

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 Respondent**

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**Recommended Citation**

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

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RONALD D. JONES and PAMELA  
JONES,

Plaintiffs and  
Respondents,

vs.

AMERICAN COIN PORTFOLIOS,  
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Trustee, L. H. INVESTMENT  
COMPANY, a Utah partnership,  
and L. H. INVESTMENT GROUP,  
a Utah corporation,

Defendants.

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AMERICAN COIN PORTFOLIOS, INC.,  
a California corporation, and  
OAKWOOD MANOR CO., a Califor-  
nia partnership,

Supreme Court Case  
No. 19003

Counterclaimants,  
Cross-Claimants and  
Appellants,

vs.

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GROUP, a Utah corporation,  
G. LEE EASTMAN, DONALD J.  
BOSHARD and A. RICHARD CALDER,

Counterdefendants,  
Cross-defendants  
and Respondents.

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**FILED**

AUG 1 1963

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Clerk, Supreme Court, Utah

APPEAL FROM JUDGMENT  
OF THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY, UTAH  
HONORABLE DAVID B. DEE, JUDGE

BRIEF OF RESPONDENT

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RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

Respondents are the record owners of the subject property and appellants allege a security interest in the property. This is an action for quiet title by respondents and foreclosure of the alleged lien by appellants.

DISPOSITION IN LOWER COURT

The trial court found appellants' interest in the property was extinguished and appellants now have no interest in the property. Based on that finding, appellants stipulated to entry of summary judgment in favor of respondents.

RELIEF SOUGHT ON APPEAL

Respondents ask this court to affirm the judgment entered by the lower court.

STATEMENT OF FACTS

In September, 1980, appellants (American Coin) entered into a Commodities Purchase Agreement with L. H. Investment Company (R. 280-284). Under the terms of the Commodities Purchase Agreement, American Coin agreed to advance

\$200,00.00, and L. H. Investment was obligated to deliver to American Coin, on October 22, 1980, the amount of gold, of a specified quality, which could be purchased at 90.5% of the London afternoon price that day, thus providing a return on American Coin's investment of 9.5% per month or 114% per annum. (R. 280, paragraph C).

To secure performance of the Commodities Purchase Agreement, L. H. Investment executed a promissory note to American Coin in the sum of \$200,000.00, which provided additional interest at 18% per annum (the "Trust Deed Note") (R. 271-273), and executed a Trust Deed covering the subject property (the "Trust Deed"), which provided it was for the purpose of securing the \$200,000.00 promissory note and included a dragnet clause covering future advances. (R. 275-278). The Trust Deed Note provided:

. . . This note is given as collateral security to assure performance by the undersigned of their obligations under that certain Commodities Purchase Agreement, and this Note shall be deemed paid in full upon strict performance by the undersigned of their covenants and obligations under the terms of the attached Commodities Purchase Agreement and this Note shall thereupon be returned to the undersigned and the Trust Deed secured hereby reconveyed and the lien thereof released of record. (R. 271, 2nd paragraph).

On or about October 22, 1980, L. H. Investment requested that it be allowed to repurchase the gold which it held ready for delivery as required under the Commodities Purchase

Agreement and American Coin agreed to sell the gold to L. H. Investment. (R. 286, paragraphs 1-3). L. H. Investment and American Coin then entered into an Amendment to the Commodities Purchase Agreement, under which the gold which L. H. Investment held ready for delivery to American Coin was sold by American Coin to L. H. Investment. (R. 286-287). As consideration for the right to repurchase the gold, L. H. Investment paid American Coin \$19,000.00 which represents the 9.5% discount and agreed to deliver to American Coin 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. (R. 286, paragraph 4). Paragraph 6 of the Amendment to the Commodities Purchase Agreement provided:

It is expressly agreed by the parties that this contract is supplemental to the previous Agreement of the parties, which is by this reference made a part hereof, and the terms, conditions and provisions thereof, unless specifically modified herein, are to apply to this contract and are made a part of this contract as though fully set forth herein . . . (R. 287).

