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Insurance--Formation of the Contract--Subrogation

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covenants after termination of employment as analogous to the restrictions on the seller in a contract of sale of a business and good will and applied like principles as used in evaluating covenants in contracts for the sale of a business. *Eureka Laundry Co. v. Long,* 146 Wis. 205, 131 N. W. 412 (1911). Better considered cases distinguish the types of covenants and examine covenants in an employment contract more critically that those between seller and buyer of a business. *Cf. Samuel Stores, Inc. v. Abrams,* 94 Conn. 284, 108 Atl. 541 (1919); *Carpenter v. Southern Properties,* 299 S. W. 440 (Tex. Civ. App., 1927) declaring that breach of covenant in an employment contract "does not so readily indicate irreparable injury to the employer" as does breach of a covenant in the sale of a business. *Menter Co. v. Brock,* 147 Minn. 407, 180 N. W. 553 (1920). They therefore put on complainant the burden of proving some irreparable injury done or threatened by defendant's breach. *Menter Co. v. Brock, supra; May v. Lee,* 28 S. W. (2d) 202 (Tex. Civ. App., 1930); *Peterson v. Johnson Nut Co.,* 204 Minn. 300, 283 N. W. 561 (1939). *Contra: Dyar Sales & Mach. Co. v. Bleiler, supra.* On complainant's failure to show irreparable injury by the employee's continued violation of the covenant, equity will refuse its aid and leave complainant to his action at law, especially where a suit for liquidated damages affords full and adequate relief. *May v. Lee, supra.* Other courts, looking with more favor upon such restrictive covenants, do not require complainant to show irreparable or even actual injury but only that such violation may result in damage to the employer. *Capital Laundry Co. v. Vannozzi,* 115 N. J. Eq. 26, 169 Atl. 554 (1933). Where employee's work was such as to enable him to learn complainant's business secrets, *e.g.,* customer lists or business methods, complainant need not show actual injury. *Srotowitz v. Roseman,* 263 Pa. 588, 107 Atl. 322 (1919); *Matthews v. Barnes,* 155 Tenn. 110, 293 S. W. 993 (1927). While courts today sustain such restrictive covenants when reasonable under the circumstances, they tend to contrue such contracts favorably to the employee in recognition of the fact that the employee, having little but his labor to sell, is often in urgent need of selling that and in no position to object to the restrictive terms in the employment contract offered him. This caution in enjoining former employees from violation of such restrictive covenants rests on solid grounds and the instant case must not be interpreted as committing our court against its exercise in cases when the matter is actually presented for decision.

INSURANCE—FORMATION OF THE CONTRACT—SUBROGATION.—*A,* the owner of land in fee, mortgaged it to *B* bank to secure a $2,500 loan,

covenanting on behalf of himself and assigns "to insure and pending the existence of this mortgage, to keep insured . . . the improvements on the hereby mortgaged property to the amount of at least" $800, benefits "in case of fire to enure to" *B*. A policy was issued by *I* insurance company to *A* who delivered it to *B*. *A* by deed duly recorded then conveyed to *C*, retaining a vendor's lien. Without knowing of the conveyance, *B* had the policy renewed in the name of *A* as owner. The policy provided, like its predecessor, that it should be void if the insured's interest were other than unconditional and sole ownership, and had attached a "union mortgage" clause subrogating *I* to *B's* rights if payment were made to *B* when the policy was void as to *A*. *A* did not know of the renewal. After a loss, *I* paid *B* under the policy and claimed subrogation to *B*'s rights under the mortgage. *C*'s demurrer to *I*'s bill of complaint was sustained by the circuit court and the case certified. *Held,* one judge dissenting, that *A* by vendor's lien had a sufficient insurable interest to support the independent contract between *I* and *B* created by the "union mortgage" clause; the policy was void as to *A* as his interest was less than unconditional ownership, and as *C* had notice of the covenant in the mortgage requiring insurance by *A* to the benefit of *B*, payment of fire loss to *B* entitled *I* to a lien on the property by virtue of subrogation. Reversed. *Fire Ass'n of Philadelphia v. Ward,* 42 S. E. (2d) 713 (W. Va. 1947).

A renewal is a new contract of insurance, *City Mortgage & Discount Co. v. Palatine Ins. Co.,* 226 Ala. 179, 145 So. 490 (1933), although regarded as an extension of the existing contract where this appears to be the intention of the parties. *Sheppard v. Peabody Ins. Co.,* 21 W. Va. 368 (1883). To be binding, it must be clearly established and have all the essentials of a valid contract. Thus a renewal cannot be effected without an offer and acceptance and new consideration. *Hallauer v. Fire Ass'n of Philadelphia,* 83 W. Va. 401, 98 S. E. 441 (1919); *Meadows v. American Eagle Fire Ins. Co.,* 104 W. Va. 580, 140 S. E. 552 (1927). These requirements were applied by Judge Fox to the instant case for in his dissent he says, ". . . and we think it can be said that there could not have been a contract of insurance between the insurance company (*I*) and Ward (*A*), because Ward had no knowledge of the renewal policy, did not accept it and therefore, was not bound by its terms." However, this overlooks the possibility of an agency relationship, express or implied. Where the mortgagor fails or refuses to fulfill a covenant to insure, the mortgagee may procure the insurance to be written and will be entitled to be reimbursed for the cost thereof. *Brine v. Insurance Co.,* 96 U. S. 627 (1877); *cf. Burgess v. Southbridge Savings Bank,* 2 Fed. 500 (1880). There seems to be no recent cases on this

