

exceptions to a master's report are entertained, dealing with facts to which his attention was never called. This practice does not commend itself. It frequently operates a surprise, and it shuts the door to any explanation. It gives room for the display of skill and strategy on the part of ingenious counsel. It may secure success at the expense of right. When there exists a rule of practice, inculcated and approved by recognized authority, it should be followed. To prevent misapprehension, it is best to state that we do not require the conclusions of the master on matters of law to be first excepted to before him. This is unnecessary. 2 Daniell, Ch. Prac. 1314. But we do require that matters of fact upon which exceptions to his report are made be brought to his attention, in order that he might report them. In the case at bar the master was directed "to inquire as to the facts stated in the petition, and to report to the court what amount of money, if any, is due to the said W. N. Camp by reason of the facts stated in the petition, together with any other matter specially deemed pertinent by the master, or required by any of the parties to be so stated. We find in his report the amount claimed by the petitioner, and we find also certain items introduced by respondent as a set-off to his claim, passed on by the master. We cannot discover that the sum claimed as liquidated damages was ever called to his attention, or that he was ever requested to report on it. This court, however, did not dismiss the appellant for not observing this rule, but it followed the course adopted by Justice Bradley in the cases quoted from Woods, and, contenting itself with calling attention to the proper practice, went on, and decided the case as if the objection had been made in the proper time and in the proper place. The court, as constituted, which rendered the decree complained of, have been consulted by the court to whom the petition was addressed. No one of the judges concurring in the judgment desires a rehearing. The motion is denied.

LATTA et al. v. GRANGER.

(Circuit Court of Appeals, Eighth Circuit. May 6, 1895.)

No. 446.

1. APPEAL—DECISION AND MANDATE—DUTY OF COURT BELOW—ACCOUNTING OF RENTS AND PROFITS—CONFLICTING EVIDENCE.

One H. leased from plaintiff a lot in the Hot Springs reservation, Ark., but was subsequently ousted by the United States under claim of superior title. He then leased the lot from the United States, and afterwards purchased it according to an award made by the commissioners appointed to adjust conflicting land claims in the reservation. Act March 3, 1877 (19 Stat. 377). Afterwards, plaintiff obtained a decree against H.'s grantees, declaring that they held the title in trust for him, and requiring conveyance thereof. On appeal, the supreme court confirmed plaintiff's title, but reversed the decree because the account of rents and profits had not been properly stated, saying, in substance, that rents and profits should not be allowed prior to the commencement of the suit, and that no increased rent should be allowed on account of improvements. *Held*, that this decree merely directed the circuit court to ascertain the fair rental value, and plaintiff was not entitled to have the rents measured by the terms of the original lease from him to H.

2. SAME—REVIEW—CONFLICTING EVIDENCE—PRESUMPTIONS.

Findings of fact by the trial court upon conflicting evidence are presumptively correct, and will not be reversed when not unreasonable in themselves or not clearly in conflict with the preponderance of the evidence.

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

The material facts out of which this suit arises are as follows: On June 26, 1875, the appellant's testator, William H. Gaines, being in possession of lot sixteen (16) in block sixty-eight (68) of the city of Hot Springs, Ark., under a claim of ownership, leased the lot for one year, with the right of renewal from year to year, to Perry Huff. Huff occupied the lot under said lease until June 1, 1876, when the United States took possession of the lot as property belonging to the United States, ousted the then occupants, and subsequently leased the lot to Huff through the agency of a receiver appointed by the court of claims. On March 17, 1880, Huff sold all his right, title, and interest in the lot to Vina Granger, the present appellee, and to Eva M. James, the latter persons well knowing that all of Huff's interest in the lot was derived from the aforesaid leases from Gaines and from the United States. Subsequently the commissioners appointed pursuant to the act of March 3, 1877 (19 Stat. 377, c. 108), to adjust conflicting claims to land situated within the Hot Springs reservation, awarded to Perry Huff the right to purchase the lot now in controversy, and the latter purchased the same, and received a patent therefor from the United States. After the decision in *Rector v. Gibbon*, 111 U. S. 276, 4 Sup. Ct. 605, to wit, on May 23, 1884, this action was begun by the present appellants against Perry Huff, Eva M. James, and Vina Granger to compel them to transfer the legal title so as aforesaid acquired from the United States to the appellants, upon the ground that the legal title acquired by them from the government was held in trust for the appellants. A decree as prayed for was rendered by the circuit court against the appellee, Vina Granger, in April, 1887, the suit having been theretofore discontinued as against Huff and James. From said decree an appeal was prosecuted to the supreme court of the United States by the appellee. By the decision of the supreme court on such appeal the present appellants' right to the lot in controversy was established and confirmed, but the decree in their favor was reversed, because the account as to rents and profits had not been properly stated, and because the allowances in that behalf made were deemed inequitable. The decision of the supreme court is reported under the title of *Goode v. Gaines*, 145 U. S. 141, 154, 12 Sup. Ct. 839. The second trial of the case resulted in a decree against the appellants for \$2,316.23, that being the sum which the master found had been paid by the appellee, Vina Granger, for taxes and for improvements made on the lot, and in obtaining a title to the land from the United States, over and above the sum justly chargeable to her on account of rents and profits. From the last-mentioned decree the appellants have prosecuted an appeal to this court.

U. M. Rose (W. E. Hemingway and G. B. Rose, on the brief), for appellants.

John McClure, for appellee.

