

1983

**Ronald D. Jones and Pamela Jones v. American Coin Portfolios, Inc., a California Corpora-Tioni Robert G. Holt, as Trustee, L. H. Investment Company, A Utah Partnership, And L. H. Investment Group, A Utah Corporation : Brief of Appellant**

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**Recommended Citation**

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

ROBERT G. JONES and  
CARL E. BARNES,  
Respondents and  
Plaintiffs,

vs.  
AMERICAN COIN PORTFOLIOS,  
INC., a California Corporation;  
ROBERT G. HOLT, as Trustee,  
L. H. INVESTMENT COMPANY,  
a Utah partnership, and  
L. H. INVESTMENT GROUP,  
a Utah corporation,  
Defendants.

Supreme Court No. 19003

AMERICAN COIN PORTFOLIOS, INC.,  
a California corporation, and  
OAKWOOD MANOR CO., a  
California Partnership,  
Appellants and  
Counterclaim and  
Cross-claim Plaintiffs,

Third District  
Civil No. C-81-6225

vs.  
RONALD D. JONES, PAMELA  
JONES, CARL E. BARNES,  
MARY BARNES, L. H. INVESTMENT  
COMPANY, a Utah partnership,  
L. H. INVESTMENT GROUP,  
a Utah corporation, G. LEE  
EASTMAN, DONALD J. BOSHAARD  
and A. RICHARD CALDER,  
Counterclaim and  
Cross-claim Defendants.

**FILED**

JUN 9 1963

Clerk, Supreme Court, Utah

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APPELLANTS, DEFENDANT AMERICAN COIN PORTFOLIOS, INC.  
AND COUNTERCLAIM AND CROSS-CLAIM PLAINTIFFS

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Appeal from the Judgment of the Third Judicial  
District Court for Salt Lake County  
Hon. David B. Dee, Judge

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Kent T. Anderson, Esq.  
JONES, WALDO, HOLBROOK  
& McDONOUGH  
800 Walker Building  
Salt Lake City, Utah 84111  
Telephone: (801) 521-3200

Attorneys for Appellants

David G. Williams, Esq.  
SNOW, CHRISTENSEN & MARTINEAU  
10 Exchange Place  
11th Floor  
P. O. Box 3000  
Salt Lake City, Utah 84110

Attorneys for Respondents

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Appellants/Defendant and Counterclaim and  
Counterclaim Plaintiffs, American Coin Portfolios, Inc. and  
Wood Manor Co. (hereinafter collectively referred to as  
"American"), through their attorneys for record, submit this  
Brief on Appeal.

I. NATURE OF PROCEEDING; DISPOSITION BELOW;  
AND RELIEF SOUGHT ON APPEAL

A. Nature of Proceeding.

This is an action for quiet title and foreclosure of  
certain interests in real property, filed in the Third  
Judicial District Court for Salt Lake County.

B. Disposition Below.

American appeals from a Summary Judgment entered in  
favor of Respondents/Plaintiffs and Counterclaim Defendants,  
Ronald and Pamela Jones (hereinafter collectively referred to  
as "Jones"), granting priority to the interest of Jones in  
the Subject Property over the interest of American. The  
Summary Judgment rules on the respective rights of only two  
parties to this multi-party case. The District Court,  
however, directed the entry of a final judgment, finding that  
there was no just reason for delay. Additionally, American  
appeals from that certain order of the honorable Judge Dee  
dated April 27, 1982, denying American's Motion for Summary  
Judgment and finding that the evidence of indebtedness held  
by American is not secured by American's Trust Deed on the

Subject Property. American also appeals from that certain minute entry of the Honorable Judge Dee dated December 7, 1982, denying American's Motion to Vacate, Amend or Reconsider the Order of April 27, 1982.

C. Relief Sought on Appeal.

In this Appeal, American requests that the Summary Judgment and the April 27, 1982 Order be reversed with directions to enter judgment in favor of American by dismissing the Complaint herein as to American and granting priority to American's Trust Deed security interest over any interest of Jones in the Subject Property, in accordance with the Counterclaim of American. In the alternative, American requests that the Summary Judgment and the April 27, 1982 Order be vacated, and the case be remanded for further proceedings.

