

The policy provides that, where by foreclosure the insured has acquired the title to the property, the price to be paid by the insurer "shall be the amount bid at said foreclosure sale." The defendant was obligated, by the terms of the policy, either to pay this amount, or to relieve the property from all liens existing thereon at the date of the policy. It refuses to do either, and seeks to escape all liability by putting the burden of freeing the property from the liens existing thereon at the date of the policy upon the mortgagee, on the ground that, at the sale of the property under the mortgages, the mortgagee bid the full amount of his mortgage debt, and thereby himself assumed the burden of paying off the mechanics' liens. Under the terms of the policy, the mortgagee had a right to look to the defendant for the extinguishment of all liens upon the property which existed at the date of the policy, and to gauge his bid on the assumption that the defendant would discharge its obligation in this regard. The contention of the defendant is in the teeth of a very plain provision of the policy which declares:

"Payment, discharge, or satisfaction of said mortgage indebtedness (except by foreclosure of said mortgage) \* \* \* shall fully terminate, annul, and avoid this policy, and all liability of the company thereunder."

The case at bar falls directly within this exception. We need not consider what effect this provision would have where the property was purchased by a stranger at the foreclosure sale. Beyond controversy, it includes and binds the parties to the contract, and is applicable to every case where the mortgagee, insured, becomes the purchaser of the property at the foreclosure sale for the amount of his mortgage debt. The judgment of the circuit court is affirmed.

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GRUBBS v. NEEDLES et al.

(Circuit Court of Appeals, Eighth Circuit. October 14, 1895.)

No. 574.

UNITED STATES MARSHALS—LIABILITY FOR FAILURE TO RETURN EXECUTION—ARKANSAS STATUTE.

Section 3061, Mansf. Dig. Ark., in force in the Indian Territory, provides that for a failure to return an execution on or before the return day an officer to whom the process is delivered shall be liable for the whole amount of money specified in the execution. *Held* that, where a marshal has received two successive executions on the same judgment, and has failed to return either of them in time, the plaintiff in such executions is entitled to recover from him the whole amount specified in one of the executions, with interest, but without any damages. *Hawkins v. Taylor*, 19 S. W. 105, 56 Ark. 45, followed.

In Error to the United States Court in the Indian Territory.

This was an action by T. M. Grubbs, surviving partner of T. M. and L. R. Grubbs, as Grubbs Bros., against Thomas B. Needles, United States marshal for the Indian Territory, for a failure to return certain executions. The circuit court gave judgment for the defendant. Plaintiff brings error. Reversed.

Jo Johnson, for plaintiff in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. Section 3061, Mansf. Dig., in force in the Indian Territory, provides that:

"If any officer to whom execution shall be delivered shall neglect or refuse to execute or levy the same according to law \* \* \* or if any officer shall not return any execution on or before the return day therein specified \* \* \* then, and in any of the cases aforesaid, each officer shall be liable and bound to pay the whole amount of money in such execution specified or thereon endorsed and directed to be levied. \* \* \*"

The plaintiff in error, T. M. Grubbs, surviving partner of Grubbs Bros., on the 5th day of December, 1892, by the consideration of the United States court in the Indian Territory, recovered a judgment against Charles Samuels and K. T. Stovall as Charles Samuels & Co., Charles Samuels, J. H. Bowers, and C. A. Fargo, for the sum of \$206.90 and costs. On the 16th of December, 1892, execution was issued on this judgment, and placed in the hands of Thomas B. Needles, marshal of the Indian Territory, for execution. This execution was returned, "No property found to satisfy the same," on the 15th day of February, 1893. The execution was returnable by its terms and by the law "within sixty days" from its date. On the 15th day of February, 1893, a second execution was issued on the judgment, and placed in the hands of the marshal for service, which was returned "No property found" on the 25th day of April, 1893. For not returning these executions within the time required by the terms thereof and by the law, the plaintiff in error, in his complaint, prays for judgment for the amount of the executions, costs, interest, and damages against the marshal and his sureties on his official bond.