On or about November 22, 1980, L. H. Investment again held ready for delivery to American Coin the gold agreed to be delivered on that date. Again, American Coin resold the gold to L. H. Investment in consideration of L. H. Investment's payment of \$19,000.00 and agreement to deliver to American Coin on December 22, 1980, the amount of gold

which could be purchased at 90.5% of the London afternoon price on that day. (R. 293, paragraph D).

On or about December 8, 1980, L. H. Investment conveyed the subject property to respondents (Jones) by Warranty Deed. The Warranty Deed recited that it was subject to the Trust Deed given by L. H. Investment to American Coin to secure the Commodities Purchase Agreement and \$200,000.00 Note, but the obligations under the Agreement and Note were not assumed by Jones. (R. 19, paragraph 3). Rather, L. H. Investment remained obligated to perform under the Agreement and Note. At the time the Warranty Deed was delivered and recorded, L. H. Investment's performance under the Commodities Purchase Agreement, Note and Trust Deed was due December 22, 1980. (R. 293, paragraph H).

On or about December 22, 1980, American Coin again resold to L. H. Investment the gold which L. H. Investment then held ready for delivery. L. H. Investment again paid the 9.5% discount and further agreed to deliver to American Coin on January 22, 1981, the number of ounces of .999 fine gold that \$200,000.00 would purchase at 90.5% of the second London fix price on that date. (R. 293, paragraph 4).

On or about January 22, 1981, American Coin and L. H. Investment entered into a new agreement entitled Revised Commodities Purchase Agreement. (R. 293-301) The new

Agreement, which provides it was to become effective December 22, 1980, (R. 301, paragraph 30), recites the prior dealings and contracts between the parties and sets forth the same scheme for the purchase and delivery of gold as in the original Agreement. (R. 293-294). The new Agreement dated January 22, 1981, however, includes a repurchase option, entitling L. H. Investment to repurchase the gold on each delivery date in lieu of delivering the gold. The new Agreement, in contrast to the Amendment to the original Agreement, also provides:

This Agreement constitutes the entire agreement among the parties pertaining to the subject matter hereof, and supersedes all prior agreements and understandings pertaining thereto. No covenant, representation, or condition not expressed in this Agreement shall effect or be deemed to interpret, change or restrict the express provisions hereof. . . . (R. 19, paragraph 19).

Consistent with the above quoted provision of the new Agreement, a new Note dated January 22, 1981, in the principal sum of \$219,000.00 was executed by L. H. Investment in favor of American Coin. (R. 290-291). In spite of the fact that L. H. Investment had conveyed the subject property to Jones on December 8, 1980, the new Agreement included warranties by L. H. Investment that it had the legal right and ability to obtain title and possession to the subject property and that it would provide American Coin an ALTA

Standard Lenders Title Insurance Policy insuring that appellant had a first Trust Deed security interest in the subject property. (R. 296, paragraph 9(c)).

L. H. Investment performed under the new Agreement dated January 22, 1981, until March or April, 1981, when it failed to deliver the gold. (R. 124, paragraph 5). American Coin then gave Notice of Default under the new Agreement and new Note. (Id.) The present action was then commenced seeking a judgment declaring that the new Agreement and new Note are not secured by the subject property.

On April 8, 1982 American Coin's motion for summary judgment was heard by the Trial Court. At the hearing American Coin admitted there were no disputed issues of facts and that all facts necessary for a determination of American Coin's interest in the property were before the Court. (R. 504, 506). The trial court, as requested by American Coin, interpreted the writings between the parties and found American Coin's lien on the property had been extinguished and it had no interest in the property.

#### ARGUMENT

#### POINT I.

L. H. INVESTMENT STRICTLY PERFORMED ITS  
COVENANTS AND OBLIGATIONS UNDER THE  
ORIGINAL COMMODITIES PURCHASE AGREEMENT AND



TRUST DEED NOTE THEREBY TERMINATING  
APPELLANTS' RIGHTS IN THE SUBJECT PROPERTY.

Under Utah law, satisfaction or performance of an agreement or obligation secured by collateral terminates, as a matter of law, the lien on the collateral. In Aird Insurance Agency v. Zions First National Bank, 612 P.2d 341 (Utah, 1980), the Court held:

A pledge of security affords rights in the pledgee only to the extent that the secured obligation may become in default. Moreover, the nature of the obligation secured is a function of the agreement between the parties . . . Satisfaction of an obligation secured by a pledge terminates, as a matter of law, the pledgee's rights in the collateral. Such termination is inherent in the definition of a security interest . . . .