II. MATERIAL FACTS

A. The Disputed Security Interests.

1. This action involves the status and priority of a security interest held by American in a 320 acre parcel of undeveloped land located in Salt Lake County (the "Subject Property"). In September 1980, defendant L. H. Investment owned fee simple title to the Subject Property. L. H. Investment entered into a Commodities Purchase Agreement dated September 22, 1980 with American, under which American



advanced \$200,000.00 to L. H. Investment for the purchase of (R. 280-84 "Commodities Purchase Agreement"; R. 201-204 Affidavit of George Drykerman, Vice-President of American"). To secure performance under the Agreement, L. H. Investment executed a Trust Deed Note (R. 271-73) and a Trust Deed on the Subject Property (R. 275-78; hereinafter the "Trust Deed"). The Trust Deed in favor of American dated September 4, 1980, properly recorded on September 24, 1980, recites that it secures "payment of the indebtedness evidenced by a promissory note . . . in the principal sum of \$200,000.00, . . . ." (R. 275).

2. Under the Commodities Purchase Agreement, L. H. Investment was obligated to deliver to American on October 22, 1980 a quantity of gold that \$200,000.00 could purchase at 90.5% of the London afternoon price on that day. On October 20, 1980, L. H. Investment and American entered into an Amendment to the Commodities Purchase Agreement (R. 286-288), whereby L. H. Investment paid American the \$19,000.00 discount premium, representing the difference between the purchase price specified in the original Agreement and the London afternoon price on October 22, 1980, and L. H. Investment agreed to pay the balance of the purchase price (\$200,000.00) by delivering to American on November 22, 1980 the amount of gold which could be purchased

for \$200,000.00 at 90.5% of the London afternoon price on that date. The October 20 Amendment recites in paragraph 6 that the Agreement as amended will continue to be secured by the Trust Deed (R. 287). This same "roll over" of the indebtedness was repeated on November 21, 1980 and December 22, 1980.

3. On December 5, 1980, L. H. Investment executed a warranty deed to the Subject Property to Jones. This deed specifically recites that it is "Subject to a Deed of Trust . . . in favor of American . . . in the principal amount of \$200,000.00 with interest thereon, recorded September 24, 1980, . . . ." (A copy of the warranty deed is attached as Exhibit "D" to Jones' Response to Appellants' Motion for Summary Disposition in this Court, dated March 21, 1983). Jones admitted in the Court below that the Subject Property was conveyed to him subject to the American Trust Deed (R. 19 "Affidavit of Ronald Jones").

4. On January 22, 1981, American and L. H. Investment entered into a Revised Commodities Purchase Agreement (R. 293-301) and a revised Trust Deed Note (R. 290-91). These documents are virtually identical to the original Agreement and Note except that they provide that the "roll over" option is automatic each month if L. H. Investment pays the monthly discount premium, and the Trust

Note was amended to show an amount of \$219,000.00, thus reflecting the \$19,000.00 discount premium payment. These amended documents recite the prior dealings of the parties and the original Commodities Purchase Agreement and Amendment thereto are attached as Exhibit "A" to the January 22, 1981 Revised Commodities Purchase Agreement (R. 303-10). The Revised Agreement and Note each specifically recite that they continue to be secured by the Trust Deed (R. 290 and 296).

5. At no time has L. H. Investment ever repaid to American the \$200,000.00 principal indebtedness, either in cash or commodities (R. 203 "Affidavit of George Drykerman"). Moreover, the Revised Agreement recites in paragraph 1 that "L. H. Investment shall continue to apply the \$200,000.00 advanced by American . . . ." (R. 294; emphasis added). There has never been any evidence produced, in the form of an affidavit or otherwise, purporting to show that American has ever received payment of the \$200,000.00 principal indebtedness.

6. There is no evidence in the record showing that after Jones took his warranty deed subject to the American Trust Deed, that Jones ever changed his position or in any way relied on the Revised Agreement and Note as a payment of the debt owed American or an extinguishment of the Trust Deed. In fact, on February 16, 1981, subsequent to the

execution of the Revised Agreement and Note, Jones executed a trust deed to the Subject Property in favor of a third party (R. 398-400), and the legal description therein specifically recites that this conveyance by Jones is expressly subject to American's Trust Deed (R. 400). This subsequent Jones trust deed was forwarded for recording by their attorney by a letter dated February 10, 1981 (R. 397).

