

Equity courts may decide both fact and law, but they may, if they see fit, refer doubtful questions of fact to a jury. Findings of the kind, however, are not conclusive, and, if not satisfactory, they may be set aside or overruled; but if the finding is satisfactory to the Chancellor, the practice is to regard it as the proper foundation for a decree. *Harding v. Handy*, 11 Wheat. 103. Such findings are regarded as influential in an appellate court, but they are not conclusive. *Goodyear v. Rubber Co.* 2 Cliff. 365; *Brockett v. Brockett*, 3 How. 691; 2 Dan. Chan. Prac., 4th Am. ed., 1072. Consequently counsel were allowed to review the whole evidence in the case, and the court has followed the course adopted by the counsel at the argument, and the result of the review of the evidence is, that the court is clearly of the opinion that the findings of the jury were correct in all material respects, and that there is no error in the record.

*Decree affirmed.*

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#### THE "ALABAMA" AND THE "GAME-COCK."

Where a collision occurs at sea, each vessel being at fault, and damage is thereby done to an innocent party, a decree should be rendered, not against both vessels *in solido* for the entire damage, interest, and costs, but against each for a moiety thereof, so far as the stipulated value of each extends; and it should provide that any balance of such moiety, over and above such stipulated value of either vessel, or which the libellant shall be unable to collect or enforce, shall be paid by the other vessel, or her stipulators, to the extent of her stipulated value beyond the moiety due from her.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The case was argued by *Mr. Edwards Pierrepont* for the "Alabama," by *Mr. W. R. Beebe* for the "Game-cock," and by *Mr. John E. Parsons* for the libellant.

MR. JUSTICE BRADLEY delivered the opinion of the court.

Without entering upon a discussion of the evidence in this case, it is sufficient to say, that, having carefully examined the same, we see no reason to be dissatisfied with the conclusions of fact arrived at by the District and Circuit Courts. On the question of blame, the conclusion is, that both the "Alabama" and

the "Game-cock" were in fault, and contributed to the loss; and that the "Ninfa," which was in tow of the "Game-cock," and suffered the loss, was not in fault. On this finding arises the question of law which is of principal interest in the case; namely, against whom, and in what manner, should the damage be adjudged? The "Alabama" was a large steamer, and was bonded for \$100,000; whilst the "Game-cock" was a small tug, bonded at the stipulated value of \$10,000. The loss was found to be about \$80,000. The District Court rendered a decree against both for the whole, regarding them as liable *in solido*. The Circuit Court, on appeal, reversed this decree, and divided the loss between them, rendering a decree against each for one-half the amount. The court adopted this division of liability in obedience to the supposed views of Dr. Lushington, in the case of *The Milan*, 1 Lush. 404, which was followed in the case of the steamboat "Atlas," both by the District and Circuit Courts of the Southern District of New York. 4 Ben. 27; 10 Blatch. 459. The theory which underlies this decision seems to be, that the "Game-cock" and her tow, the "Ninfa," being moved by one power, are to be regarded as one vessel, the same as a ship and her cargo; and that the two combined, whatever be their mutual relations to each other, are, as regards the "Alabama," affected by the fault of the tug; and that those vessels on the one side, and the "Alabama" on the other, according to the admiralty rule in collision cases, must each bear half of the damage. The rule has been thus applied when the ship and her cargo constituted one opposing force, and a single ship the other; the entire damage to ships and cargo being equally divided between the two ships. Where both ship and cargo on one side belong to the same owners, the case is no way different from that of the two ships alone being injured. And even so long as the ship having cargo is able to respond to half the loss, no difficulty arises; for the other ship is liable for the balance, so that the owner of the cargo injured will lose nothing. But, if the carrying ship is unable to respond to half the damage sustained by her cargo, the deficiency will be entirely lost if the other offending vessel can only be made liable for a single moiety. And yet it would seem to be just that the owner of the cargo, who is supposed to be free from

