1879

*June 2.
*Dec. 12.

JAMES CLARK,.....APPELLANT;

AND

THE SCOTTISH IMPERIAL INSURANCE COMPANY,.....RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Fire Insurance.—Advances made to build a vessel.—Insurable interest.

C. made advances to *B.* upon a vessel, then in course of construction, upon the faith of a verbal agreement with *B.*, that after the vessel should be launched, she should be placed in his hands for sale, and that out of the proceeds the advances so made should be paid. When vessel was well advanced *C.* disclosed the facts and nature of his interest to the agent of the respondent's company, and the company issued a policy of insurance against loss by fire to *C.* in the sum of $3,000. The vessel was still unfinished, and in *B's* possession when she was burned.

Held,—Reversing the judgment of the Court below, that *C's* interest, relating, as it did, to a specific chattel, was an equitable interest which was insurable, and therefore *C.* was entitled to recover.

APPEAL from a judgment of the Supreme Court of *New Brunswick* (1) making absolute a rule *nisi* to set aside a verdict, and enter a non-suit.

The action was on a policy of insurance against fire.

A special case agreed upon by the parties for the purpose of the appeal states that:

"The *Scottish Imperial Insurance Company* now is, and in and prior and subsequent to the year 1874, was a corporation established and legally authorized

*PRESENT.—Ritchie, C. J., and Strong, Fournier, Henry, Taschereau and Gwynne, J. J.

(1) 2 Pugs. & Bur. 240.

under the laws of the Dominion of *Canada* to issue policies of fire insurance in the Dominion of *Canada*.

"The said company in said year had an office in the city of *Saint John*, in the Province of *New Brunswick*, and *W. Colebrook Perley* was its lawful Agent, and as such had power to act for said company.

"On or about the tenth day of August, 1874, the said company issued a policy of insurance against loss by fire to the plaintiff, in the sum of $3,000, 'on a schooner in course of construction by *John Bishop* in his ship-building yard at *Hopewell*, *Albert Co.*, *N. B.*, $3,000 insurance valid, launched or not launched, with liberty to complete, fit out and load cargo, the liability under this policy to cease when any marine policy exists covering said schooner,' for the period of six months, and the premium of said insurance was duly paid. The policy was put in evidence on the trial, but was subsequently burnt, and all other papers used or put in evidence at the said trial have since been burnt.

* * * *

"That by consent of both parties a verdict was taken for the plaintiff for the sum of $3,318, being the amount plaintiff claimed to be interested in such vessel, with interest, with leave to the said defendants to move the Supreme Court of *New Brunswick* for leave to enter a non-suit, should the said Court be of opinion that the plaintiff had no insurable interest.

"That the said Supreme Court subsequently granted a rule *nisi*, calling on the plaintiff to show cause why a non-suit should not be entered, and after argument and time having been taken to consider, the judgment of the Court was delivered by *Allen*, C. J., (the other Judges concurring in such judgment, but giving no reasons therefor.)

"The said rule was made absolute, as follows:

"In the Supreme Court,

1879

CLARK v. SCOTTISH IMPERIAL INSURANCE CO.

"Trinity Term, 41 *Victoria*,

James Clark v. *The Scottish Imperial Insurance Comp'y.*

"Upon reading the rule granted in this cause, and on hearing Mr. *Thomson* against the said rule, and Mr. *Weldon* in support thereof, and the Court having taken time to consider, doth now order that the said rule be made absolute, and a non-suit granted.

"By the Court,

(Signed) W. CARMAN.

From this rule plaintiff appealed.

Clark, the plaintiff, who carried on business in *Saint John*, describes, in his evidence, his connection with the builder, who resided in *Hopewell*, and through him, with the vessel, and what took place between himself and the agent on effecting the insurance and after the loss had taken place. He says:—

"In 1872 I commenced supplying *Bishop* on this vessel. In this year he commenced getting timber out. The arrangement was that I was to supply him to build this vessel, and hold the vessel as security for my advances. I was to dispose of the vessel in shares, or the whole, as I saw proper, and when the vessel was disposed of, what was remaining after I got my pay was to go to *Bishop*. That was the arrangement. In pursuance of that arrangement, I made advances to him, to over $2,000. At the time I made application for insurance, Mr. *Perley* was agent. I went to effect insurance in August, 1874."

Mr. *Armstrong*, who went with plaintiff to agent to effect the insurance, says: "*Perley* was away. I told his young man *Clark* wanted to make application for insurance. I got blank from *Clark* and filled it up. *Clark* signed it and left it there. I cannot state what was on the paper. I can only state what took place at the time. I am satisfied it was an application for insurance on a vessel which was building by *Bishop*, and

that it stated plaintiff had been advancing on her, and the insurance was to cover advances."