7. The warranty deed from L. H. Investment to Jones, while absolute on its face, was a deed given as security only. The deed secured the payment to Jones of approximately \$60,000.00 from L. H. Investment in connection with a sale of diamonds by Jones. This security interest only is admitted in correspondence from Ronald Jones (R. 352-53), and his attorney, James Harward (R. 395), and is the subject of a separate lawsuit by L. H. Investment against Jones in Third District Court, Civil No. C81-1858. In fact, Jones executed a warranty deed back to L. H. Investment on December 29, 1980 to be placed in escrow, which deed again expressly recites the continuation of the American Trust Deed (R. 396). As late as May 5, 1981, after American had recorded its Notice of Default, Jones' attorney delivered written instructions directing the recording of the escrowed warranty deed from Jones to L. H. Investment upon L. H. Investment's performance of the underlying agreement for which Jones originally received a deed as security (R. 400).

9. In March, 1961, L. H. Investment defaulted on account of the indebtedness to American, and American proceeded with steps to foreclose the Trust Deed (R. 9-13 "Notice of Default and Notice of Trustee's Sale").

1. Proceedings in the Court Below.

9. Prior to American's trustee sale, Jones commenced this action against American, Robert Holt as American's trustee, and L. H. Investment to enjoin the trustee's sale (R. 2-4). Jones subsequently amended the complaint to quiet title to the Subject Property in Jones (R. 184-94). American counterclaimed and cross-claimed for judicial foreclosure of its Trust Deed and a declaration of priority of American's interest over all claimants (R. 118-127).

10. American added as parties to this action the individual guarantors of its Note (Eastman, Calder and Boshard, who are also the principals of L. H. Investment) and Carl and Mary Barnes, who claim an interest in the Subject Property. L. H. Investment, Lee Eastman and Richard Calder have appeared in the action, admitted the allegations of the counterclaim and cross-claim of American and stipulated to the entry of judgment against them in accordance therewith (R. 197-98). Donald Boshard has answered the cross-claim of

American, denying personal liability but admitting most of the substantive allegations of American (R. 179-80).

11. On March 25, 1982, American moved for summary judgment on its counterclaim and cross-claim based on the pleadings, the admissions of L. H. Investment and the affidavit of George Drykerman, Vice-President of American (R. 199-200). Jones submitted a memorandum in opposition to the motion, admitting that the warranty deed given to Jones was expressly subject to the Trust Deed of American (R. 210).

12. The Jones memorandum, however, assumed, without factual support, that all obligations under the original Commodities Purchase Agreement and Note had been performed and therefore the underlying debt to American was extinguished, and argued that the future advances "dragnet" clause of the Trust Deed would not secure the "new" debt created in January 1981 by the Revised Agreement and Note (R. 212-13). The assumption that the execution of the January 1981 Revised Agreement and Note constituted performance by L. H. Investment and extinguished the underlying indebtedness to American was clearly controverted in paragraph 9 of the Affidavit of George Drykerman (R. 203) and in the Revised Agreement itself, which also specifically states that it remains secured by the Trust Deed (R. 293-301). The underlying principal indebtedness of \$200,000.00, to which

Trust Deed is expressly subject, has never been paid to American. Therefore, there was no future advance in January 1981, and American does not rely on the "dragnet" clause contained in the Trust Deed.

13. The Court took American's Motion for Summary Judgment under advisement (R. 207) and subsequently entered the Order of April 27, 1982, which order finds that the January 22, 1981 Revised Commodities Purchase Agreement and Trust Deed Note "are not secured by the subject property." (R. 321-22) The form of this order was not served upon opposing counsel as required by Rule 2.9(b) of the District Court Rules of Practice, and American's counsel first saw the order in connection with Jones Motion for Summary Judgment dated June 21, 1982 (R. 484 "Statement by Jones Counsel"; R. 348-49 "Affidavit of Robyn Heilbrun"). American moved to Vacate, Amend or Reconsider the Order of April 27, 1982, and a hearing on this motion was held on August 6, 1982.

14. At the August 6 hearing, the Court apparently realized that its prior April 27, 1982 Order was incorrect (R. 499-500), and the Court stated that it would "rework it" (R. 500). However, the Court failed to make a ruling or prepare an order. Both parties wrote to the Court in September and October 1982 requesting a ruling on the motion. When no ruling was forthcoming, counsel for

American, after receiving permission from counsel for American, orally requested a ruling from the Court. The Court then denied the Motion to Vacate, Amend or Reconsider by a minute entry dated December 7, 1982, giving no reason therefor (R. 409).

