

of the land which is the subject of controversy, and for damages. During the trial, upon a motion for nonsuit by the defendant company, the court announced that the action could not be maintained in the form in which it then was, and that, unless an application for leave to amend was made and allowed, the motion for nonsuit would be granted. Thereupon the defendant in error made application for leave to file his second amended complaint, which motion was allowed, and the complaint in its present form was filed. The defendant in error excepted to the ruling of the court to the effect that ejection would not lie, and he now requests a review of this ruling, in the event of a reversal by this court of the judgment in his favor; and to this end he relies upon a stipulation by which "it is stipulated and agreed that plaintiff's exceptions upon the trial to the rulings of the court, as shown by the transcript upon defendant's writ of error, may be considered upon the hearing in the circuit court of appeals with the same force and effect as if a writ of error had been allowed upon plaintiff's part, and duly certified by the court upon the trial." The decision already announced is decisive of the question. Moreover, the objection was waived by the defendant in error, by his election to amend his complaint and proceed as he has done. It was open to him to have stood upon his right to proceed in ejection, or to adopt the course he has taken. He was at liberty to take one of two roads, but not both; nor can he at the same time accept and reject the judgment under review. It follows that the judgment of the court below should be reversed, and the case remanded for further proceedings in accordance with this opinion.

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#### THE BRANDYWINE.

(Circuit Court of Appeals, Fourth Circuit. May 3, 1898.)

No. 258.

**1. ADMIRALTY APPEALS—FINDINGS OF COURT BELOW.**

The circuit courts of appeals, in reviewing admiralty cases, are not limited to questions of law; but it is the settled practice of these courts to give great weight to the conclusions of fact by the trial judge, unless they are based on evidence manifestly insufficient, and in cases of conflicting testimony, apparently of equal merit, to follow the conclusions reached below.

**2. SALVAGE—AMOUNT OF COMPENSATION.**

An award of \$500 upon a salvaged value of \$1,522.50 held excessive for services rendered by the first to arrive and most efficient of a number of tugs which pumped water into a burning barge; the time occupied being about 6½ hours, and there being no danger to life or property. The award should be reduced on appeal to \$250.

Appeal from the District Court of the United States for the Eastern District of Virginia.

Robert M. Hughes, for appellant.

T. S. Garnett, for appellee.

SIMONTON, Circuit Judge. This is an appeal from a decree of the district court of the United States for the Eastern district of Virginia. It is a case of salvage. The barge Brandywine, on the

morning of 20th April, 1897, was lying at the pier of Lambert's Point, near Norfolk. She was a large barge, some 190 feet in length, drawing when loaded 23½ feet, engaged in carrying coal, and with a capacity of about 1,800 tons of coal. She had two decks. She had no propelling power of her own, but was equipped with an engine used in the hoisting apparatus. This engine was forward in the between decks, in the forward part of the deck, in an engine room the whole width of the vessel, about 30 feet from the stem, back where the bulk-head comes. The engine room was entered by what was called the "companion way hatch," not the "fore hatch." The crew of the barge consisted of four men. Between 4 and 5 o'clock of this morning, the master of the barge was aroused from sleep by the call of a watchman on the pier that the barge was on fire. Calling his men, he got out, and found the fire was in the engine room, and getting some assistance from the crew of a four-mast schooner near, he began to get the fire hose from the pier aboard his barge, and to put it in the hatch of the companion way. Just at that time, the tug, Emma Kate Ross, which was lying some distance off the pier with scows in tow, discovered the fire, and leaving her scows at anchor, went at once to the Brandywine. Placing her bow opposite the bow of the barge, she put on two streams of water, one from a pipe on her own bow, the other from the deck of a pile driver alongside of her. Her deck was 10 feet below the deck of the barge, and the deck of the pile driver about on a level with the barge's deck. The Emma Kate Ross is a large tug, equipped with a powerful fire apparatus, her pump having the capacity of 6,000 gallons a minute. With these two streams she played water on the barge, chiefly on her deck and bow. After the Ross had been at the barge about a half or three-quarters of an hour, another tug, the Little Nell, came to the assistance of the latter, and began pumping water into her, followed in rapid succession by the Pocahontas, Louisa, Alvah Clark, and E. B. McCauly, all tugs more or less suitably equipped for extinguishing fires, but none as well equipped as the Ross. For some time no men from the Ross went aboard the barge. But, after men from one or more of the other tugs boarded the barge, the master and crew of the Ross did so also. The testimony is very conflicting as to the amount and effectiveness of the assistance rendered to the barge by the Emma Kate Ross. She stood by the barge as long as she was at the pier, pumping water on and into her. About 9 o'clock two of the other tugs towed her away to some flats near. The Ross accompanied them, and, as soon as they reached the flats, rendered efficient service in turning the head of the barge to the wind. But the witnesses differ very much in their testimony upon the point who put out the fire. The court below, although no specific findings of fact are given, evidently solved this conflict in favor of the Emma K. Ross, by awarding her \$500 as a salvage award.

This court is not limited, as the supreme court was under act of 1875, to the review of questions of law only in an admiralty appeal. It can also review the findings of facts. *The Havilah*, 1 U. S. App. 1, 1 C. C. A. 77, and 48 Fed. 684; *The State of California*, 7 U. S. App. 20, 1 C. C. A. 224, and 49 Fed. 172; *The Philadelphian*, 21 U. S. App.