Plaintiff then says: "I signed a paper—the one spoken of by Mr. *Armstrong*. The paper was not given back to me. After *Perley* returned home, I thought it best to see him as he was the agent. I saw him, and I said: 'Mr. *Perley*, I have made application for insurance on a vessel that was building by one *John Bishop*, in *Hopewell, A. C.*' Says I: 'Mr. *Perley*, I want you distinctly to understand that the vessel is not building for me directly, but I hold her as collateral security. She is in my hands and for sale, to dispose of any way I see fit to getting money out of her.' He said he had seen the application, but he said Mr. *Armstrong* had made a mistake in figuring up the premium—he had charged me some $2 or $3 too much. He took the paper—I suppose it was the same paper I had signed before—and altered the figures, and it reduced it down to some $31, it had been $33. He said that it was proper I should have insurance on a vessel where I had been making such large advances, it would be foolish if I didn't. I didn't sign any paper except the one which I signed when Mr. *Armstrong* was with me. I said: 'Mr. *Perley*, I have made application for $3,000. I haven't advanced that yet, but I have advanced something over $2,000, but it would take $3,000, and more, probably, to put her off.' *Perley* said if I advanced more I could further insure, but that I couldn't get more than my advances if I insured ever so much. I told him I was aware of it. I got the policy; this is it. The young man who was in the office brought this round to me. The young man's name is *Wade*."

Plaintiff then says he went on making advances. Vessel was destroyed 3rd or 4th October, 1874. First intimation he got of the fire was by letter from *Bishop*, which he showed to *Perley* the same day he got it.

1879

CLARK v. SCOTTISH IMPERIAL INSURANCE CO.

"Vessel was burnt to ashes on Saturday night. I can give no information how fire originated." He says: "Mr. *Perley* read this letter. He said: '*Clark*, its a bad job—but you're a fortunate man that you insured. Now you see the necessity of having proper insurance when you're making advances.' I said: 'Mr. *Perley*, what steps am I to take? I'm not much acquainted with insurance business' He said: 'its my duty, as agent, to go and see where vessel was burnt.' I directed him how to go there. He told me afterwards that he had been up. After he returned, I went in, and he smiled and said: 'It was the cleanest burn I ever saw, and there was nothing left but a pile of iron—didn't look if there had ever been much there.' I made out my claim—it amounted to $2,960, or thereabouts. Young Mr. *Charles Clark* kept my books. Goods would be sent generally to *Bishop* in his son's vessel, and save freight; sometimes by other vessels. I had transactions with *Bishop* before of a similar kind. I knew it took him a long time to build a vessel. I told him I would charge him interest, which he agreed to, and I made up an interest account. Bishop had built three or four vessels before this, under advances from me, under same terms. I would always hold them. Sometimes I bought an interest in them—half or three-quarters. I signed a letter addressed to Mr. *Perley*, and delivered it at his office to his young man."

On cross-examination, he proved the correctness of advance account. He says: "*Bishop* has dealt with me fourteen or fifteen years. He got all kinds of advances. I always held the vessel. I would sell the vessel or get a mortgage on her. When vessels came down they were registered in the name of *Bishop*. Before selling I would ask *Bishop* what vessel would be worth, as a guide for me to sell. I never saw this vessel. Used to sell the vessels at from $16 to $18 a

ton, hull and spars. They were iron fastened. When I commenced to supply this vessel former vessel was off. I had security on her. Former vessel was built by *Bishop* for his son. It was in the fall of 1872 I commenced on this. Former vessel I charged advances to son. When she came down and was registered, I got mortgage on her. His son gave the mortgage. Former vessel was the 'Minnie.' On this vessel I supplied iron, oakum, spikes, etc."

Re-examined—Had been in the habit of making these agreements with ship-builders. Always held on to the vessel. Sold her or got a mortgage on her. There was no written agreement. Question—"Did you make the advances on the faith of this agreement?" Mr. *Weldon* objects. "Admitted, subject to Mr. *Weldon's* objection. Answer—I did. I would not make them without."

Bishop, the builder, speaks as to the correctness of plaintiff's account as amounting "to pretty near $3,000." He then describes the state the vessel was in; that he considered the vessel at the time of loss worth near $5,000, and that he had no insurance on her, and lost everything he had in her; and, as to his agreement with plaintiff, he says: "*Clark* managed principally all my business in *Saint John*. I never sold any of the vessels. Don't think *Clark* sold any. I allowed him the privilege of doing so. We would talk the price over. *Clark* would either take a share in vessel, or take a mortgage on her when she came down for his advances. If he took a share, he would credit me with price of share, account of advances. I don't think I ever gave a mortgage to him. I built four vessels. This was the fourth. He was part owner of three vessels. In fall of 1873, after Christmas, I had the vessel pretty nearly half in frame—about one-third framed. Laid keel in August, 1873. Worked on her all winter. At time of

1879

CLARK v. SCOTTISH IMPERIAL INSURANCE CO.

fire I considered vessel about half done—more than that, for I had timber there to finish her. Don't think that we came to an arrangement as to price at which *Clark* should sell her. Think about $18 was spoken of, and I thought I should get $20. I bought part of her keel from *Uriah Bennett*, and I built on to it. I laid it before I got any timber in my yard, and it was two months after I laid the keel before I made the arrangements with *Clark*. It was Christmas, 1872, she was one-third timbered. We were two winters and two summers building her. In 1873 we had her all timbered out and top sides on and clamps in. In summer, 1874, we finished her at as far as she was when she was burnt. We finished laying decks, covering boards, waterways, etc."