15. There was not only no factual or legal basis for the court to grant priority to the security interest of Jones over American's interest in the Subject Property, but Jones had not even moved for summary judgment at the time of the April 27, 1982 Order. Moreover, the effect of the wording of such order, was not only to grant priority to Jones over American, but also to completely divest American of any security interest whatsoever in the Subject Property.

16. After the Court denied American's Motion to Vacate the April 27, 1982 Order, American stipulated to the entry of Summary Judgment against it, while continuing to object to the April 27, 1982 Order and reserving its right to appeal to this Court (R. 420-22; ¶ 3). Summary Judgment was entered pursuant to such stipulation, entering a final order and reciting that American does not waive any right to appeal (R. 423-26).



### III. QUESTIONS PRESENTED

A. Does the holder of a note secured by a Trust Deed on real property retain his security interest when the note is renewed with only minor amendments thereto, where the amended note incorporates the Trust Deed, the principal indebtedness evidenced by the note is never paid, and an interest in the real property of an intervening third party is expressly made subject to the Trust Deed?

B. Is a debt that is evidenced by a note and an agreement, and secured by a Trust Deed on real property, extinguished when the note and agreement are amended in part, where the principal indebtedness evidenced by the note and agreement is never paid?

C. If the holder of a note secured by a Trust Deed on real property accepts a new note as payment for the secured note, is the holder subrogated to the rights in the Trust Deed as security for the new note, where the position of an intervening purchaser or lienor of the real property is not made worse after the new note is accepted than it was prior to such acceptance?

D. Where the interest of a grantee in a deed of real property is made subject to a prior Trust Deed with the grantee's knowledge, will the interest of the grantee be equitably subordinated to the interest secured by such Trust

Deed, where there is some defect in the continued perfection of the Trust Deed security interest, but the indebtedness secured by the Trust Deed is never paid and the grantee is in no worse position after the equitable subordination than he originally bargained for?

E. Did the District Court commit reversible error when deciding on defendant's motion for summary judgment, by ruling that defendant had no security interest in the Subject Property, where all parties admitted the validity of the original Trust Deed, Note and Agreement in favor of defendant, plaintiff admitted that its intervening warranty deed was expressly made subject to defendant's original Trust Deed, the trustor of the Trust Deed admitted that the Revised Note and Agreement were secured by the original Trust Deed, which Revised Note and Agreement on their face state that they are secured by the original Trust Deed, and the defendant supplied a sworn affidavit that the underlying indebtedness had never been paid?

#### IV. ARGUMENT

The Court below apparently accepted the assumptions and arguments set forth in the Jones Memorandum in Opposition to American's Motion for Summary Judgment (R. 208-220). The Memorandum assumed that L. H. Investment "fully performed" under the original Commodities Purchase Agreement and Trust Deed Note and thereby extinguished the underlying debt, without supplying any affidavit or other testimony to that effect. The Memorandum then argued that since the prior debt was extinguished, the January 22, 1981 Revised Agreement and Note constituted a "future advance" and was not covered by the Trust Deed's "dragnet clause". Therefore, Jones argued that even though his Deed was expressly subject to the Trust Deed, the Trust Deed did not secure the "new" indebtedness to American.

The initial assumption that a new debt was created in January 1981 was directly contradicted by the only evidence before the Court, and therefore the Summary Judgment finding that the Revised Agreement and Note are not secured by the Trust Deed was manifest error.

A. Neither the Indebtedness Owed to American Nor Its Security Interest Was Extinguished by the January 22, 1981 Revised Note and Agreement.

When a note is given in renewal of another note, it does not raise the presumption of extinguishment of the

debt. Marking Systems, Inc. v. Interwest Film Corp., 507 P.2d 176, 178 (Utah 1977); see Utah Code Annotated § 70A-3-802.

First Security Bank of Utah v. Proudfit Sporting Goods Co., 552 P.2d 123 (Utah 1976), sets forth the controlling law on the present facts. In November 1970, Proudfit executed a renewal note in the amount of \$63,000 and a trust deed securing the note, which trust deed recited that it was to secure the note "and any extensions and/or renewals or modifications thereof." Id. at 123-24. Remington obtained and recorded a judgment lien against the property in December 1971. In June 1972, Proudfit executed a renewal of the note in the amount of \$68,180.00, secured by the prior trust deed. This Court found "little merit" in Remington's argument that when Proudfit executed the 1972 note, the 1970 trust deed note for a lesser amount was paid and a new separate contract came into being. Id. at 124. The court quoted the law as follows:

Nor does the giving of a new note in renewal of another note extinguish the debt for which the original note was given unless it clearly appears that it was the intention of the parties that the execution of the new note and the cancellation of the old note should extinguish the debt represented by the old note.