point, probably because nearly all current form mortgages and trust deeds for realty have, immediately following the covenant to insure, a provision which states, ". . . that in case the mortgagor shall fail to keep said buildings so insured . . . , the said mortgagee may effect and pay for such insurance . . . and the amount so paid shall become part of the mortgage debt." This clearly authorizes the mortgagee to effect insurance for the mortgagor and cause him to be bound by the policy terms. The problem created by the fact that the mortgagor was not an actual party to the renewal and seemingly not bound thereby is not new to our court for in *Gillespie v. Scottish Union & National Ins. Co.,* 61 W. Va. 169, 56 S. E. 213 (1906) a similar situation arose; the court held the mortgagor bound by the terms of the policy, citing *Hare v. Headley,* 54 N. J. Eq. 545, 35 Atl. 445 (1896) which, in syllabus point 5 states, "An independent contract between the mortgagee of property, for whose benefit the owner insures it, and the insurer, that the insurance shall continue good as to the mortgagee, notwithstanding any forfeiture by the owner, and that if any loss is paid the mortgagee under such circumstances (policy void as to mortgagor), the insurer shall be subrogated to rights of the mortgagee under the mortgage, is valid, though the owner does not know of it." Although there was no *ratio decidendi,* the court by holding the mortgagor bound by the terms of the policy carried to a correct conclusion the formation of the contract and its validity. As to participation in the proceeds of the policy, the same result attends the approach of the majority and the dissent in the instant case. If the transaction be treated as insurance by the mortgagor for the benefit of the mortgagee, in the event of loss, the proceeds of the policy will be subject to the same claims by the mortgagee as could have been enforced against the property insured; and, of course, payment to the mortgagee discharges the debt *pro tanto. Sisk v. Rapuano,* 94 Conn. 294, 108 Atl. 858 (1919). But where there is a breach of condition by the mortgagor and the policy contains a "union mortgage" clause, the mortgagee's rights remain unaffected and the policy becomes no more than a security insurance by the mortgagee. If the insurer is required to pay, it becomes subrogated to rights of the mortgagee. *Hildreth v. Federal Land Bank of Baltimore,* 111 W. Va. 602, 163 S. E. 50 (1932). If considered as insurance by the mortgagee on behalf of the mortgagor, as where the mortgagee himself procures the policy as a contracting party in accordance with terms of an agreement by which the mortgagor is to pay the premiums upon such insurance, upon destruction of the property, the mortgagee is entitled to receive payments from the insurer, but such payment discharges the debt *pro tanto. Connecticut Mut. Life Ins. Co. v. Scrammon,* 117 U. S.

634 (1886). It seems, however, that, if the insurer stipulates for subrogation to rights of the mortgagee under the mortgage, payment of the policy will not discharge the debt, even though the mortgagee may have procured the policy by arrangement with the mortgagor. *Foster v. Van Reed,* 70 N. Y. 19 (1887); *Alamo Fire Ins. Co. v. Davis,* 25 Tex. Civ. App. 342, 60 S. W. 802 (1901); *cf. Baker v. Monumental Sav. & Loan Ass'n,* 58 W. Va. 408, 52 S. E. 403 (1906). If treated as insurance by the mortgagee of his interest only, payment by the insurer following loss is not a discharge of the debt, but only a change of creditors, for the insurer is subrogated to the mortgagee's rights on payment. *Dunbrack v. Neal,* 55 W. Va. 565, 47 S. E. 303 (1905). Thus, whichever of these three situations the facts of the instant case are thought to disclose, the debt was not discharged by the insurer's payment of loss to mortgagee. In the *Gillespie* and instant case, the result implies that the court considered the transaction as insurance by the mortgagor for the benefit of the mortgagee. This seems to be the better view as the mortgagee acts for the mortgagor by reason of the express or implied agency. While the result in the instant case seems sound, it is unsatisfactory in not establishing a basis for its conclusion that the mortgagee was authorized to act for the mortgagor and effect an insurance policy binding him by all its terms.

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Unemployment Compensation—Disqualification of "Rank and File" Union Members for Compensation During Strike of Foreman's Union.—A work stoppage occurred at the mines of Mead Coal Company as a result of a strike by the members of Local 303, a "foreman's" union in District 50 of the United Mine Workers. The claimant, a member of Local 6109, a "rank and file" union affiliated with District 29 of the United Mine Workers, reported for work at an affected mine but was told that it was not operating due to the strike of the supervisory employees. On application for unemployment benefits prescribed by statute, W. Va. Code (Michie, 1943) c. 21A, the deputy director of employment compensation decided against the claimant but was reversed by the department trial examiner and he in turn by the Board of Review of the Department of Unemployment Compensation which held that the claimant was ineligible under W. Va. Code (Michie, 1943) c. 21A, art. 6, §4 (4). This decision, affirmed by the circuit court of Kanawha County, rested on an affirmative finding that claimant was "participating, financing, or directly interested in such dispute and [belonged] to a grade or class of workers who were