Re-examined.—"Think plaintiff commenced advancing in 1872—in July. I wanted to build a vessel, and I wanted plaintiff to supply her, and I told him that he should have the vessel as security for what he supplied me with. That I would put in all I could myself. I said I could not tell him how much I could put in. That was about all that passed. He was to sell her, or make any bargain he could with her, and then to pay me the balance of what was paid him."

The defendant called no witnesses.

The question to be determined on this appeal was whether plaintiff had an insurable interest.

Mr. *Thomson*, Q.C., for appellant:

In this case the nature and extent of the appellant's interest in the subject matter of this insurance were fully and fairly disclosed to the respondent company, which, through its agent, admitted the interest to be an insurable one. The Court below decided that the appellant had not an insurable interest in the property. The appellant contends that it was only necessary to

have an equitable interest, in other words such an interest as a Court of Equity will recognize and protect. The Chief Justice of the Court below says there never was any written agreement with regard to the advances, but an oral or written declaration may be as effectual as the most formal instrument.

The promise of the appellant's advance, and the advances made in pursuance of it, and on the faith of *Bishop's* agreement to place the vessel after being launched in his hands, in order that he might sell her, and pay himself, did create a valid lien in equity on the the vessel; and therefore he had an insurable interest. See *Lucena* v. *Craufurd* (1); *Ex parte Houghton* (2); *Ex parte Yallop* (3); *Gurnell* v. *Gardiner* (4); *Riccard* v. *Prichard* (5).

An equitable assignment is thus defined by Sir *John Leach*, V. C., in *Watson* v. *The Duke of Wellington* (6):

"In order to constitute an equitable assignment there must be an engagement to pay out of a particular fund."

In *Field* v. *Megaw* (7), *Montague Smith*, J., says: "If the plaintiff had agreed that the fund should be held specifically for *Weld*, the agreement might have been enforced by a bill in equity."

Non-existing property to be acquired at a future time, although perhaps not assignable at law, is clearly so in equity. *Brown* v. *Tanner* (8); *Wilson* v. *Wilson* (9).

It was assumed that the appellant claimed that there had been a sale, but that such a sale was void under the statute of frauds.

The contract was not for the sale of the vessel, but for the making of advances to build a vessel, on the agree-

(1) 2 B. & P. 269.
(2) 17 Ves. 253.
(3) 15 Ves. 67.
(4) 9 Jur. N. S. 1220.
(5) 1 K. & J. 277-279.
(6) 1 R. & M. 602.
(7) L. R. 4 C. P. at p. 664.
(8) L. R. 3 Ch. App. 597.
(9) L. R. 14 Eq. 32.

1879

CLARK v. SCOTTISH IMPERIAL INSURANCE CO.

ment that the vessel was to be the fund out of which the appellant was to be paid, and for the purpose of making such fund available, the vessel was to be placed in his hands for sale, after she should be launched.

Neither was there anything in the contract, which necessarily prevented its being carried out within a year. How does the statute of frauds apply to such a contract?

The case of *Stockdale* v. *Dunlop* (1), relied on by the respondent and the Court below, has no bearing on the present case. Moreover, the decision of *Leroux* v. *Brown* (2) virtually overrules that decision; and what right have the company to set up the statute of frauds. It does not affect a contract so as to make it void. It only declares that you cannot enforce it, but that is only between vendor and vendee, and not a third party.

It was also stated that there was no mutuality.

The appellant contends the agreement was mutual. It was an agreement by *Clark* to make such advances to *Bishop* as might be necessary to complete the vessel, and as *Bishop* might require, in consideration of which *Bishop* agreed that *Clark* should have a lien on the vessel, sell her, and pay himself out of the proceeds. Why is such agreement not mutual? The effect of it, moreover, was to suspend any right of the appellant to sue *Bishop* for the advances, at all events, until the fund out of which the advances were to be paid (the vessel) failed or was exhausted. Could *Clark* have sued *Bishop* for the advances at any time while the vessel was in the course of construction and before launching? It is submitted that he could not.

The Court seems to have been under the impression that to pass an interest in property not in esse requires, even in equity, an agreement possessing peculiar requisites not necessary in contracts relating to

(1) 6 M. & W. 224. (2) 12 C. B. 801.

property actually in existence, and that such requisites are wanting here.

This view of the law, however, is wholly at variance with the authorities cited above, and with Lord *Westbury's* judgment in *Holroyd* v. *Marshall* (1). The learned Chief Justice says: "There was no such agreement as would pass property not in esse at the time it was made, or create any lien upon it, without a transmutation of possession; there was no obligation on the part of the plaintiff to make any specific amount of advances, and, therefore, the agreement, if such it might be called, was entirely wanting in mutuality. There was not even such a contract as could be enforced either at law or in equity."