1914 (quoting from Interstate Trust v. Headlund, 51  
Utah 243, 171 P. 315 (1918)); accord, Gray v. Kappos 90 Utah  
309, 61 P.2d 313, 315 (1936).

In the present case, the facts before the Court are virtually identical to those in Proudfit. L. H. Investment executed and recorded a Trust Deed for the benefit of American, which recites that it secures "payment of the indebtedness evidenced by a promissory note . . . in the principal sum of \$200,000.00 . . . with interest . . . and any extensions and/or renewals or modifications thereof . . . " (R. 275). In Proudfit the second renewal note was for an increased debt amount. In the present case the January 22, 1981 Revised Agreement and Note, merely included the normal \$19,000 discount premium as part of the renewal Note, and each document recites that "L. H. Investment shall continue to apply the \$200,000.00 advanced by American" and that each continues to be secured by the Trust Deed (R. 290 and 293-96). American provided an affidavit that the indebtedness had never been paid, and L. H. Investment, the grantor for both parties herein, stipulated to the entry of judgment in favor of American (R. 197-98).

Finally, the Court held in Proudfit that the taking of a renewal note does not extinguish the debt unless such "clearly" appears as the intent of the parties. Id. at 124.

The intent of the parties to the prior trust deed was controlling in Proudfit even though the intervening lienholder was in no way a party or privy to the transactions between First Security and Proudfit. In the instant case, not only are the Revised Agreement and Note unambiguous that no extinguishment was intended, but the grantor for both American and Jones has stipulated to a judgment in favor of American on the validity of the security interest, and is suing Jones in a separate action to declare the Jones warranty deed void.

The only fact distinguishing Proudfit is that in Proudfit the intervening lienholder did not take his lien expressly subject to First Security's trust deed and yet the court ruled that First Security's renewal note remained secured by the prior trust deed. In the present case, Jones took his interest subject to American's Trust Deed and thus it is even more clear than American's trust deed retains priority.

The rule in Proudfit and Gray v. Kappos, supra, is supported by numerous cases from other jurisdictions. Easton v. Ash, 116 P.2d 433, 437 (Cal. 1941) ("The renewal agreement was sufficient not only to revive the indebtedness but to renew the original mortgage as well."); Waynesboro Nat. Bank v. Smith, 145 S.E. 302, 305-06 (Va. 1928).

In William V. Hurd Lumber & Woodwork Co., 230 N.W. 2d (Mich. 1930), the court was confronted with facts almost identical to those here. The plaintiff purchased property and took a deed subject to a mortgage. The mortgage note was surrendered to the mortgagor in exchange for new notes. The court rejected plaintiff's claim that the substituted renewal notes discharged the mortgage. "No change in the form of the evidence, or the mode or time of payment--nothing short of actual payment of the debt, or an express release--will operate to discharge the mortgage." Id. at 921 (emphasis added); accord, Smith v. Thomas, 245 P. 399, 401 (Idaho 1926).

Jones admits that American's Trust Deed secured not only the original September 1980 Commodities Purchase Agreement and Note, but also the October 1980 Amendment to the Commodities Purchase Agreement, which merely "rolled over" the indebtedness for one month by the payment of \$19,000.00. Jones also admits that the "roll over" on November 22, 1980, which made the debt due on December 22, 1980, was still secured by the Trust Deed. (R. 512-514 and 519). However, Jones attempts to argue that the underlying indebtedness and security was extinguished by execution of the Revised Note and Agreement, which documents merely made the "roll over" automatic. This argument places form over substance. The parties to the Trust Deed only formalized an

arrangement that Jones admits was valid prior to the formalization. The undisputed fact is that American was never repaid its original advance.

B. The January 22, 1981 Revised Agreement and Note Did Not Constitute a Future Advance.

In the Court below, Jones assumed that the indebtedness of L. H. Investment to American was extinguished, and thus argued that the January 22, 1981 Revised Agreement and Note constituted a "future advance". Jones then cited cases to support the proposition that the "dragnet clause" of the Trust Deed would not secure a future advance. The future advance argument is a red herring and the cited cases are irrelevant.

