

the defendant's individual obligation to pay the interest quarterly. The lessee, as between the lessor and lessee, has become the principal for the payment of interest. The intention and the object of the provision were, as in the mortgage cases, palpably and primarily for the benefit of the plaintiff, and to enhance its certainty of securing the interest upon the lessor's mortgage. It is not required that the benefit of the plaintiff should be the sole object of the agreement.

The next point is that the complaint does not state that the defendant had agreed or was under obligation to mine between January 1, 1897, and July 1, 1898. It is true that the complaint does not formally state that the lease was in force up to and on July 1, 1898; but it does state that on and prior to July 1, 1898, quarterly payments amounting to \$30,000 had become due and payable under the terms of the agreement, which sufficiently avers that the lease continued to be operative.

It is next said that the agreement provides that the royalties are to be paid so long "as coal to that amount is produced under the lease," and, as it appears from the complaint that no coal was mined after January 1, 1897, there was no obligation on the part of the lessee to pay. The clause which is referred to was to prevent an obligation to pay if coal did not exist or had been exhausted, but not to relieve the lessee from his liability to pay a royalty if he willfully and arbitrarily refused to mine. The complaint avers a willful and wrongful neglect and refusal by the defendant to mine after June 1, 1896. The demurrer is overruled, with costs, with leave to the defendant to answer within 30 days from the date when this opinion shall be filed.

GRAND ISLAND & W. C. R. CO. et al. v. SWEENEY et al. (four cases).

(Circuit Court of Appeals, Eighth Circuit. June 5, 1899.)

Nos. 1,212-1,215.

APPEAL—NECESSARY PARTIES.

Railroad subcontractors have an interest in a decree holding them liable jointly with the principal contractors and the railroad company for the purchase price of the materials supplied for their use in constructing the road, and establishing a lien on the road therefor; and an appeal from such decree cannot be entertained unless they are joined, or an order of severance obtained.

Appeal from the Circuit Court of the United States for the District of South Dakota.

N. K. Griggs, Henry Frawley, J. P. Laffey, and Charles F. Mander-son, for appellants.

Charles W. Brown, Eben W. Martin, and Norman T. Mason, for appellees.

Before CALDWELL and THAYER, Circuit Judges.

PER CURIAM. These are suits which were brought by Thomas Sweeney, the appellee, to recover the value of certain blasting ma-

terials which were supplied by him to Chamberlain & Skinner, Carroll, Donoghue & Co., and to Nathan Westcott, who were, respectively, subcontractors under John Fitzgerald & Bro. for the construction of certain sections of the Grand Island & Wyoming Central Railroad Company, lying within the state of South Dakota. John Fitzgerald & Bro. were the original contractors with said railroad company for the construction of its entire line of road, and sublet portions of the work to the three parties above named, who are hereafter referred to as "subcontractors," and who, in turn, purchased from Thomas Sweeney, the complainant below, certain materials for blasting purposes, which were consumed in the construction of the several sections of the railroad which they had respectively contracted to construct. Under and by virtue of the laws of the state of South Dakota (Comp. Laws Dak. 1887, c. 31, § 5469), the complainant claimed to be entitled to a lien upon the railroad for the value of the materials which he had so supplied to said subcontractors. The present suits appear to have been brought to obtain a judgment against the several subcontractors to whom the materials were supplied, as well as a lien, to secure the payment of the judgment, against the property of the railway company. The decrees which were eventually rendered in the several cases in accordance with the prayer of the complaints ascertained and fixed the amount which was due to the complainant from the several subcontractors to whom the materials had been furnished, and adjudged that the amount so due be paid by the respective subcontractors and by the defendant railway company within 30 days thereafter, and that in default of such payment the property of the railway company to which the lien attached should be sold to satisfy the respective amounts so as aforesaid found to be due from the respective subcontractors to the complainant. From these decrees in the respective cases the defendant railway company and John Fitzgerald & Bro., the original contractors, have appealed, without joining the subcontractors as appellants, and without obtaining a judgment of severance against them, and without giving said subcontractors any notice whatsoever, so far as the record discloses, to appear and join in the appeals, or to refuse to so join. Upon the face of the record, the several subcontractors, to wit, Chamberlain & Skinner, Carroll, Donoghue & Co., and Nathan Westcott, have an interest in the decrees which are challenged by the respective appeals, and will be affected by a reversal of the same. The subcontractors, according to the provisions of the decrees, are jointly liable with the railway company for the sums therein found to be due and required to be paid. The decrees conclusively establish the amount of their indebtedness to the complainant, and further adjudge that they, as well as the railway company, shall pay the amount of such indebtedness to the complainant within a specified period. It is manifest, we think, that the subcontractors who have neither joined in the appeals, nor been requested or notified to join therein, have a direct interest in the question raised by the several appeals, namely, whether the railway company as well as the subcontractors shall be required to pay the several debts which have been ascertained to be due from