Under the evidence it is by no means clear that the property was not in esse when the agreement between *Clark* and *Bishop* was made. It would seem, in fact, that the vessel had been some time in course of construction before *Clark* was asked to advance upon her.

In any case the appellant had clearly such an insurable interest as was decided to be sufficient by *Lawrence*, J., in *Lucena* v. *Craufurd*, "To be interested in the possession of a thing is to be so circumstanced with respect to it as to have *benefit from its existence, prejudice from its destruction.*" *Davies* v. *The Home Ins. Co.* (2).

Mr. *Weldon* Q. C., (Mr. *Haliburton*, with him), for respondent.

There is no dispute as to the facts of the case.

We contend appellant had not an equitable interest which a Court of Equity could enforce. The policy states that the insurance is "*on a schooner*;" the peculiar interest of the insured is not inserted.

(1) 10 H. L. 209.
(2) 24 U. C. Q. B. 364 and in appeal 3 Grant Err. & App. 269.

1879

CLARK v. SCOTTISH IMPERIAL INSURANCE CO.

The party here insures a vessel; the question is, if company paid, would they have a right of subrogation.

There is a broad distinction between the cases cited and the present one. The article was not in existence when the agreement was passed; it was an article to be manufactured, and this was not a contract of which a Court of Equity would decree a specific performance, at all events, while the vessel was in an incomplete state and unfinished. There was no contract that could be enforced. In its inception it lacked mutuality. *Clark* was under no obligation to continue his advances. There was nothing in that agreement which could prevent *Bishop* from disposing of the vessel to a *bona fide* purchaser, for until vessel was complete appellant had only an inchoate right in an article to be manufactured. That is the distinction between this case and *Holroyd* v. *Marshall*, and others cited.

The right to insure cannot be only "an expectation of possession on the part of the plaintiff, founded on a mere promise of *Bishop*," as held in the case of *Stockdale* v. *Dunlop* (1).

A Court of Equity would even compel the party to give a mortgage for that part, but in this case respondent submits the Court could not compel *Bishop* to give a mortgage.

A right to insure must be of such a nature as to constitute an interest which the law will recognize and enforce. In this case the appellant chose to trust *Bishop*, and he has only a mere *moral* title which will not sustain an insurance.

The learned counsel referred to *Angell* on Insurance, sec. 69; *Seagrave* v. *Union Marine Insurance Co.* (2); *Anderson* v. *Morice* (3); *Folsom* v. *Merchants' Mut. Mar. Ins. Co.* (4).

(1) 6 M. & W. 224.
(2) L. R. 1 C. P. 305 and 310.
(3) L. R. 10 C. P. 58; S. C., L. R. 4 Ex. 609.
(4) 38 Maine 418.

Mr. *Thomson*, Q. C., in reply.

RITCHIE, C. J., after referring to the evidence given above, proceeded as follows:

The defendants, by their first plea, claimed that the plaintiff had no insurable interest in the vessel, and it was, as the learned Chief Justice in the Court below says, upon this plea, upon which issue was joined, that the case turned. A verdict was taken for the plaintiff by consent for $3,318, with leave to move to enter a non-suit, and with power to the Court to draw inferences of fact. The Court was of opinion that the evidence showed no insurable interest whatever in the plaintiff, and made a rule absolute for a non-suit.

There is no contradictory evidence in this case, nor is it disputed, that there was a verbal agreement and understanding between *Bishop* and *Clark*, that if *Clark* would make the necessary advances to *Bishop* to enable him to build this vessel, he, *Clark*, would be in a position to look to the vessel when completed as security for his pay—in other words, that the advances were to be made on the security of the vessel, and that the advances were made on the faith of this agreement.

It is quite true, as suggested by the learned Chief Justice, that there was not any such agreement as would pass the property in this unfinished vessel, or any such transmutation of possession as would create a lien upon it in the legal technical sense of that word; but this by no means determines the question in controversy, nor does the fact put forward by the learned Chief Justice, assuming such to be the case, that "there was no obligation on the part of the plaintiff to make any specific amount of advances," in my opinion affect the case.

The contract of insurance being a contract of indemnity, it is abundantly clear that the plaintiff must establish some interest in the subject-matter insured.

1879

CLARK v. SCOTTISH IMPERIAL INSURANCE Co.

Ritchie, C.J.

The questions we have to determine are, what constitutes such an insurable interest? And did the verbal agreement and the advances made on the strength of it, confer on *Clark* an insurable interest in the vessel while in course of construction?