Before SANBORN and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The present appeal presents but two questions for our consideration. The first is whether the master should have computed the rents of the property in controversy at the rate specified in the lease from Gaines to Huff of date June 26, 1875; and the second is whether the sum allowed by the master on account of rents was too small, even though the aforesaid lease does not govern in de-

termining the rental value of the property. The appellants maintain the affirmative of both of these propositions.

It will be observed by reading the opinion rendered in this case on the former appeal to the supreme court of the United States (vide *Goode v. Gaines*, 145 U. S. 141, 154, 12 Sup. Ct. 839), that the first decree was reversed because the allowance in favor of the present appellants on account of rents was deemed excessive and inequitable, in view of the peculiar relations of the parties to the suit, and the cause was remanded to the circuit court solely for the purpose of having the rent account restated. The lease executed by *Gaines* in favor of *Huff* was described in the bill of complaint, and the terms and conditions thereof, as well as the amount of rent therein reserved, could not have escaped judicial observation. Nevertheless, no direction was given to the circuit court to cause the rents on a second hearing to be computed at the rate reserved in the lease, nor was any intimation given to that effect. After pointing out the circumstances that had given rise to the litigation, and after alluding to the fact that the defendants had not acted knavishly or in bad faith, the supreme court said, in substance, that the defendants ought not to be charged with the rents prior to May 23, 1884, that being the date when the suit was instituted; that they should simply be charged with the rental value after that date, and that "no increased rents should be allowed on account of the improvements." If the court had intended that the rents should be computed at the rate fixed in the lease, and that the lease should control in estimating the rental value, it is obvious that the clause above quoted from the opinion would have been entirely unnecessary. We think, therefore, that the decision directed the circuit court, in effect, to ascertain the fair rental value of the lot without reference to the rent reserved in the original lease, and upon that theory the circuit court evidently acted.

It may be well to observe, in support of the view which appears to have been taken by the supreme court, that, inasmuch as the appellee, *Vina Granger*, bought the lot in controversy from *Huff* in the year 1880, after the latter had been ousted of possession under the lease, and had attorned to the United States, the true owner, it is by no means apparent that any such privity existed between her and the original lessor, *Gaines*, as would, in any event, render her amenable to the provisions of the lease and liable for the rent therein reserved. But, be this as it may, it was clearly the duty of the circuit court to follow the directions given by the supreme court in the opinion delivered on the first appeal, and, having done so, no error was committed of which the appellants can be heard to complain on the present appeal.

With respect to the second question above proposed, it is sufficient to say that the evidence contained in the record is not of such character as would warrant us in overruling the finding of the circuit court, and the finding of the master as well, with respect to the rental value of the property in controversy. In *Warren v. Burt*, 12 U. S. App. 591, 600, 7 C. C. A. 105, 58 Fed. 101, this court said that where the trial court has considered conflicting evidence, and made

its finding thereon, the finding must be taken as presumptively correct, and must be permitted to stand, unless an obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence. To the same effect are the decisions in *Tilghman v. Procter*, 125 U. S. 136, 8 Sup. Ct. 894; *Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. 355; *Donnell v. Insurance Co.*, 2 Sumn. 371, Fed. Cas. No. 3,987; *Richards v. Todd*, 127 Mass. 172. In the present case, we cannot say that the circuit court obviously erred in assessing the rental value of the property. The question was one with respect to which different minds might well entertain different views, and the testimony with respect to the rental value was conflicting. The conclusion reached by the circuit court is not in itself unreasonable, and is not clearly in conflict with the preponderance of evidence. It must, therefore, be allowed to stand. The decree of the circuit court is hereby affirmed.

LATTA et al. v. NEUBERT. SAME v. COHN. SAME v. RUGG (two cases).
SAME v. GARNETT. SAME v. SUMPTER et al.

(Circuit Court of Appeals, Eighth Circuit. May 6, 1895.)

Nos. 451, 457, 458, 459, 460, and 477.

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

U. M. Rose, W. E. Hemingway, and G. B. Rose, for appellants.
John McClure, for appellees.

Before SANBORN and THAYER, Circuit Judges.

THAYER, Circuit Judge. These cases were submitted by counsel under a stipulation that they should abide the decision in *Latta v. Granger* (which has just been decided) 68 Fed. 69. In accordance with the stipulation, the decrees rendered by the circuit court are affirmed.

MANHATTAN TRUST CO. v. SIOUX CITY & N. RY. CO. (TRUST CO. OF
NORTH AMERICA, Intervener).

(Circuit Court, N. D. Iowa, W. D. June 1, 1895.)

1. RAILROAD MORTGAGES — AFTER-ACQUIRED PROPERTY — LANDLORD'S LIEN — IOWA STATUTE.

The S. Ry. Co. made a mortgage covering after-acquired property, which was recorded in W. county, Iowa, on January 31, 1890. On January 21, 1890, the railway company took a lease of certain lands for depot purposes within W. county. Most of the rolling stock acquired by the railway company was shown to have been delivered to it before being used on such depot grounds, and none was shown to have been used there before delivery to the railway company. *Held* that, as to all rolling stock acquired after the recording of the mortgage, the lien of the mortgage attached immediately upon its delivery to the company in W. county, or upon its coming within that county, and before any lien could attach in favor of the landlord under the Iowa statute (McClain's Code, § 3192), giving a landlord a lien for rent on any personal property of the tenant used on the premises, during the term.