. If the lives had been recently named, one of them might have died next day, and none of them might now have been existing. It is essential that the particular lives should appear in the agreement. But then, 2dly, it was not till a lapse of nine years that the Respondent put himself in a situation to incur the risk. Mears indeed, in his deposition, says, that the three lives were to be three of the Respondent's children. But suppose this parole (extrinsic) evidence admissible, it left it uncertain which three of the children. The way they argue it is that, in these cases, it is understood that the lessee is to name any lives he thinks proper. But there is no authority for that. The effect of this is to give the tenant a lease for ten years,

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and three lives after; he, perhaps, naming lives not *in esse* at the time of agreement, or waiting till the dangers of very early life were passed. No case has been found in the least resembling this in its circumstances. But where an estate has been sold at a price to be named by a person who dies before it is named, it has been decided that it is an agreement which cannot be carried into execution. Then the Respondent ought to have made certain repairs as a condition precedent before he could properly claim the lease; and the Court by its decree impliedly admits that this had not been done, for the decree directs the lease to be granted upon its being done. The Court therefore decides that point in our favour, and yet decrees performance. The Appellant applied to the Court by motion to have the arrears of the 140*l.* rent paid into Court, but without success, though that rent, was at all events payable. And then there was no provision in the decree for payment of the rent, though it is the rule of Courts of Equity to make complete decrees. In these respects the decree is at least materially defective, if not totally wrong.

Mr. Leach and *Mr. Jos. Martin* (for Respondent). Phillips the tenant enters into this executory contract with Mears. Lord Kensington admits in his answer that he had notice of the contract, that he purchased the estate subject to the agreement, that in 1800 he promised a lease accordingly, if it was a good agreement, and that till 1807 he did not know that it was otherwise and that the lives were

not named. Lord Kensington therefore never disputes the contract, and he cannot say that it was waived or abandoned by the tenant, who, as appears in evidence, was expending sums in improvements, which he never would have done, except upon the faith that the contract would be executed. The tenant was paying rent under the agreement, and Lord Kensington, admitting that he had notice of the agreement, must on the principles of equity be presumed to know the contents of it. What then is this legal defect? It is left uncertain, it is said, who is to *name* the lives. But it is not uncertain; for by the principles of law, when the agreement is to give a lease for lives, it is the same as if it were added "to be named by the lessee." The principle is clear. Every deed is to be taken most beneficially for the grantee. Where there is a lease for life, it is for the life of the lessee; and where there is a lease for nine, or seventeen, &c. years, the option is in the lessee. But supposing the contract to be sufficiently certain, they say there was delay. That was the appellant's fault. But suppose it were negligence on both sides; if the Appellant saw the tenant cultivating the ground, as a person would not do unless upon the faith of the contract, he is bound. The delay, it is said, gives the tenant an advantage which otherwise he would not have. True, that is an inconvenience. But why did you not apply to him to name the lives? Even at law, where there is a lease with covenant to pay rent on a certain day, or that the landlord may re-enter, he must make a demand, and that on the day. The Appellant might have relieved himself from the inconve-

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nience; and if, on demand, the lives had not been named, he would have been discharged. Thus if it were mere negligence. But the Appellant admits that the tenant applied to him for a lease. Then it is objected in point of form that the tenant had no title to sue till he made the repairs. But the Appellant does not deny in his answer that they were made, and at any rate there was no issue on that point, nor any question below about it. Then they say that the Court refused to order payment into Court of the rent of 140*l.*; and made the payment no term in the decree. But the Court did not think it necessary, the injunction merely preventing the landlord from taking possession, and leaving him free in other respects. To be sure, it would have been a proper term in the decree that the rent should be paid before execution of the lease. But did they ask it? Mears states that it was understood that the lives were to be three of the tenant's children. But he was not bound to name them till demand. (And with reference to the alleged uncertainty of the term as a supposed ground for refusing specific performance—*Clinan v. Cooke*, 1 Scho. Lef. 22.—*O'Herilhy v. Hedges*, 1 Scho. Lef. 123.—*Lindsay v. Lynch*, 2 Scho. Lef. 9. were cited.)

