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.

It is not contended by the petitioner that a lien is created for such a debt by Canadian or English law. It seems to be conceded that a debt contracted in these circumstances in Canada gives the creditor nothing but a personal claim against his debtor. The evidence before the commissioner was positive in this regard, and was not questioned by the petitioner. These considerations also effectually dispose of the second question above referred to relating to the lien created by the statutes of our state. Regardless of the place of contract, it will hardly be asserted that such a law has any relation to insurance on a foreign vessel. *Moores* v. *Lunt*, 4 N. Y. Sup. Ct. Rep. (Thomp. & C.) 154; affirmed, 60 N. Y. 649. See, also, *Brookman* v. *Hamill*, 43 N. Y. 554.

When, however, the additional fact appears that the contract is also a foreign one, all possible doubt is removed. The operation of the statute is, by express terms, confined to contracts made within this state.

But it is argued that, irrespective of the *lex loci contractus*, the lien should be enforced if recognized by the *lex fori;* that the question resolves itself into one of remedy only. I cannot accept this view. The court should hesitate to give a party a lien when his contract gives him none. As was said by Mr. Justice BRADLEY in *The Lottawanna*, 21 Wall. 558, 579: "A lien is a right of property, and not a mere matter of procedure." Should the petitioner obtain a decree, it will be enforced according to the law of the forum. But this question stands at the very threshold of its right to obtain a decree. The respondent insists that petitioner has no standing in court unless it establishes a lien, and the proof shows that it has no lien. The argument that a lien should be established simply because the action is brought in this court, would lead logically to the conclusion that material-men, who furnished the barge with supplies at Toronto, where no privilege exists, could acquire one by bringing their action here. A lien once established will be enforced according to our own and not Canadian procedure. But our courts should not attempt to give rights to suitors which they do not possess at the time they commence their proceedings. If there is here a right to the surplus, it can rest only on the theory that petitioner had a lien which attached to the ship. As it had no privilege against the ship, it can have none against the proceeds.

Judge STORY, in his Conflict of Laws, says, at page 453, (8th Ed.:)

"Where the lien or privilege is created by the *lex loci contractus*, it will generally, although not universally, be respected and enforced in all places where the property is found, or where the right can be beneficially enforced by the *lex fori*. And on the other hand, where the privilege or lien does not exist in the place of the contract it will not be allowed in another country, although the local law where the suit is brought would otherwise sustain it."

I am clearly of the opinion that the insurers cannot succeed, for the reasons that the contract was made in Canada, and having no

privilege there there can be none anywhere. I am aware, however, that there is not entire unanimity among the authorities upon the last question considered. Namely, whether the law of the contract or the law of the forum should be controlling? See *The Maggie Hammond*, 9 Wall. 435, 451, 452; *Scudder* v. *Union Nat. Bank*, 91 U. S. 406, 412, 413; *Harrison* v. *Sterry*, 5 Cranch, 289; *The Union*, 1 Lush. 137; *Ogden* v. *Saunders*, 12 Wheat. 213, 361.

But the case will be relieved of all perplexity on this score should the conclusion be reached that by the *lex fori*, also, no maritime lien exists. Although a determination of this question may not be necessary after the finding that the contract was made in Canada, yet, it is thought proper to decide it in view of the possible doubt above referred to; and for the further reason that a matter of such importance to insurer and insured may not longer be left open to conjecture in this district. Inasmuch as there is a clause in the policy making the premium a lien in case of misfortune and loss only, and a provision in the note rendering the policy void in case of non-payment; it is by no means certain that a privilege would be sustained in any tribunal. For it may, with plausibility, be argued that no benefit could possibly accrue to the ship after the policy was forfeited; that the underwriters preferred the penalty to the lien. But these considerations are, perhaps, subordinate to the main question, which is: Does our law recognize a maritime lien for unpaid premiums in favor of underwriters? The affirmative of this proposition is held by the following authorities, where the lien is relegated to the lowest class of maritime privileges. *The Dolphin*, 1 Flippin, 580; affirmed in a qualified way, Id. 592; *The Illinois*, decided on the authority of *The Dolphin*, 2 Flippin, 383; *The Guiding Star*, 9 FED. REP. 521; affirmed, 18 FED. REP. 263. In this case the lien was sustained because given by a state statute upon vessels navigating the waters of the state, or bordering thereon.