Consistent with the applicable law, under the express terms of the Trust Deed Note executed in September 1980, strict performance by L H Investment of its covenants and obligations under the original Commodities Purchase Agreement, a copy of which was attached to the Note, constituted payment in full of the note and release of the Trust Deed lien. The note specifically recites it was given as collateral security to assure performance under the Commodities Purchase Agreement and provides:

And this Note shall be deemed paid in full upon strict performance by the undersigned of their covenants and obligations under the terms of the attached Commodity Purchase Agreement and this Note shall thereupon be returned to the undersigned and the Trust Deed secured hereby reconveyed and the lien thereof released of record.

Accordingly, the first issue raised is whether L. H. Investment performed its obligations under the September, 1980 Commodities Purchase Agreement and Trust Deed Note.

The original Commodities Purchase Agreement was in effect from September 1980 to December 22, 1980. The new Revised Commodities Purchase Agreement became effective December 22, 1980. American Coin, by the recitals in the new Agreement, acknowledged L. H. Investment held ready for delivery the required amount of gold on each delivery date through December 22, 1980. In fact, American Coin has never claimed a breach or default of the original Commodities Purchase Agreement or Trust Deed Note and there is no dispute that L. H. Investment strictly performed its obligations under the first Agreement and Amendment thereto through December 22, 1980. American Coin's argument is that the new Agreement was merely an extension or modification of the first Agreement.

- A. Whether the Revised Commodities Purchase Agreement dated January 22, 1981, was a new agreement or merely an extension or modification of the first agreement was properly determined by the trial court based on the written contracts and no material issues of fact exist.

Appellants argument to this Court that questions of fact exist as to the intent of the parties to the contracts is without merit for two reasons: First, American Coin expressly represented to the trial court that both parties

relied upon the terms of the written contracts to establish the facts and specifically requested the court to rule on the issue based on its interpretation of the written contracts.

Its counsel urged the court as follows:

Ms. Heilbrun: The issue before the Court in this matter is a simple single issue of law regarding the validity and priority of a recorded Trust Deed owned and held by my clients, American Coin Portfolios, Inc. and Oakwood Manor . . . . The Jones, as do we, appear to rely on the terms of the writings between the parties to establish the operative facts. At least in that we agree. Our interpretation differs obviously. That's why we are here today. This Court can determine which interpretation is correct from the express contracts and summary judgment can be granted. (R. 504, 506).

Having so urged the trial court, appellants are estopped from now claiming the trial court erred because questions of fact exist. It is well-settled that:

The rule that a party will not be allowed to maintain inconsistent position is applied in respect to positions in judicial actions and proceedings. As thus applied, it may be regarded not strictly as a question of estoppel, but as a matter in the nature of a positive rule of procedure based on manifest justice and, to a greater or lesser degree, on considerations of orderliness, regularity, and expedition in litigation. . . . The rule against inconsistent position applies generally to positions assumed not only in the course of the same action or proceeding, but also in proceedings supplemental thereto, including proceedings for review or retrial. . . ." 28 Am. Jur. 2d, Estoppel and Waiver, § 69 at 696-697.

Second, while the intention of the parties may be a question of fact to be determined from all the circumstances

in a dispute between the parties to an agreement, when the dispute is between a party to the agreement and a third party (not a party to the agreement), the intent must be determined solely from the express language of the document itself. James Weller, Inc. v. Hansen, 517 P.2d 410 (Ariz. App. 1973); Stearns v. Williams, 240 P.2d 833 (Ida. 1982); Lepel v. Lepel, 456 P.2d 249 (Ida. 1969).