As noted above, L. H. Investment stipulated to the entry of judgment in favor of American on its claim that the \$200,000.00 had not been paid, and American filed an affidavit stating that "the indebtedness represented by the original Trust Deed Note has not been satisfied or discharged" (R. 203). At a minimum, this raised a question of fact as to whether the original debt was extinguished and precluded a summary judgment finding in favor of Jones. Moreover, as noted in Section IV A above, extinguishment of a debt by giving a renewal note can only be established by showing the "clear" intent of the parties. The only evidence



intent favored the continuation of the security interest. Thus, since the debt was not extinguished, the January 22, 1981 Revised Agreement and Note could not constitute a "future advance" as asserted by Jones.

However, even if the future advance argument were applicable, the Utah cases provide that whether a dragnet clause in a Trust Deed will cover future advances is a question of the intent of the parties and whether the new obligation states that it is to be secured by the prior Trust Deed. First Security Bank of Utah v. Shiew, 609 P.2d 952, 955-56 (Utah 1980); Health Tecna Corp. v. Zions First National Bank, 609 P.2d 1334 (Utah 1980); see North Park Bank of Commerce v. Nichols, 645 P.2d 620, 621-22 (Utah 1982).

In the present case, both the Revised Note and Agreement specifically state that they are to be secured by the Trust Deed, the affidavit of George Drykerman states that the Revised Agreement and Note were to be secured by the Trust Deed, and the Stipulation to the Entry of Judgment in favor of American by L. H. Investment evidences this intent. This was the only evidence before the Court as to the intent of the Parties.

C. The Security Interest of American Is Prior to Any Interest of Jones Under the Doctrine of Equitable Subrogation.

Assuming, arguendo, that American lost the legal priority of its Trust Deed by executing the January 1981

Revised Agreement and Note, American still has equitable priority in the Subject Property over the interest of Jones under the doctrine of equitable subrogation. When a lender pays off a lien on real property, with the understanding that such lender will take the security position of the lien holder whose lien is paid off, the lender will be equitably subrogated to the security position of the original lien holder. Martin v. Hickenlooper, 90 Utah 150, 59 P.2d 1139, 1152 (1936); George v. Butler, 16 Utah 111, 50 P. 1032, 1034 (1897).

The principle of equitable subrogation was applied in the case of Tracy-Collins Trust Co. v. Goeltz, 5 Utah 2d 350, 301 P.2d 1086 (1956). In Tracy-Collins the plaintiff took a new mortgage and made a new loan, the proceeds of which paid a prior mortgage. The court quoted the applicable law:

[I]t is not necessary that there should be an express agreement that the prior lien shall be kept alive for the benefit of one advancing money to pay it, or that it be assigned, but if . . . it was the intention of the parties that the person making the advance was to have security of equal dignity and position with that discharged then equity will so decree.

Id. at 1090 (quoting Jackson Trust Co. v. Gilkinson, 105 N.J. Eq. 116, 147 A. 113).

Even if Jones argument is accepted that the Revised Agreement and Note paid the prior indebtedness, American did so with the express understanding that it would take the original lien position under the Trust Deed. Equity will intervene to subrogate American to the original security which secured the debt "paid" by American.

At oral argument, the court below recognized this legal position:

THE COURT: The subrogee would be the second holder subrogated to the first holder because of the equities involved. The equities would involve the second holder assumes [sic] the role of the first holder and gets that equitable consideration-- equitable position regardless of whether the note was extinguished.

MS. HEILBRUN: Right. He who paid off the note. In other words American paid off the prior note. American believed itself to be retaining that position. American would be equitably subrogated to the position of the holder of the prior note.

MR. COURT: Uh-huh. Yeah.

(R. 499-500). The Court, however, did not address this issue in the belated minute entry summarily denying American's Motion to Vacate, Reconsider or Amend the April 27, 1982 Order.

D. The Security Interest of American is Prior to any Interest of Jones Under the Doctrines of Equitable Subordination and Equitable Mortgage.

Assuming, arguendo, that there was some defect in the perfection of American's security interest in its Trust Deed for the January 1981 Revised Agreement and Note, American still has a prior interest in the Subject Property over the interest of Jones under the doctrines of equitable subordination and equitable mortgage. A mortgage which, because of some defect, is only operative to transfer an interest in equity to the mortgagee, is effective not only against the parties thereto, but also against others who secure their interests with knowledge of the rights of the mortgagee. 55 Am. Jur. 2d, Mortgages § 332, at 399.

