lien here exists, as I conceive, by the maritime law, irrespective of any credit to the owner, or of the position asserted that every port in the state of the owner's domicile is to be deemed the home port of the ship.

Coming, now, to the questions of the fact involved, the first one for consideration is the compensation contracted to be paid for the use of the two pumps. The contention of the libelants is that the agreed price was $45 and $35 a day, respectively; of the claimant, $35 and $25. Without stopping to discuss the evidence in detail, I am satisfied that the claimant's contention is supported by the proofs; that the libel originally filed proceeded upon a *quantum meruit*, for the service is of persuasive force in the conflict of evidence. I find, however, that the contract did not include the services of an engineer to operate the pumps. I do not find that any agreement was reached between the parties in that regard. Leathem accompanied the pumps, as was his custom, and, as he asserts, "to see that they were used right," the master undertaking to furnish an engineer. Afterwards Leathem operated the large pump, and claims for his services $10 a day for each pump, although, as matter of fact, the smaller one was operated by the engineer of the ship. Leathem was not a licensed engineer. He had some knowledge of operating engines in mills, but was manifestly not an expert at the business. He did, however, with the consent of the master and of the owner, operate the larger pump, and should receive a fair compensation for that service. I see no reason to allow him more than the usual rate shown to be paid for such service, $5 a day, and that compensation should be limited to the days he so actually operated that pump as engineer. So nearly as I can estimate the time from the evidence, which is quite uncertain upon the proof, I determine the number of days he was so employed at 18 and the libelants are allowed $90 for that service.

It is asserted by the claimant that at Sheboygan while the attempts to raise the ship were in progress, and some eight days before she was placed in dry dock, it was agreed between the owner and Leathem, one of the libelants, that the bill for the service of the pumps should be rendered at the rate of $45 and $35 per day, respectively, and that there should be allowed the owner a deduction of 40 per cent. from such charge. The vessel was valued at $30,000, and was not insured; the cargo at $3,800 or $3,900, and was insured. In other words, that there was a secret arrangement, and the cargo was to be charged in general average with the prices stated, but the owner was in fact to pay only 60 per cent. of the amount charged. It was testified by the claimant that at the time of the alleged agreement he had become discouraged at the repeated failures to keep the ship afloat, and was negotiating with others to raise her; that this fact coming to the knowledge of Leathem, one of the libelants, he suggested that there was no need to pay the demanded price of $1,000 to raise the ship; that it should not cost over $250 more to raise her; that it was "an insurance job," and "we have got to get these bills up as high as we can;" and that the cargo would pay 9⅔ per cent. of the cost. In this there is corroboration by the master, except

as to the amount of the rebate, he leaving the room before the close of the negotiations. On the 7th September the master certified to the bill at the rates specified, without any rebate mentioned therein. He asserts that at that time he spoke to Leathem concerning it, who replied "that will be an after consideration." In this he is corroborated by his letter to the owner inclosing the bill, and asking authority to certify it, in which he states the remark of Leathem as to rebate as given in his testimony. Leathem denies this arrangement *in toto*, asserting that no such conversation ever occurred; that the terms of the original contract, as he claimed it to be, viz., $45 and $35 per day for the pumps, were never questioned or disputed by the master; that the subject of rebate was never mentioned, and that the master certified to the bill without reserve and without suggestion of rebate; that he knew the ship was not insured and that the cargo was insured; and that he understood at Menominee from the agent of the insurers of the cargo that 9 per cent. of the expense of raising the vessel would fall upon the insurers. The claimant asserts that he assented to the arrangement without any design to defraud the underwriters of the cargo, and without intention to present other than the actual bill of expenditure, and solely because he discovered that, with the rebate offered, the *per diem* cost of the pumps to him would be $12 less than the contract price as claimed by the master. He insists that Leathem in proposing this arrangement overreached himself, failing to perceive that thereby he would receive less than entitled to by the contract as claimed by the master.

I am persuaded by the proofs that there was an agreement for a rebate. Whether or not the rate agreed upon was 40 per cent. may admit of doubt. It would seem unnatural for Leathem to assent to a deduction which would abate his compensation for the use of the pumps, to that date, as conceded by the libelants, by some $256, exclusive of all compensation as engineer; and this without any resulting benefit to himself, and solely to enable the claimant to recover a lesser amount from the underwriters. If that was the rate agreed upon, it indicates either a lack of discernment and inattention to self-interest not apparent from the appearance of Leathem in the witness box, or a generous impulse growing out of the "hard luck" attending the raising of the ship. The latter seems the only probable motive for such an agreement by him. It is not necessary to determine the fact. It suffices that there was an agreement for a rebate, whatever the rate. This agreement was suggested by Leathem to the claimant with a view to the latter obtaining from the underwriters of the cargo a larger salvage than he ought. I think it was accepted with like intent and purpose on the part of the claimant. His avowed reasons for acceptance impress me as uncandid. Leathem suggested, "It is an insurance job; we have got to get these bills as high as we can." The claimant demurred to the price stated, asserting they were not according to the contract. Leathem said, "What is the matter with a rebate?" The claimant answered, "I listened to that readily, and said, 'All right.'" The master's version is that the owner replied, "Oh, that is different." All this occurred before

any rate of rebate was suggested. Such an offer is susceptible of but one interpretation. It was a bald suggestion to defraud the underwriters. The claimant's ready assent compels the conviction that he was quick to entertain the offer. Honesty does not listen to suggestions of fraud with such easy complacency, or yield with such ready assent. Honesty is more robust. I am satisfied that both parties conspired to perpetrate a fraud upon the underwriters. Indeed, it was asserted by counsel, at the bar, without dissent, that such agreements are not infrequent in cases of salvage, and that marine underwriters well understood that they were thus imposed upon. If insurance companies submit to such imposition, they are culpable, in a sense condoning the offense. Such contracts will not be tolerated in courts of justice. They will not consider them nor enforce them against either party. They will only deal with them in the way of relieving innocent victims of the fraud, or of punishing the guilty participants therein.