fault, should recover the damage done thereto from those who caused it; and if he cannot recover from either of them such party's due share, he ought to be able to recover it from the other. The same reason for a division of the damage does not apply to him which applies to the owners of the ships. The safety of navigation requires that if they are both in fault, they should bear the damage equally, to make them more careful. And this consideration may well require, or at least justify, a primary award against each of a moiety only of the damage sustained by the cargo, for as between themselves that would be just. But if either is unable to pay his moiety of damage, there is no good reason why the owner of the cargo should not have a remedy over against the other. He ought not to suffer loss by the desire of the court to do justice between the wrong-doers. In short, the moiety rule has been adopted for a better distribution of justice between mutual wrong-doers; and it ought not to be extended so far as to inflict positive loss on innocent parties.

In the cases which have been cited from Lushington and others, it does not appear that any difficulty arose from the inability of either of the condemned parties to pay their share of the loss. No such inability seems to have existed. And when it does not exist, the application of the moiety rule operates justly as between the parties in fault, and works no injury to others. It is only when such inability exists that a different result takes place. The cases quoted, therefore, may have been well decided, and yet furnish no precedent for the case under consideration.

Conceding, therefore, that a vessel in tow, and without fault, is to be regarded as sustaining the same relation to the collision which is sustained by cargo (and it seems fair thus to consider it), we think that the decree of the Circuit Court was erroneous, and that a decree ought to be made against the "Alabama" and the "Game-cock," and the irresponsible stipulators, severally, each for one moiety of the entire damage, interest, and costs, so far as the stipulated value of said vessel shall extend; and any balance of such moiety, over and above such stipulated value of either vessel, or which the libellant shall be unable to collect or enforce, shall be paid by

the other vessel or her stipulators to the extent of the stipulated value thereof beyond the moiety due from said vessel.

This is substantially the form of decree sanctioned by this court in *The Washington and The Gregory*, 9 Wall. 516, a case involving similar principles, although the particular point was not fully discussed in that case.

*Decree reversed, and record remanded with instructions to enter a decree in conformity with this opinion.*

MR. JUSTICE CLIFFORD dissented.

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#### HOT SPRINGS CASES.

RECTOR *v.* UNITED STATES; HALE *v.* UNITED STATES; GAINES ET AL. *v.* UNITED STATES; RUSSELL *v.* UNITED STATES.

1. The third section of an act of Congress, approved April 20, 1832 (4 Stat. 505), which is still in force, enacts that four sections of land, including the hot springs in Arkansas, shall be reserved for the future disposal of the United States, and shall not be entered, located, or appropriated for any other purpose whatever. The Indian title to them was not extinguished until Aug. 24, 1818, nor were the public surveys extended over them until 1838, nor has the sale of them ever been authorized by law. No part of said sections was, therefore, ever subject to pre-emption or to location; and no claim thereto has been validated or confirmed by any act of Congress.
2. The "Act for the relief of the inhabitants of the late county of New Madrid in Missouri Territory, who suffered by earthquakes," approved Feb. 17, 1815 (3 Stat. 211), required the following steps to be taken: Application to the recorder of land-titles, showing the party's claim, and praying a certificate of location — certificate of location issued by the recorder, setting forth the amount of land to which the applicant was entitled — application to the surveyor, presenting the certificate of location, and designating the lands which the party desired to appropriate — survey and plat made by the surveyor — return of the survey and plat to the recorder to be filed and recorded, with a notice designating the tract located and the name of the claimant — certificate of the recorder, stating the facts, and that the party was entitled to a patent — transmission of this certificate to the General Land-Office — the patent. In addition to these requisites, the land thus appropriated must have been a part of the public lands of the Territory, the sale of which was authorized by law. A survey, therefore, of part of said four sections made in 1820, if never returned to the recorder's office, did not within the meaning of said act, or of the act of April 26, 1822 (4 Stat. 668),