As to the first, it is easily answered, negatively, that an insurable interest is not confined to a strict legal right of property; and, affirmatively, that any interest which would be recognized by a Court of Law or Equity is an insurable interest, or, as Mr. *Bunyon* thus sums up the question (1), "that any legal or equitable estate or right which may be prejudicially affected, or any responsibility which may be brought into operation by a fire will confer an insurable interest." There must therefore be a valid subsisting contract, susceptible of being enforced between the parties themselves, in order to constitute an insurable interest, or right of action against the insurer, not a mere expectancy or probable interest, however well founded. Was there, then, in this case such an existing contract between *Clark* and *Bishop*, in respect to this vessel in course of construction, as conferred on *Clark* an interest in it binding in law or equity, which a Court of Law or Equity would recognize and enforce, and which interest was prejudicially affected by the fire?

Though, as put by the Chief Justice, there may have been no obligation on the plaintiff's part to make any specific amount of advances, and though a Court of Equity will not decree performance of a mere agreement to advance money, I take it to be a well established principle, that where money has been advanced on an agreement that it should be secured on or paid out of a certain fund, or out of the proceeds of property to be sold for that purpose, a Court of Equity would, as between the parties to such an agreement, prevent the borrowers

(1) Bunyon on Fire Ins. p. 8.

or debtors from appropriating such property or fund to another purpose; therefore, as *Clark* actually made the advances, and so on his part fully performed his side of the agreement, a clear mutuality was established, and an agreement subsisted which *Bishop* was bound to perform; he received the benefit of the agreement and should not be permitted to repudiate the burthen; and that agreement, in my opinion, was a specific appropriation of the specific property to the discharge of these particular advances; an engagement (distinct from the legal estate or actual possession), to pay out of this particular property, sufficient to bind the property in equity and clothe it with an equity in favor of the plaintiff, and which gave to *Clark* a privilege or claim on such property, an equitable lien in the nature of an equitable assignment for the advances made, and by means of which the builder was enabled to proceed with its construction. Had the fire not occurred, and had the vessel been completed, as the agreement contemplated, and had *Bishop* attempted to divert the vessel to other purposes to the detriment of plaintiff's claim, I think a Court of Equity would, at plaintiff's instance, have interposed and compelled *Bishop* to act in good faith and carry out his side of the agreement, either by granting a formal mortgage on her in *Clark's* name, or by ordering a sale, or by placing her in *Clark's* hands to be sold, and the proceeds applied, as far as necessary, to the liquidation of *Clark's* advances; in other words, that a Court of Equity would recognize an equitable security on the property for the advances, and would enforce an appropriation of the property for their re-imbursement; for it would be the grossest fraud for one party to refuse to perform after performance by the other, and the ground of the doctrine of part performance is fraud.

In *Fry* on Specific Performance (1), it is said:

(1) Sec. 388, Ed. 1858.

1879

CLARK v. SCOTTISH IMPERIAL INSURANCE CO.

Ritchie, C.J.

The principle upon which Courts of Equity exercise their jurisdiction in decreeing specific performance of a parol argeement accompanied by part performance is the fraud and injustice which would result from allowing one party to refuse to perform his part after performance by the other upon the faith of the contract (1).

That this agreement, though by parol, and the advances made under it, created an equitable charge on this property and gave *Clark* an equitable interest therein, principle and numerous authorities clearly establish, and it is, in my opinion, equally clear that if such equitable interest existed it was an insurable interest.

In *Rodick* v. *Gandell* (2), Lord *Truro* says:

I believe I have adverted to all the cases cited which can be considered as having any bearing upon the present case, and the extent of the principle to be deduced from them is, that an agreement between a debtor and creditor that the debt owing shall be paid out of a specific fund coming to the debtor, or an order given by a debtor to his creditor upon a person owing money or holding funds belonging to the giver of the order, directing such person to pay such funds to the creditor, will create a valid equitable charge upon such fund; in other words, will operate as an equitable assignment of the debts or fund to which the order refers.

In *Gurnell* v. *Gardiner* the head note is as follows (3):

Parol authority by a debtor to a creditor to go and take certain goods and sell them and pay himself a particular debt out the proceeds.

Held, to amount to the creation of an equitable lien upon such goods, and as such to be valid as against a claim by the personal representative of the debtor after his death

The Vice-Chancellor says:

In this case everything was by parol; the words are clear; and that, coupled with the conduct of the intestate, amounts to the creation of a valid equitable lien. It seems to me to be impossible to resist the plaintiff's claim on the ground that this was not a valid equitable assignment in writing. I find no law which says that a valid

(1) Per Sir Wm. Grant in *Buckmaster* v. *Harrop*, 7 Ves. 346; per Lord Cottenham in *Mundy* v. *Jolliffe*, 5 My. & Cr. 177.

(2) 1 De G. McN. & G. 777.

(3) 9 L. T. N. S. 367.

equitable lien cannot be created by parol, and the conclusion, if these premises be just, is inevitable, that where all things are by parol, and associated together for the purpose of giving an authority, where all is one transaction, and the power and the purpose are coupled together by the same evidence, they operate to confer a valid right which this Court is bound to enforce.