Sir S. Romilly (in reply). The nature of the objection has been misunderstood, for we have no dispute as to who should name the lives, but what the lives were. And in that respect the contract is as uncertain as if it had been a lease for years without mentioning the number. The cases cited depended

on the Irish Tenantry Act, or the principles of equity in Ireland as to these leases before the act, under which renewals were decreed on the terms of paying septennial fines and interest. As to the question of laches, the landlord was not bound to apply to the tenant to name the lives; and, as to the condition precedent, they say that the point was not in issue. But suppose the Defendant had stated in his answer that he did not know whether the repairs were done or not, it was incumbent on the Plaintiff to prove it. But it was in reality denied that the repairs were done, and the decree imports that they were not done. As to the rent in arrear, it was not surprising that the Appellant had not asked that the payment should be made a term of the decree, when the Court had before refused to interfere with respect to the rent. Here is a lease without a period limited. The agreement is to let to Phillips for three lives at a certain rent, and subject to certain conditions as to ploughing, &c. Phillips might then perhaps have the right to name the lives. But as he neglected for so long a time to do so, it is sufficient ground for refusing a specific performance now. It may be said that this may be the subject of reasonable compensation. But, if law refuses that mode of adjustment where there is unreasonable delay, so ought equity. There is no evidence that Phillips tendered any life. And here we are to consider that, if the lives had been named in due time, not one of them might have been in existence at this time. 2dly, The contract is merely conditional, On completing certain repairs, &c. you shall have a lease. Yet there is no evidence that Phillips

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did complete these repairs. That however might perhaps be the subject of compensation, but how could the chances of life be calculated?

Lord Redesdale. This was a bill for specific performance of a contract for a lease. And the decision of the Court below appears to be well founded, that under the particular circumstances of this case the contract should be performed, provided Phillips the tenant had performed his part. The contract is to let for three lives at 140*l.* rent, certain repairs being first made, in terms of a covenant to that effect.

It has been objected that this decree does not provide for putting the premises into a proper state of repair, and that, unless this were done, the contract was not to be performed. So far there is some ground of objection to the form of the decree. Another objection is, that there is no provision for the payment of the rent in arrear. It appears that Lord Kensington has brought actions for rent, and has recovered certain sums, and what he has so recovered must be brought into the account for rent: and I think the decree ought to have made some provision respecting the payment of rent.

I propose then to your Lordships to declare, that under the particular circumstances of this case, Phillips is entitled to a specific performance of the contract, and that the Court below be directed to inquire whether the repairs have been done; for certainly they ought to be done prior to the delivery of the lease: and that, if not already done, in case they should not be done within a reasonable time, to be limited by the Court, the bill be dismissed with his costs to the Appellant; for if Phillips

does not do that, he is not entitled to have the agreement performed: and in case it should appear that this has been already done, that it should be referred to the officer of the Court to inquire what rent was due, and what sums had been paid in respect of rent, and that the account should be carried on till the making of the lease; and that Phillips should pay what was due before he got his lease, so as to provide for that object.

Then the only further consideration is that of costs. No doubt the Court below was not desired to make these additions, and some costs ought to be allowed. The Respondent has been a good deal harassed, with the expenses of this suit, and with actions for use and occupation; and I propose, therefore, that 100*l.* costs be allowed, which is less than the actual expence.

Lord Eldon (C.) I entirely agree in that proposition under the particular circumstances of this case. The purchase was made subject to the agreement between the tenant and the former owner. The person who was concerned for Lord Kensington in the purchase of the property, knew that there was such an agreement; and I think the law would justify me in saying, that, the tenant being in possession, the purchaser was bound to know the nature of his title, and the demand to which he was subject. Here however it was in fact known, as the estate was purchased subject to the agreement; and the equity of the case, therefore, undoubtedly is, that the agreement should have been made good at the time of the purchase: and though an objection

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is made that the naming the lives now renders the performance a different thing (which is the case) from what it would have been if the lives had been originally named, as the lives if named at first might have dropped by this time, yet it is clear that the parties were going on as if the one had been entitled to performance, and the other had been bound to perform; so that, not using the words in any offensive sense, there seems to have been a mutual default here. I have said these few words because I am anxious that this should not be considered or understood as a decision, that, under such an agreement as this, a party may lay by as long as he pleases, and then apply with effect for a specific performance. It is only on the particular circumstances of this case, taking it out of a general rule, that the decision is founded. But under these particular circumstances I think the decree, subject to the proposed variations, ought to be affirmed with 100*l.* costs.

Decree *affirmed* accordingly, with alterations as above.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

ROBERT GEORGE STEEL—*Appellant.*
ROBERT STEEL and others—*Respondents.*

June 18, 24, 1817.

Entail, with restrictions upon the heirs and *members* of tailzie. Held by the House of Lords, affirming a deci-