In James Weller, Inc. vs. Hansen, supra, Hansen and Cherokee Construction Company (like American Coin and L. H. Investment) were involved in several transactions pertaining to the property involved. Weller performed work on the property and filed notice of a mechanic's lien, naming Cherokee as the owner. In the litigation, Hansen sought to quiet title to the property and Weller sought to foreclose its mechanic's lien. Hansen claimed he did not receive the required notice of the mechanic's lien. Weller argued that based on the contracts between Hansen and Cherokee, they were joint venturers and therefore the notice to Cherokee was sufficient. Hansen argued there was a factual issue and the relationship between him and Cherokee had to be based on their intent and determined from all the relevant circumstances. The Court held:

While the intent of the contracting parties is essential as between the parties, where there is a

clear and unambiguous contract, as here, the contract controls as to Weller, a third party.

\* \* \*

. . . The intent of the contracting parties to form a partnership is always an essential element of a partnership as between the partners themselves, but as to third parties, the relation will be determined from the facts rather than the conclusions of the co-partners as to the nature of the business relationship. Id. at 1114-1115.

Jones was not privy to the contracts between American Coin and L. H. Investment. Therefore, whether the second contract was a new agreement or merely a modification of the first agreement must be determined from the express language of the contracts, as urged by American Coin in the trial court, and not from the conclusions of the parties to the contracts, as now argued by American Coin.

B. The Trial Court's Interpretation of the Written Contracts was correct.

American Coin's contention that the new Agreement was merely an extension or modification of the old Agreement is untenable, particularly when the express terms of the new Agreement are compared with the terms of the October 22, 1980 Amendment to the original Agreement. When the original Agreement was extended and amended in October 1982, the Amendment provided:

It is expressly agreed by the parties that this contract is supplemental to the previous agreement of the parties, which is by this reference made a

part hereof and the terms, conditions and provisions thereof, unless specifically modified herein, are to apply to this contract and are made a part of this contract as though fully set forth herein.

In contrast, when the new Agreement was made in January, 1981, after strict performance of the old Agreement, it provided:

This agreement constitutes the entire agreement among the parties pertaining to the subject matter hereof, and supersedes all prior agreements and understandings pertaining thereto. No covenant, representation or condition not expressed in this Agreement shall affect or be deemed to interpret, change, or restrict the express provisions hereof. (R. 19, paragraph 19).

In each case the contract language is clear and unambiguous. In October 1980 when the Commodities Purchase Agreement was to be merely modified, it was done by amendment, which expressly provided it was supplemental to the original agreement, and incorporated all provisions of the original agreement not expressly modified.

Also noteworthy is the fact that no new note was executed to secure the Amendment. In contrast, a completely new and separate contract was prepared and signed by the parties in January 1981. The new contract recites full performance of the original agreement and expressly provides it supersedes all prior agreements. Additionally, a new note securing the new contract was prepared and signed. The new note is for a

different principal amount and does not by its terms purport to be a renewal or extension of the old note.

American Coin's reliance on First Security Bank of Utah v. Proudfit Sporting Goods Co., 522 P.2d 123 (Utah 1976), is misplaced. In Proudfit this Court held that the holder of a security interest did not lose its priority as to an intervening judgment creditor where the debtor obtained an extension or renewal of a note to the holder of the security interest. The original obligation in that case was never satisfied but was extended. The Proudfit case would be applicable to this case if L. H. Investment had not performed under the original contract and had obtained an extension of time in which to perform. The undisputed facts in this case, however, are that L. H. Investment did perform under the original contract. The new contract was not an extension of time for L. H. Investment's performance, but, in fact, recites full performance by L. H. Investment under the first contract and expressly provides it supersedes all prior agreements.

In summary, under applicable Utah law and by the express provisions of the September 1980 Trust Deed Note, the Note was deemed paid in full, and the trust deed lien terminated when L. H. Investment performed its obligations under the September 1980 Commodities Purchase Agreement and the

Amendment thereto. The clear and unambiguous language of the written contract supports the trial court's finding that the Revised Commodities Purchase Agreement was a new contract and not a mere extension of the earlier agreement. L. H. Investment did not have title to the subject property in January 1981, when the new Agreement was made and therefore could not give American Coin a security interest in the property as it purported to do.

#### POINT II.

THE REVISED COMMODITIES PURCHASE AGREEMENT  
AND TRUST DEED NOTE, DATED JANUARY 22,  
1981, ARE NOT SECURED BY THE SUBJECT  
PROPERTY UNDER THE SEPTEMBER, 1980, TRUST  
DEED.