them to the complainant, or whether it shall be discharged from that obligation, leaving the subcontractors solely liable for such indebtedness. It cannot be said, we think, from an inspection of this record, that the subcontractors who have not been joined as appellants have no interest in the question whether the lien is upheld or denied. For these reasons, therefore (that is to say, because all persons who appear to have an interest in the decrees have not been made parties to the appeals, or been given notice to appear and join in the appeals, or otherwise defend their interest), the several appeals must be dismissed, on the strength of the following cases: *Trust Co. v. Clark*, 49 U. S. App. 571, 27 C. C. A. 522, and 83 Fed. 230; *Trust Co. v. McClure*, 49 U. S. App. 46, 24 C. C. A. 66, and 78 Fed. 211; *Dodson v. Fletcher*, 49 U. S. App. 61, 24 C. C. A. 69, and 78 Fed. 214; *Masterson v. Herndon*, 10 Wall. 416; *Hardee v. Wilson*, 146 U. S. 179, 181, 13 Sup. Ct. 39; *Davis v. Trust Co.*, 152 U. S. 590, 14 Sup. Ct. 693; *Gray v. Havemeyer*, 10 U. S. App. 456, 3 C. C. A. 497, and 53 Fed. 174. It is so ordered.

WALL v. CHESAPEAKE & O. RY. CO.

(Circuit Court of Appeals, Seventh Circuit. June 6, 1899.)

No. 564.

1. FOREIGN CORPORATIONS—SERVICE OF PROCESS UPON—AGENTS.

A person employed in Chicago to solicit business and give information on behalf of a foreign railroad company having no property or office within the state, who has no power to make contracts for the company, is not an agent on whom service of process against the company can legally be made under the statutes of Illinois.

2. PROCESS—OBJECTION TO SERVICE—PRACTICE IN FEDERAL COURTS.

It is proper practice to try the question of the sufficiency of the service of a summons by motion to quash the return, supported by affidavits.

3. FEDERAL COURTS—FOLLOWING STATE PRACTICE—ACT OF CONFORMITY.

A federal court is not required by the act of conformity (Rev. St. § 914) to follow the state practice of trying the question of the sufficiency of the service of the summons to a jury on a plea in abatement, where such practice is not statutory, but was established by decision of the state supreme court as the proper mode of procedure under the common law.¹

4. PROCESS—OBJECTIONS TO SERVICE—PRACTICE.

A foreign corporation, defendant, on a motion to quash the return on the summons on the ground that service was made on a person not authorized by law, is not required to state in its affidavit on whom service may properly be made, or, if there is no one within the district, to state such fact.

Woods, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

Clair E. More, for plaintiff in error.

Joseph Mann, for defendant in error.

¹ As to conformity of practice in federal to that of state court, see note to *O'Connell v. Reed*, 5 C. C. A. 594; note to *Griffin v. Wheel Co.*, 9 C. C. A. 548; and note to *Insurance Co. v. Hall*, 27 C. C. A. 392.