The following cases decide against the lien: *The Jenney B. Gilkey*, 19 FED. REP. 127; *The John T. Moore*, 3 Woods, C. C. 61; *The Robert L. Lane*, 1 LOW. 388, where the question is referred to, but not decided. See, also, the note to *The Dolphin*, in which the reporter has collected numerous authorities bearing upon the subject. The argument against the lien seems to me to have the most weight. That the contract of insurance upon a ship is in its nature maritime, is no longer an open question. *Insurance Co.* v. *Dunham*, 11 Wall. 1. It is, however, a contract for the personal indemnity of the insured. The credit is given to him, not to the ship. The principle upon which the law recognizes a lien for necessaries is that the ship may thus be enabled to engage in the competitions of commerce. Security is given the material-man, it is true, but the chief benefit is to the ship. It enables her to sail. A contract of insurance in no way aids the ship. She sails no better and no faster because of the insurance. It puts no steam in her boilers, and no wind in her sails. Insured and un-

insured vessels are tossed alike by the tempest, and are alike liable to "the peril of waters, winds, and rocks." Indeed, there are those uncharitable enough to assert that a liberal insurance on a vessel does not tend to make her master and crew more diligent in guarding against danger, or more obstinate in refusing to abandon her to her fate. It is argued with considerable force that the contract is frequently one for an indemnity against partial as well as total loss, and contains numerous provisions for repairs, salvage, etc. But these provisions are incidental to the main agreement, are often optional with the underwriters, and are inserted for their benefit rather than for that of the insured. The advantage to the vessel is in the future, and depends upon many remote contingencies. It is in this respect different from every other service to which a privilege attaches. If insurance were regarded by the admiralty as essential for the proper equipment of the ship, would not the ship's husband and master have been permitted to contract for it? Yet neither can do this, though both have the right, generally, to bind the ship for necessaries.

If, in case of loss, the liens were transferred to the insurance money there would be great cogency in the argument that the ship is benefited. An insured ship would then be able to offer additional security to those furnishing her with necessaries. But such is not the case. As is said in *The John T. Moore, supra:* "In case of loss the maritime liens upon the vessel are displaced and do not follow the insurance money. The money goes to the owner and not to the lienholder, who may insure his own interest." Again, unless distinguishable in some way from maritime privileges in general, the lien, if established, must cover the entire ship and not alone the insurer's interest. It must proceed upon the theory that the credit of the ship is pledged. It must be a lien enabling its holder to seize and sell the ship wherever found. It must follow the proceeds wherever they may be. But all who have an interest in the ship may insure; part owners, lienholders, and mortgagees. Upon what principle of law should the owner of a twentieth part be permitted to create a lien upon the other nineteen-twentieths, because he is in default to the underwriters for the risk they have run on his behalf? A case might easily be imagined where the insurers could seize a ship and sell her, or cause great loss, upon a claim for premiums on a policy issued to a lienholder or mortgagee. Parties having interests of this character ought not to be permitted to protect themselves at the expense of the ship. And yet, if the principle is once admitted, upon what theory can they be excluded? Unless the ship is benefited the ship should not pay.

Another objection is the almost absolute impossibility of ascertaining the existence of the incumbrance. The courts do not and ought not to favor secret liens. They should not be extended. And yet the most diligent inquiry might fail to discover liens of this character. This is not true to the same extent of other maritime privileges. An

examination of the ship or inquiries addressed to her master and crew will in almost every instance reveal her liabilities. But what method of investigation would enable a proposed purchaser or charterer to discover, for instance, that a lien existed in favor of a foreign insurance company for a policy issued to a former part owner?

The interests of the underwriters can be fully protected without the lien, and it is thought that no sound reasoning, drawn from the law maritime, can be invoked in its favor, but, on the contrary, its establishment will lead to confusion and often to injustice, without corresponding advantage. The exceptions of respondent are sustained.

THE GEORGE MURRAY.

(District Court, N. D. Illinois. May Term, 1884.)

1. COLLISION — FAULT—STEAMER AND SCHOONER — NIGHT—SPEED—CHANGE OF COURSE.
   Upon examination of the evidence, *held*, that the steam-propeller Canisteo was alone responsible for the collision with the schooner George Murray, because of her negligence in not giving the schooner so wide a berth as not to have embarrassed or alarmed her, and in using too great speed for some moments before the collision, and after the danger of collision should have been apparent to her officers. *Held, further*, that the only change of course on the part of the schooner was made at the moment of extreme peril, and when allowable as an act *in extremis*, even when, if it had not been made, perhaps there might have been no collision.
2. SAME—LOOKOUT.
   The precaution of a lookout is not indispensable when, from the circumstances, a lookout could not be of service, or when the officer of the deck is in full possession of all the information a lookout could possibly give.

Damages for Collision.

Schuyler & Kremer, for Wiley M. Egan, Petitioner.

Robert Rae, for Phenix Insurance Company.

BLODGETT, J. On the morning of October 14, 1880, a collision occurred in the waters of Lake Michigan, a short distance off Point Waugoschance, between the schooner George Murray and the steam-propeller Canisteo, in which the Canisteo was so badly damaged that she was beached within a short time after the collision. Wiley M. Egan, as owner of the schooner, filed a petition for limitation of liability, and the usual monition against all persons having any claims against the schooner was issued. The Canisteo was bound on a voyage from Chicago to Buffalo, with a cargo consisting in part of 15,000 bushels of corn on which the Phenix Insurance Company had issued a policy of insurance. The cargo of the Canisteo being a total loss by reason of the collision, the insurance company paid the loss, to the amount of $7,200, under the policy, and presented its claim for the amount in its own behalf, asking to be subrogated to all the rights