In *Malcolm* v. *Scott* (1), the Vice Chancellor says:

The of case *Burn* v. *Carvalho* was relied on as an authority in the plaintiff's favor. In that case the creditors requested the debtor to order *Rego*, the holder of property of the debtor, immediately to hand over to the creditors' agent such property as *Rego* might have belonging to the debtor, equivalent in value to the amount of certain bills; in answer to which request the debtor promised that he would write to *Rego* and direct him to hand over to the creditors' agent property of the debtor to cover the amount of the bills which might not eventually be paid. Lord *Cottenham* describes this as the result of the state of facts before him, he says: "The question, is whether such promise and agreement would not give a lien in equity?" and he decides that the letters containing the requests and the promise amounted to an equitable assignment of the funds in the hands of *Rego*. That was a promise to pay out of a particular fund in answer to an application for payment out of that very fund. I do not conceive that Lord *Cottenham* meant to decide anything more in that case, than that, when you make out the agreement to give the lien the form of the transaction is not material.

Previously to this, the Vice-Chancellor said:

I accede to the plaintiff's argument that where there is, as in this case there clearly is, a good consideration for the lien, it is immaterial what may be the form of the transaction. It is only necessary that the transaction should be evidence of an agreement for a lien; the real nature of the transaction, and not the mere form of it, must, I apprehend, be regarded: *Bill* v. *Cureton* (2), which case I followed in *Hughes* v. *Stubbs* (3).

The loss the parties in the present case sustained by the fire was this, that by reason of the destruction of the property, they were prevented from even "perfecting" their equitable title by lawfully clothing it with the possession of the property.

(1) 3 Hare 52. (2) 2 My. & K. 511.
(3) 1 Hare 476.

1879

CLARK v. SCOTTISH IMPERIAL INSURANCE CO.

Ritchie, C.J.

This was, as was said by the Vice-Chancellor in *Langton* v. *Horton* (1):

The first and the substantial question in this cause is, whether the future cargo of the *Foxhound*—that which was the future cargo at the time of the assignment—passed either at law or in equity, by the assignment, from *Birnie* to the plaintiffs. I lay out of view all question as to the operation of the instrument at law, and look at the case only as a question in equity.

Is it true, then, that a subject to be acquired after the date of a contract cannot, in equity, be claimed by a purchaser for value under that contract? It is impossible to doubt, for some purposes at least that, by contract, an interest in a thing not in existence at the time of the contract may, in equity, become the property of a purchaser for value. The course to be taken by such purchaser to perfect his title I do not now advert to, but cases recognizing the general proposition are of common occurrence. A tenant, for example, contracts that particular things, which shall be on the property when the term of his occupation expires, shall be the property of the lessor at a certain price, or at a price to be determined in a certain manner. This, in fact, is a contract to sell property not then belonging to the vendor, and a Court of Equity will enforce such contracts, where they are founded on valuable consideration, and justice requires that the contract should be specifically performed. The same doctrine is applied in important cases of contracts relating to mines, where the lessee has agreed to leave engines and machinery not annexed to the freehold, which shall be on the property at the expiration of the lease, to be paid for at a valuation. The contract applies in terms to implements which shall be there at the time specified, and here neither construction nor decision has confined it to those articles which were on the property at the time the lease was granted. But it is not necessary that I should refer to such cases as these, for Lord *Eldon*, in the case of the ship *Warre* (2) and in *Curtis* v. *Auber* (3), has decided all that is necessary to dispose of the present argument. Admitting that those cases are not specifically and in terms like the principal case, they are not of the less authority for the present purpose; for they remove the difficulty which has been raised in argument, and decide that non-existing property may be the subject of valid assignment. I will suppose the case of the owner of a ship, which is going out in ballast, proposing to borrow of another party a sum of £5,000 to pay the crew and furnish an

(1) 1 Hare 555.

(2) 8 Price 269, n.

(3) 1 J. & W. 526.

outfit; and agreeing that, in consideration of the loan, the homeward cargo should be consigned to the party advancing the money. It cannot reasonably be denied, in the face of the authorities I have just referred to, that a Court of Equity, upon a contract so framed, would hold that the party advancing the money was, as against the owner, entitled to claim the homeward cargo. And if a party may contract for the consignment of a homeward cargo, I cannot see why he may not contract with the owner of a ship engaged in the South Sea fisheries, that the fruit of the voyage—the whales taken or the oil obtained—shall be his security for the amount of his advances; I cannot, without going in opposition to many authorities which have been cited, throw any doubt upon the point, that *Birnie*, the contracting party, would be bound by the assignment to the plaintiffs.

* * * * * * * * *

In the course of the argument I suggested the case of the purchaser of an estate, who having paid his purchase-money, prevailed on the occupying tenant to give him possession, and I enquired whether equity, affecting the validity of the contract, would say that possession was unlawful, and would permit the vendor who had received the money to turn the purchaser out of possession. This question may be tried by that test, for though this is not in the form of a purchase, it is yet a transaction in respect of which a price was paid, for the price of the security was the money they advanced. It appears to me that whether *McG.* acted or not under the authority of *B.*, the plaintiff had, on the 9th of January, perfected their equitable title by lawfully clothing it with the possession of the property.