It is suggested that the owner could not have contemplated a fraud, because the cargo could not be subjected to any part of the expense accruing subsequently to its removal from the ship. Ordinarily such subsequent expense is incurred to save the ship, and not for the benefit of the cargo. There may, however, be cases where such subsequent expense would constitute a claim to general average. It may be that here the cargo is not liable in general average for any portion of the expense of raising the ship, whether before or after its removal. It may be that it may legally be charged for a proper share of the subsequent expense. That depends upon facts not disclosed by this record, and is a question not in controversy here. See *McAndrews* v. *Thatcher*, 3 Wall. 347; *Kemp* v. *Halliday*, 6 Best & S. 723, 34 Law J. Q. B. 233, 243; *Job* v. *Langton*, 6 El. & Bl. 779, 26 Law J. Q. B. 97; *Moran* v. *Jones*, 7 El. & Bl. 523, 26 Law J. Q. B. 187; *Walthew* v. *Mavrojani*, L. R. 5 Exch. 116.

However that may be, it is clear that both parties supposed that the cargo was liable in general average, and acted upon that presumption. Counsel for claimant suggested that the claimant knew otherwise. There is nothing to support the suggestion. To the contrary, from the occupations of the parties, the libelant would be in better position to know the facts and the law applicable in such case than the claimant. If both knew the cargo was not liable, there is no possible motive shown for any such agreement for rebate.

It is urged by the libelants that the bill certified by the master should be held conclusive of the contract of hiring. Settlements by the master, when deliberately and fairly made, are upheld. *The Senator*, Brown, Adm. 545. This bill was, however, presented and certified pursuant to and in furtherance of the corrupt agreement considered. It is tainted with fraud, and cannot be sustained. It does not speak the agreement of the parties. It declares the fraudulent contract sought to be imposed upon the underwriters.

With respect to the claim to abatement of the amount due because of alleged want of good faith and skill on the part of the libelants, unreasonable delay in the work, and inefficiency of the pumps, but little

need be said. There was incompetency somewhere with respect to this work. It cannot otherwise be accounted for that so much time should have been consumed in raising the ship within a harbor and in smooth and shallow water. That incompetency, I think, rests with the master and owner, not upon the libelants. The latter were not engaged as wreckers, and were not in control of the work. They hired to the master their pumps, and operating service for one of them, at a *per diem* compensation. They were subject to discharge at any time at the will of the master. He, not they, controlled the operations. If the pumps were inefficient, or Leathem unreasonably prolonged the work, the master had the remedy in his own hands. He could put an end to the employment at will. Retaining the service, the claimant cannot refuse compensation, or claim abatement of the contract price. *Starke* v. *Crilley*, 59 Wis. 203, 18 N. W. Rep. 6. I pronounce for the libelants upon the basis stated, with interest from the date of filing the libel, and for costs.

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## THE BRINTON.

## THE WILKESBARRE.

## ULRICH *v.* THE BRINTON AND THE WILKESBARRE.

(*District Court, S. D. New York.* May 4, 1892.)

1. COLLISION—NARROW CHANNEL—SWINGING TOW—FAILURE TO REVERSE IN TIME.
A tug and tow and a steamboat attempted to pass each other in the Kill von Kull, in a channel 1,000 to 1,100 feet wide, and exchanged a signal of one whistle. The evidence showed that the tail of the tow, which was going with the tide, had swung at the time of collision nearly three fourths of the distance across the channel; also that the steamboat did not reverse, because not thought necessary, although the swinging of the tow was apparent. *Held*, that the collision was due to the fault of both steamers.

2. SAME—DAMAGES—PERSONAL INJURY—NOT PROXIMATE RESULT.
A boatman, who is not struck or thrown into the water by the blow of a collision, but of his own volition remains aboard the disabled boat after collision, his health suffering in consequence of the exposure, cannot charge his personal injury as an item of the damages occasioned by the collision.

In Admiralty. Libel by Napoleon B. Ulrich against the steamtug Brinton and the steamer Wilkesbarre for collision. Decree for libelant against both vessels.

*Hyland & Zabriskie*, for libelant.

*Robinson, Bright, Biddle & Ward*, for the Brinton.

*Wing, Shoudy & Putnam*, for the Wilkesbarre.

BROWN, District Judge. On the 15th of December, 1891, about daybreak, as the steamtug Brinton was taking a tow of light canal boats, consisting of four tiers, with four boats in each tier, on a hawser of 20 fathoms, to the westward through the Kill von Kull in a strong flood tide, the tail of the tow, when in the vicinity of the plaster works at New