The words "A. H. Dalziel, Agent at Sarnia, Ont.," are indorsed on the policy in the same handwriting, apparently, which appears on its face. The premium note is dated at Sarnia, Ontario, May 1, 1883; is made payable, not to the order of either of the persons proposed in the original application as indorsers, but to the order of the insurance company itself. The note recites that it is given for "premium of insurance on schooner barge Waubaushene, policy No. 611, of Sarnia, Ontario, A. H. D. (A. H. Dalziel) Agency, Insurance Co. of the state of Pennsylvania," and that if it is "not paid at maturity the full amount of premium shall be considered as earned, and the said policy becomes void, while the amount remains overdue and unpaid." The note was indorsed by the company, Crosby and Dimick general agents. The policy extended from May 1 to November 30, 1883, and was by special clause confined to "total loss and general average only."

Upon the hearing before the commissioner the note was surrendered. It has never been paid. The barge having been sold by order of the court in another proceeding, the petitioner now seeks to have the amount of the premium paid from the surplus in the registry of the court. The respondent, as mortgagee, resists this attempt, insisting that the debt is a mere personal contract of the owner, carrying with it no privilege against the ship.

The questions which the court must examine are these: *First*, was the contract made in the state of New York or in Canada? In other words, is the controversy to be determined by the law of this country or Canada? *Second*, has the law of New York, creating a lien in favor of underwriters for unpaid premiums, any application to this case? *Third*, is a general lien created by the maritime law of this country? The commissioner to whom the cause was referred decided—*First*, that the contract of insurance was made in New York; *second*, that the New York law has no application to a Canadian vessel; *third*, that a maritime lien for unpaid premiums does exist in favor of the insurer. That the commissioner was correct as to the second proposition I have little doubt, but am constrained to disagree with him as to the other two.

Where was the contract made? It cannot be said that any binding contract was entered into when the policy was made out and mailed at Buffalo, for the reason that it differs wholly from the application. *Eliason* v. *Henshaw*, 4 Wheat. 225. The minds of the parties did not meet. They did meet, however, when, at Sarnia, Ontario, May accepted the contract and signed the note in the precise form adopted by the company. It is argued for the petitioner that as May agreed to give an indorsed note and did not do so, the minds of the parties did not come together until the unindorsed note was accepted by the agents at Buffalo. Hence the contract was made there. The provision for an indorsed note was for the benefit of the insurers. Unquestionably, they could waive it. That they did waive it there is little doubt. They sent to Dalziel, who for this purpose

was their agent, made so by this act, a policy of insurance and a note, with instructions to deliver the one and return the other properly signed. The departure from the application was made, in the first instance, by the insurers. They knew that the owner of the Waubaushene had made no application to insure her in their company, that he had not even mentioned its name in this connection, and it may well be questioned whether they were in a position to demand from him any unusual conditions. But let it be assumed that, under the peculiar circumstances attending this application, they were justified in exacting an indorsed note. They did not do so, and the evidence seems to warrant the conclusion that they did not intend to do so. Mr. Marshall, who, on behalf of the company, sent the papers to Dalziel from Buffalo, testified:

"My purpose in sending the note was to have Dalziel procure it to be signed by the insured and to return to us. This was done. This is the way we always do with Dalziel or any other applicant, and he is expected to have the note executed and returned. * * * The general instructions to all our agents and brokers are to have the note signed when they deliver the policies, and Dalziel was included in this number."

There is no pretense that Dalziel had any special instructions in this case. Certainly he was not asked to obtain an indorsed note. Had he entertained any doubt on the subject, the form of the policy and the note must have removed it. The policy was complete and ready to deliver. It acknowledged receipt of the note in the ordinary form. The note, made payable to the company's own order and not to the order of the proposed indorser, completely negatived the idea that anything but the signature of May was required. If the insurers intended to rely upon the agreement in the original application, would they not have made the note payable to the order of Miller or Moat? Most certainly. They had departed from many of the provisions and stipulations of the application. They waived others. This was one of them. In the application the note was to be made payable at the Bank of Montreal. In the note sent Dalziel the space designed for the insertion of the place of payment was left blank. This was a waiver of that condition, and can it be successfully argued that had May inserted some other bank the contract would have been incomplete till the agents at Buffalo had assented to the change? It is thought not. But assuming that they did not intend to issue the policy until an indorsed note had been executed, are they in a position to maintain such a proposition? Are they not concluded by their own acts? They made Dalziel their agent to deliver the policy and return the note to the company. They refer to him on the back of the policy as "Agent at Sarnia, Ont." In the note they refer to the policy as of the "Sarnia, Ont., A. H. D. Agency." They held Dalziel out to May as the person with whom he was to deal, at least so far as the delivery of the policy and the return of the note was concerned. And when to this is added the fact that they gave May a receipt "for

the amount of the consideration of this insurance," it is, indeed, difficult to understand upon what theory they can now be heard to say that no contract was consummated at Sarnia.

It has frequently been held that a delivery of the policy to the assured containing a receipt for the premium estops the company, for the reason that the receipt is conclusive evidence of payment, to the extent at least that such payment is necessary to give validity to the contract. 3 Kent, Comm. 260; *Provident Ins. Co.* v. *Fennell*, 49 Ill. 180; *Basch* v. *Humboldt Ins. Co.* 35 N. J. Law 429.

Had the vessel been lost while the note was yet in the mails between Sarnia and Buffalo, it is thought that May could have recovered the insurance upon the ground that the contract was executed between him and the company. If the agreement was not as favorable to the insurers as they could wish, they have no one but themselves to blame; it was their negligence and not May's that produced this result. But again, let it be assumed that Dalziel had no authority to act for the company; that his acceptance of the note was not authorized, and that the insurers are not by their own acts estopped from asserting that no contract was made. Did not their subsequent conduct ratify the agreement? What Dalziel did, if he had authority to do it, consummated a valid contract. This will hardly be disputed. But the insurers accepted the note which they now say he was not authorized to take. Did they, by this act, make a new contract, or did they ratify the old one? Plainly, the latter. The ratification related back to the original act. It could relate to no other act.

Judge STORY, speaking of the rule of ratification, says: "In short, the act is treated throughout as if it were originally authorized by the principal; for the ratification relates back to the time of the inception of the transaction, and has a complete retroactive efficacy." Story, Ag. § 244. See, also, *Soames* v. *Spencer*, 1 Dowl. & R. 32, (16 E. C. L. 14;) *Moss* v. *Rossie Lead M. Co.* 5 Hill, 137; *Lawrence* v. *Taylor*, Id. 107; *Hankins* v. *Baker*, 46 N. Y. 670.

The case is not like *Shuenfeldt* v. *Junkermann*, 20 FED. REP. 359, where the defendants were endeavoring by a disingenuous defense to avoid the obligation imposed upon them by a contract fairly made, and of which they had had the full benefit. The court strained the rule in that case to uphold the contract, and prevent the success of an unfair proceeding.

The subject of the insurance was a Canadian vessel. The note, payable at a Canadian bank, was dated and signed in Canada. The policy, containing a receipt for the premium note, was delivered in Canada. The ratification, if ratification were needed, related back to what took place in Canada. It must be held, therefore, that the contract was made in Canada, and, as a necessary result, that the case must be determined by Canadian law. *Heebner* v. *Eagle Ins. Co.* 10 Gray, 131, 143; *Male* v. *Roberts*, 3 Esp. 163; *Thwing* v. *Great West Ins. Co.* 111 Mass. 93; Wood, Fire Ins. § 93.