In *Ebsworth* v. *The Alliance Marine Insurance Co.* (1) there was no difference of opinion as to the right of plaintiffs to recover their own actual advances, but two of the judges thought they were neither the legal owners of the cotton, nor in equity trustees as to the surplus for the consignors.

Bovill, C. J., says (2):

The bill of exchange, being drawn by the shippers and accepted by the plaintiffs against the consignment, that consignment immediately became an equitable security to the plaintiffs for the amount of their acceptance; and they would have been entitled in equity to

(1) L. R. 8 C. P. 596.

(2) Ibid. p. 607.

1879

CLARK v. SCOTTISH IMPERIAL INSURANCE Co.

Ritchie, C.J.

have the cotton appropriated for their re-imbursement: *Exparte Barber* (1); *Exparte Mackey* (2); and see also the recent case before the Lords Justices of *Exparte Smart* (3); and *Bank of Ireland* v. *Perry* (4).

* * * * * * * * *

In the judgment of *Chambre*, J., whose views were ultimately adopted by the House of Lords, he says (5): "I am not disposed to question the authorities in general; on the contrary, there appears to me to have been great propriety in establishing the contract of insurance, wherever the interest declared upon was, in the common understanding of mankind, a real interest in or arising out of the thing insured, or so connected with it as to depend on the safety of the thing insured and the risk insured against, without much regard to technical distinctions respecting property, still, however, excluding mere speculation or expectation and interests created no otherwise than by gaming (6)."

Brett, J., says:—

The first point is, thus raised whether plaintiffs had any insurable interest. I think they had: because they had an existing contract with regard to the cotton by virtue of which they had an expectancy of benefit and advantage arising out of or depending on the safe arrival of the cotton (7).

In *Hoare* v. *Dresser* (8), The Lord Chancellor (Lord *Chelmsford*) says:

If this question had arisen at law, the case of *Wait* v. *Baker* (9) would have appeared to me a decisive authority that no property passed in these cargoes to *Dresser*, so as to enable him to maintain an action for them. But the question in equity is not whether the property in the cargoes actually passed to *Dresser*, so as to give him a legal right, but whether there was not a contract for timber, which, though general at first, was, by the subsequent transactions between the parties, rendered specific, so as to enable *Dresser* to assert an equitable title to it? I entertain no doubt that, although at the time of the acceptance of the bill of exchange for £500 no timber had been specifically appropriated as the cargoes to be sent to *Dresser*, yet that when the "Verene" and "Christiana" were laden with timber ex-

(1) 3 M. D. & D. 174.
(2) 2 M. D. & D. 136.
(3) L. R. 8 Ch. 220.
(4) L. R. 7 Ex. 14.
(5) 3 B. & P. at p. 104.
(6) Ibid. p. 619
(7) Ibid. p. 637.
(8) 7 H. L. 311.
(9) 2 Exch. Rep. 1.

pressly for the purpose of satisfying the contracts which had been entered into on account of *Norrbom* for the supply of the exact quantities shipped for *Bristol* and for *London*, *Dresser* had an equitable title to the property in these cargoes which he could enforce against *Norrbom*, or against any other person claiming from *Norrbom* with no better title than he possessed.

Lord *Cranworth* (1) says:

At law there must be a positive appropriation to give a legal title: that was established in *Wait* v. *Baker*. So that, however unjustly a party may be acting who says I shall send you from abroad some timber by a particular ship, if in truth he sends it so as to make it the legal property of another, that legal property must prevail. The difference between law and equity I take to be this: that if there has been an engagement to appropriate a particular cargo, or an engagement to satisfy a contract out of a particular thing, such as to appropriate a part of a larger cargo, in either of those cases equity will interfere, in the one case, to decree what in truth is a specific performance, or something very like a specific performance, of the contract to appropriate a particular cargo; and, in the other, to give the puchaser a lien upon the larger cargo in order to enable him to satisfy himself of the smaller demand.

In the *United States* of *America* the same principles are enunciated.

In *Hancox* v. *Fishing Insurance Co.* (2), *Story*, J., says:

If in the present case the vessel had been successful in her outward voyage, and upon the homeward voyage had been lost with her catchings and other proceeds on board, it would be difficult to resist the claim of the plaintiff to a recovery for a total loss. He would have had a lien on the shares of the seamen in those proceeds, or some interest in the nature of a lien. It seems perfectly clear that a person having a lien, or an interest in the nature of a lien, on the property outward has an insurable interest, and it will make no difference in such a case that he might still have a right to pursue his debtor personally for the debt on account of which the lien attached. There are many authorities in the books to this effect.

And citing, among others, *Wolf* v. *Horncastle* (3).

(1) Ibid p. 317.

(2) 3 Sumner's Reports, 139.

(3) 1 B. & P. 316.

1879

CLARK v. SCOTTISH IMPERIAL INSURANCE CO.

Ritchie, C.J.