90, 9 C. C. A. 54, and 60 Fed. 423. Yet it is now the settled practice of this court to give great weight to the conclusions of fact by the trial judge, unless they are based upon evidence manifestly insufficient, and in cases of conflicting testimony, apparently of equal merit, to follow the conclusions reached below. The Wilhelm, 16 U. S. App. 356, 8 C. C. A. 72, and 59 Fed. 169; The Alejandro, 15 U. S. App. 98, 6 C. C. A. 54, and 56 Fed. 621; The Lucy, 20 C. C. A. 660, 74 Fed. 572. In subsequent discussion of this case, we assume that the services rendered by the Emma K. Ross were salvage services of meritorious character; and the only remaining question is as to the amount of the award.

The barge Brandywine, after the fire was extinguished, was sold at auction, her owners being present, and was bought by a third person for \$1,522.50. This is the gross value of the salvaged property to her owner, and the award must be ascertained with this sum as a factor. As has been seen, the district court awarded to the Emma K. Ross alone \$500, a third of this sum. The services of the other tugs do not seem to have entered into the estimate. We think this allowance excessive. The services of the Emma K. Ross had some of the elements of salvage service,—promptness and efficiency. They had no element of danger to life or property. Nor were they rendered to a vessel hopeless of aid from any other quarter than the salvaging vessel. Nor were they rendered alone. The other tugs were with her, rendering aid, if not as effective as that rendered by the Ross, certainly contributing materially in making her assistance successful. The capacity and efficiency of those other tugs are demonstrated by the fact that after the Emma K. Ross had left the barge, the fire being absolutely to all appearance subdued, it broke out afresh, and they were without her aid able to extinguish it entirely. For their services their owners are content with \$50 each. The Emma K. Ross was at work from 4:30 a. m. to 11 a. m.; the Little Nell from about 5 a. m. to about 3 p. m.; and the other tugs left about an hour before her. The cases in this circuit of salvage for rescue from fire are very few. The Alice Minot, 30 Fed. 212, was a case in which a cotton vessel afire was towed by a tug into deep water, away from her wharf, and was there sunk by her crew who scuttled her. The court of the Eastern district of Virginia awarded the tug for salvage \$500. In that case the value of the property saved was \$72,000. In The Cherokee, 31 Fed. 167, a steamship of the Clyde Line, with a full cargo, was found to be afire very soon after leaving her dock. The tug Monarch went to her rescue, began pumping on her with powerful pumps, and towed her afire to her wharf. Then the fire department took charge of her, and extinguished the flames. The district court for the district of South Carolina awarded \$850 for the salvage service. The property at peril was valued at \$272,500. The S. B. Baker, 23 Fed. 109, decided by the district court for the Southern district of New York, is a case which somewhat resembles the case at bar. A fire broke out during a westerly gale among the cotton bales which composed the cargo of the lighter Baker. Upon a signal from the superintendent of the wharves, a tug towed her out, with her burning cargo, from the slip into the river, and played upon the fire with her small hose un-

til the arrival of two city fire department tugs. The tug then towed the three vessels (the lighter and two steam fire department tugs) to a place convenient for taking out the burning cotton. The value of the cotton saved was \$20,000; of the lighter, \$3,000; and of the tug, \$14,000. Held, that \$750 was a proper salvage award. This award was reduced on appeal in the circuit court to \$350. It is true that new evidence in the higher court influenced this reduction. It is evident, however, that the court thought that the award of the district court, without this new evidence, was high enough. See, also, *The Alice Clark*, 39 Fed. 621. In the light of these cases, and taking into consideration the number of tugs actively engaged in the same work and at the same time with the *Emma K. Ross*, we think that \$250 is a liberal reward to her for her salvage services on that occasion. Let the case be remanded to the district court, with instruction to modify its decree in reducing the salvage award to this sum of \$250.

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BUTLER v. UNITED STATES.

(District Court, D. Indiana. June 15, 1898.)

No. 5,796.

1. FEES OF COURT OFFICERS—ATTENDANCE AND PER DIEMS.

Rev. St. §§ 574, 638, declare that the circuit and district courts sitting in equity or admiralty shall be deemed "always open" for the transaction of certain business. The act of March 3, 1887, forbids payment of per diems or attendance fees except for days "when the court is opened by the judge for business, or business is actually transacted in court," etc. *Held*, that the clerk is entitled to attendance fees for days between regular terms on which he is required to attend, and does attend, on the transaction of business by the judge.

2. SAME—CLERK'S FEES—DOCKETS AND INDEXES.

When, after docket entries, indexes, etc., have been made, a criminal case is transferred from one place of holding the district court to another, and then discontinued in the former place, the clerk is entitled to his docket and index fees therefor, although the costs have not been taxed at the place to which the case is removed.

3. SAME—SWEARING WITNESSES.

Where the witnesses for both parties are sworn at the same time, pursuant to an order of the judge, the clerk is entitled to have his fees therefor paid by the government.

4. SAME—AFFIDAVITS OF INDIGENT DEFENDANTS.

The clerk is entitled to a fee of 10 cents each for filing and entering affidavits of indigent defendants in criminal cases, on which the court makes an order for summoning witnesses in their behalf.

5. SAME—AFFIDAVITS TO MARSHAL'S ACCOUNTS.

The clerk is entitled to fees for taking the affidavit of the marshal proving the accounts rendered by him, since such proofs are for the convenience and protection of the government.

The facts in the above-entitled cause are stated in the finding of the court as follows:

(1) The court finds that the material averments of the petition and the facts alleged therein are true.

(2) And the court finds that Noble C. Butler, the petitioner, was on the filing of the petition, and is now, a citizen, and resident of the city of Indianapolis