The defense set up in the answer for the marshal's failure to return the first execution within 60 days is that the defendants in the execution had no property. The matters relied on in the answer for not returning the second execution within 60 days are that by due diligence the money could not have been made on the execution, and that in the lifetime of the execution the plaintiff therein directed and instructed the marshal "to make no further effort to levy said execution, or make the money on the same, but to return the same as unsatisfied to the clerk's office of the United States court." Testimony shows that these directions of the plaintiff to the marshal, which the answer avers applied to the second execution, were in fact given in relation to the first execution. There was a trial to a jury, and the court directed a verdict for the defendants. We have decided at the present term that section 3061, Mansf. Dig., is in force in the Indian Territory, and that proceedings thereunder may be had against the marshal and his sureties. *Manufacturing Co. v. Needles*, 69 Fed. 68.<sup>1</sup> The case at bar was ruled below before our decision in the case cited had been announced. Owing to the variance between the allegations of the answer and the proof, the plaintiff would seem to have technically a cause of action for a failure to return both exe-

<sup>1</sup> 16 C. C. A. 132.

cutions. But it is clear the plaintiff can have but one satisfaction of his judgment. As observed by Chief Justice Cockrill in *Hawkins v. Taylor*, 56 Ark. 45, 19 S. W. 105: "The statute is highly penal, and its terms should not be extended by construction to cases not within its plain meaning." Touching the defense based on the alleged directions of the plaintiff to the marshal, we do not deem it necessary to do more than to call attention to the rule announced by the supreme court of Arkansas in a proceeding under this statute where that defense was relied on: "The sheriff is not excused from returning an execution by any conduct of the plaintiff which falls short of showing that the nonreturn resulted from the act or instructions of the plaintiff or was ratified or waived by him." The variance between the allegation of the answer setting up this defense and the proof can be removed by an amendment of the answer.

The extent of the recovery in proceedings under this statute is shown by the opinion of the court in the case of *Hawkins v. Taylor*, *supra*. Upon the record before us, the plaintiff was entitled to judgment against the marshal and his sureties on one of the executions for "the whole amount of money in such execution specified," and interest, but was not entitled to any damages. *Hawkins v. Taylor*, *supra*.

The judgment of the United States court in the Indian Territory is reversed, and the cause remanded, with directions to grant a new trial.

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#### HARTFORD FIRE INS. CO. et al. v. CHICAGO, M. & ST. P. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. October 7, 1895.)

No. 614.

#### 1. CONTRACTS—PUBLIC POLICY—HOW DETERMINED.

The public policy of a state or nation must be determined by its constitution, laws, and judicial decisions; not by the varying opinions of laymen, lawyers, or judges as to what the interest of the public demands.

#### 2. SAME.

A party who seeks to put a restraint upon the freedom of contract in any case must make it plainly and obviously clear that the contract in question is against public policy.

#### 3. SAME—FEDERAL COURTS—FOLLOWING STATE DECISIONS.

Whether or not, in a lease by a railroad company of part of its right of way, a provision exempting it from liability for any damage to buildings or personal property situated thereon, resulting from the negligence of its officers or agents, or from fire communicated from its locomotives, is against public policy, is a question of general law, in regard to which the federal courts, while regarding the state decisions as persuasive authority, must in the end exercise an independent judgment. 62 Fed. 904, affirmed. Caldwell, J., dissenting, on the ground that the proposition is wrong in principle, and its decision is not necessary to the decision of the case.

#### 4. SAME—RAILROAD COMPANIES—CONTRACTS—LIABILITY FOR NEGLIGENCE.

A lease by a railroad company of a portion of its right of way, upon condition that the company shall not be liable for any damage to buildings or personal property situated thereon by reason of fire originating from its locomotives, or for damage resulting from the negligence of its employés or agents, is not void, as against public policy, either under the Iowa decisions or upon general principles. 62 Fed. 904, affirmed.