In Redemptorist Fathers of the State of Washington v. Purdy, 24 P.2d 1089 (Wash. 1933), the court set forth the elements of an equitable mortgage:

The essence of an equitable mortgage is the intent of the parties to create a lien on the property described to secure the principal obligation. If the intent is present, equity will establish the lien, not only between the parties, but against purchasers or incumbrancers with notice.

Id. at 1090; accord, Reidy v. Collins, 26 P.2d 712, 714 (Dist. Ct. Cal. 1933); see Owens v. Continental Supply Co., 71 F.2d 862, 863 (10th Cir. 1934).

In the present case, the intent that the January Revised Agreement and Note be secured by the Trust Deed is unambiguous on the face of each document. Jones not only took his deed with notice of the Trust Deed, he took the deed expressly subject to the Trust Deed. Moreover, Jones executed a trust deed to a third party subsequent to the January Revised Agreement and Note, and in such document recited that it was subject to American's Trust Deed. Nor did Jones ever change his position in reliance on any extinguishment of American's debt in January 1981.

Thus, Jones' notice of the equitable mortgage was expressly present and continuing, and Jones' interest in the Subject Property should be subordinated to American's security interest.

#### V. SUMMARY AND CONCLUSION

The execution by American and L. H. Investment of the January 22, 1981 Revised Agreement and Note did not constitute performance under the original Agreement and Note and therefore did not extinguish the underlying debt secured by the American Trust Deed: (1) The Revised Agreement and Note merely "rolled over" the original indebtedness; (2) The Revised Agreement and Note expressly recite that they continue to be secured by the Trust Deed; (3) American has never been paid any portion of the original \$200,000.00 advance which was secured by the Trust Deed; (4) Jones warranty deed was made expressly subject to the American Trust Deed; and (5) at the time the Jones warranty deed was executed, the American indebtedness had already been "rolled over" for two consecutive months.

Since the underlying indebtedness to American was never extinguished, there is no issue in this lawsuit of whether a "future advance" of moneys is covered by the "dragnet clause" in the Trust Deed. There was no future advance because the original debt was never paid.

Moreover, even if the execution of the Revised Agreement and Note could be construed as a payment of the prior indebtedness, American is equitably subrogated to the Trust Deed security for the prior obligation because the Revised Agreement and Note paid the prior secured debt.

Finally, Jones took his interest in the Subject Property expressly subject to the American Trust Deed. He was not a bona fide purchaser without notice and he did not change his position after the Revised Agreement and Note were executed. In fact, Jones subsequently executed a Trust Deed to a third party reciting that it was subject to the prior American Trust Deed. Even if a defect in American's security instruments exists, the interest of Jones is equitably subordinated to the rights of American.

American's Trust Deed on the Subject Property is both legally and equitably prior and superior to any interest of Jones. On the undisputed facts, Summary Judgment should have been entered in favor of American. But in any event, there was no basis for the Court below to find, in a Summary Judgment context, that American's Revised Agreement and Note were not secured by the Subject Property.

American requests that this Court reverse the Summary Judgment and the findings of the April 27, 1982 Order, with directions to enter judgment in favor of American, or in the alternative, vacate the Judgment and Order and remand this case for further proceedings.

DATED this 9th day of June, 1983.

RESPECTFULLY SUBMITTED,

JONES, WALDO, HOLBROCK & McDONOUGH

By \_\_\_\_\_  
Kent T. Anderson  
Attorneys for Appellants/  
Defendant and Counterclaim  
and Cross-claim Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Appellant's Brief on this the 9th day of June, 1983, to be hand-delivered to:

David G. Williams, Esq.  
SNOW, CHRISTENSEN & MARITENEAU  
10 Exchange Place  
11th Floor  
P.O. Box 3000  
Salt Lake City, Utah 84110

and caused to be mailed to:

Robert G. Holt, Esq.  
ROOKER, LARSON, KIMBALL & PARR  
185 South State Street  
Suite 1300  
Salt Lake City, Utah 84111

Lewis T. Stevens, Esq.  
GREEN, CALLISTER & NEBEKER  
800 Kennecot Building  
Salt Lake City, Utah 84133



Donald E. Elkins, Esq.  
750 North 200 West  
Suite 104  
Provo, Utah 84601

David K. Smith, Esq.  
1399 South 700 East, #14  
Salt Lake City, Utah 84105

A handwritten signature in dark ink, appearing to be "David K. Smith", is written above a solid horizontal line.

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