And Chancellor *Kent*, in speaking of *Lucena* v. *Crauford* (1), says:

> The decision was that commissions to become due to public agents and all reasonable expectations of profits were insurable interests. The interest need not be a property in the subject insured. It is sufficient if a loss of the subject would bring upon the insured a pecuniary loss or intercept a profit. Interest does not necessarily imply a right to or property in the subject insured. It may consist in having some relation to or concern in the subject of the insurance, and which relation or concern may be so affected by the peril as to produce damage. Where a person is so circumstanced he is interested in the safety of the thing, for he receives a benefit from its existence and a prejudice from its destruction, and that interest is, in the view of the English law, a lawful subject of insurance.

In this case nothing like misrepresentation or fraud is alleged by the assured. The nature of the property and the appellant's interests were in the most full and frank manner disclosed to the assurers, and with such knowledge the interest was by them recognized as insurable, the premium accepted and risk undertaken, and their action now in repudiating their liability after a loss, the fairness of which is not questioned, presents their conduct before the Court in anything but a favorable light, and it is a satisfaction to know that the law will not aid them in depriving the plaintiff of what is not only his legal but his just due.

This appeal must be allowed with costs, and the rule absolute to enter a non-suit discharged.

STRONG, J., delivered a written judgment, in favor of allowing the appeal, which the Reporter has been unable to obtain (2).

FOURNIER, J., concurred.

HENRY, J.:—

I entirely concur in the judgment delivered. The doctrine, that under the circumstances of this case an

(1) 3 Kent's Com. sec. 276.

(2) This judgment will be found at page 706.

equitable lien existed, is so firmly established and unequivocally recognized by so many authorities that it cannot now be questioned.

The circumstances are such as we find in many of the cases reported, including those cited in the judgments just delivered.

It is equally well settled that a party has a right to insure property over which he has an equitable lien; and if a party goes to an insurance company, and offers to have such an interest insured and they take the risk, the contract is valid. The judgment of the Court below seems to have been founded altogether on a misapprehension of the law applicable to equitable liens. In the view taken on this point by the Court below I entirely disagree. Neither the actual or constructive possession of the property is necessary to be in the insurer, either at the time of issue of the policy or when the loss insured against takes place. It is sufficient if he have an equitable lien on the specific chattel property covered by the policy. The appellant had in this case such a lien on the vessel in question which then was covered by the policy, and I think, therefore, the appeal should be allowed and judgment entered in his favor with costs.

TASCHEREAU, J., concurred.

GWYNNE, J.:—

The question arising in this case may be determined wholly upon the authority of *Holroyd* v. *Marshall* (1). Lord *Westbury* there lays it down as an elementary principle long settled in Courts of Equity, that in equity it is not necessary for the alienation of property that there should be any formal deed of conveyance, that a contract for valuable consideration, by which it

(1) 10 H. L. 191, & 9 Jur. N. S. 213.

1879

CLARK v. SCOTTISH IMPERIAL INSURANCE CO.

Gwynne, J.

is agreed to make a present transfer of property, passes at once the beneficial interest, provided the contract be such as a Court of Equity will decree a specific performance of.

Now, applying the principles here laid down to the present case, there can be no doubt, that immediately upon the first advance being made by the plaintiff under the contract with *Bishop*, the beneficial interest in the vessel then on the stocks was, in equity, transferred from *Bishop* to the plaintiff by way of security to the latter for his advances, and such interest increased in value from day to day as the vessel progressed, and became a security to the plaintiff for all his advances from time to time, as they were made. That interest was one which, relating as it did to a specific chattel, was such that a Court of Equity would have secured the benefit of it to the plaintiff by specific performance, or by injunction restraining *Bishop* from dealing with the vessel otherwise than in accordance with his contract with the plaintiff. This is a proposition which, at the present day, cannot admit of a doubt, and as an equitable interest is sufficient to create an insurable interest, the plaintiff at the time of the insurance being effected, and at the time of the loss, had an insurable interest in the subject of the insurance under the circumstances as established by the evidence. Between this case and *Stockdale* v. *Dunlop* (1), upon the anthority of which the Court below rest their judgment, there is no parallel; there the agreement was to sell *oil to arrive*. It was proved that the expression *oil to arrive* was a mercantile term, and that if the oil should not arrive by the vessel, the purchaser had no right to it; until arrival, in effect, the contract did not profess to transfer any interest to the purchaser, and as the vessel did not arrive with the oil, but was lost on the voyage, the in-

(1) 6 M. & W. 224.

tending purchaser had not, either at the time of the insurance being effected, or at the time of the loss, any beneficial interest in the property insured; he had only an expectation that the event, the happening of which was a condition precedent to the accrual of his interest in the property, would happen, namely, the arrival of the ship with the oil; until then there was, as *Parke*, B., says, no contract which could be enforced. Between that case and the present it is apparent that there is no parallel.

Appeal allowed with costs.

Solicitor for appellant—*J. R. Armstrong.*

Solicitor for respondents—*C. W. Weldon.*