

which it relates. In the state courts in this state all cases, at the option of either party, must, on issues of fact, be tried before a jury. The common law of England, as now practiced and understood in its application to evidence, is the general rule enjoined by statute upon the courts of this state. All the provisions of the Texas statute in reference to taking depositions are manifestly made "in order to prevent a failure or delay of justice." And I do not perceive any sound reason to forbid the courts of the United States in this state granting commissions to take depositions in every case where the parties could obtain such a commission, if the suit or action was in the state courts. If we can and should so grant them, we may order the clerk to issue them in all such cases by a general order or a rule of court, to relieve the judges from receiving and acting upon separate applications and the parties from the inconvenience and uncertainty of finding one of the judges of the court. Nor do I perceive any difficulty in the fact that the commission issues to any clerk of the district court, judge or clerk of the county court, or any notary public of (say) Dallas county, Texas. It is matter of common knowledge that, either under rules of court or consent of parties, the testimony of witnesses living out of the county where the case is to be tried, has heretofore commonly been taken by deposition, and must always of necessity continue to be so taken in this state. And, if the circuit court cannot do what I conceive we have tried by our rule 14 to do, parties litigating in this court will be practically remitted to the grace and courtesy of their adversary. In the absence of controlling authority, I am unwilling to so limit the power of this court. The motion for new trial is refused.

NATIONAL FURNACE CO. v. MOLINE MALLEABLE IRON WORKS.

(Circuit Court, N. D. Illinois. January 7, 1884.)

SPECIAL APPEARANCES—WHEN ALLOWED, AND FOR WHAT PURPOSES.

A defendant may, without leave of court, enter a special appearance for the purpose of objecting to the jurisdiction of the court, by virtue of the steps taken to bring him in or serve him with process, or for any other reason, but a defendant interested in a controversy cannot be allowed to come in under a special appearance and avail himself of all the chances of a decree in his favor and retire without harm if the decision of the court should be against him.

In Equity.

F. Ullmann, for complainant.

Osborn & Lynde and Hill, Wood & Boyd, for defendant.

BLDGETT, J. In this case a cross-bill is filed by the defendant Wheelock, asking for the foreclosure of the trust deed and chattel mortgage described in the original bill as having been given by the

defendant company to Charles F. Heimingway, to indemnify complainant in the cross-bill and others who had become sureties for said company; and George H. Hill, who is one of the beneficiaries named in said trust deed and mortgage, is made a defendant, but with an allegation that he should not be allowed to participate in such security, because, as charged, said Hill had, as a director of the company, assented to the incurring of indebtedness by said company to an amount in excess of its capital stock. On the filing of this cross-bill a rule was entered that a copy be served on defendant Hill, who was a resident of Cincinnati, Ohio, and that said Hill plead, demur, or answer to the said cross-bill within 20 days. Mr. Hill now asks that he be allowed to enter a special appearance for the purpose of objecting to the proof, or of demurring to part of the cross-bill, or answering so much thereof as seeks to charge the property of the corporation with a lien, or that prays a decree as to the validity of the deed of trust, without submitting to the jurisdiction of the court as to any other matter; that is, he is asking to enter a special appearance in the case. If this defendant wishes to enter a special appearance for the purpose of objecting to the jurisdiction of the court, by virtue of the steps taken to bring him in or serve him with process, or for any other reason, I think he has the right to do this, without a special leave of court; but, as I understand this motion, he asks leave to appear and contest all the relief claimed in the cross-bill, but does not wish to so submit to the jurisdiction of the court as to authorize the court to proceed against him, so far as his right to indemnity under the trust deed is concerned, or to enforce, directly or indirectly, any liability he may have incurred as a director of the company, if he shall be shown to have assented to the incurring of indebtedness to an amount in excess of the capital stock of the company.

It is clear from the tenor of this original bill and the Wheelock cross-bill that the questions raised in this case will be—*First*, as to the validity of the trust deed and mortgage; *second*, whether, if the trust deed and mortgage are valid, defendant Hill will be entitled to any benefit from it; *third*, whether defendant Hill assented to the incurring of debts exceeding the capital stock of the company, and by so doing has forfeited any right to indemnity under this trust deed and mortgage. It therefore seems quite evident to me that if defendant Hill wished to make this contest raised by the cross-bill, he should not be allowed to do so, except on condition that he enter his full appearance. His request in this case, if granted, would sanction the practice of allowing any defendant interested in a controversy to come in and avail himself of all the chances of a decree in his favor and retire without harm if the decision of the court should be against him. As I said at the outset, if the defendant wished to challenge the sufficiency of the service by which jurisdiction over him is attempted to be obtained, he can do so by a special appearance, for that

purpose alone, without leave of court. Daniell, Ch. Pr. 453, 512, 537. But if he asks the privilege of fighting his side of this battle under a special appearance, I do not think he should be allowed to do it.

The motion is overruled.

OWENS v. WIGHT.¹

(Circuit Court, D. Colorado. December, 1883.,

1. LEASE—COVENANT OF.

The execution of a lease for real estate implies a covenant to lessee for quiet enjoyment during the term.

2. SAME—REMEDY OF LESSEE.

In case of entry upon the demised premises by the lessor during the term, the remedy of the lessee is in damages by suit at law for breach of covenant, and not by action in equity for an accounting.

On Demurrer to Bill.

C. I. Thompson, for plaintiff.

A. W. Rucker, for defendant.

HALLETT, J. The bill avers that defendant and others demised to plaintiff a mining claim called the Vanderbilt lode for a term of six months, from March 7, 1883; that defendant afterwards, and during said term, entered on the said premises, and took therefrom a large quantity of valuable ore, and plaintiff prays that defendant may be required to account for said ore. If, as alleged, defendant and others made a lease to plaintiff, a covenant for quiet enjoyment would be implied from such letting. *Tayl. Landl. & T. § 304; Sedg. Dam. 183, note.* The entry into the premises by defendant during the time was a breach of the covenant, and plaintiff's remedy is in damages for such breach. What the measure of damages may be is not for present consideration. Upon the facts stated, plaintiff is not entitled to an account, and the remedy is not in equity, but at law. Plaintiff may have the case transferred to the law docket if he wishes to do so. Whether the action shall be against the defendant alone or against all of the lessors is not now to be determined. Defendant should have demurred before answering, and therefore he must pay the costs of the answer, and the costs, if any, upon the issue of fact joined. The answer may be withdrawn, and the demurrer will be sustained.

¹From the Colorado Law Reporter.