Since the obligations under the original Commodities Purchase Agreement were fully performed and the original Trust Deed Note thereby fully paid and American Coin's only claim of default is under the new Agreement and new Note, its claim to a security interest in the property under the September 1980 Trust Deed is necessarily based on the future advance provision of the Trust Deed, commonly known as a "dragnet clause". The dragnet clause provided that in addition to the \$200,000 promissory note, the Trust Deed secured "the payment of such additional loans or advances as hereafter may be made to Trustor, or its successors or



assigns, when evidenced by a Promissory Note or notes reciting that they are secured by this trust deed."

Dragnet clauses such as this are not favored in equity and are to be carefully scrutinized and strictly and narrowly construed. First Security Bank of Utah v. Shiew, 609 P.2d 952 (Utah 1980); Osborn, Nelson & Whitman, Real Estate Finance Law, Section 12.8 (1979). In this case, the dragnet provision does not extend the trust deed to the new Commodities Purchase Agreement or new Trust Deed Note, dated January 22, 1981, for three reasons:

- A. Once the Original Note Was Fully Paid and Discharged, the Trust Deed Lien Was Extinguished and Could Not Thereafter Secure Future Loans.

One rule quoted with approval by this Court in First Security Bank of Utah v. Shiew, *supra*, and applied by courts in construing and limiting the application of dragnet clauses, is stated by Osborn, Nelson & Whitman as follows:

Once the original debt has been fully discharged, the mortgage is extinguished and cannot secure future loan. Id. at 774.

As discussed under Point I, there is no dispute that L. H. Investment fully performed each and every obligations under the original Commodities Purchase Agreement. The original Trust Deed Note, by its express terms, was deemed paid in full upon L. H. Investments' performance of its covenants and obligations under the original Commodities

Purchase Agreement. Accordingly, the lien created by the September 1980 Trust Deed was extinguished. The new Agreement made in January, 1981, which by its terms superseded all prior agreements and understandings between L. H. Investment and American Coin, and the new Note signed at that time, could not be secured by a lien which had been extinguished.

B. The Obligations Under the January 22, 1981, Agreement and Note, which Appellants Claim Were Breached, Were Incurred After the Property Was Conveyed to Jones.

According to Osborne, Nelson & Whitman, supra, another rule applied by courts in construing dragnet clauses is: "If the real estate is transferred by the mortgagor to a third party, any debts which the original mortgagor incurs thereafter are not secured by the mortgage." Id. at 775. This rule was also quoted with approval by this Court in First Security Bank of Utah v. Shiew, supra, and was adopted by the drafters of the Uniform Land Transfer Act. ULTA § 3-205(d).

The same rule was applied by the Texas courts in Vaughan v. Crown Plumbing and Sewer Service, Inc., 523 S.W.2d 72 (Tx. Ct. App. 1975), a case with facts strikingly similar to the present case. On May 13, 1974, Crown Plumbing purchased an apartment complex from Gayne. The sale was subject to

several existing liens on the property, but the obligations secured by said liens were not assumed by Crown. One of the liens was created by a trust deed dated February 1, 1972, in favor of Vaughan, which contained a clause purporting to cover future advances. On July 29, 1974 (after the sale to Crown) Gayne signed another promissory note to Vaughan. Gayne defaulted on this obligation and Vaughan proceeded with the requisite notices to conduct a trustee's sale, claiming the July 29, 1974 note was secured by the February 1, 1972 trust deed. Crown brought suit and obtained a TRO and preliminary injunction enjoining the trustee's sale. The appellate court affirmed, holding that the February 1972 trust deed did not secure the obligation of Gayne to Vaughan because it arose after Gayne transferred the property to Crown.

In the present case, the only obligations which American Coin claims were breached arose after L. H. Investment conveyed the subject property to Jones. Accordingly, these obligations are not secured by the September 1980 Trust Deed.

- C. The Dagnet Clause in the September 1980 Trust Deed Does Not Extend the Trust Deed Lien to the Obligations Under the January 22, 1981 Agreement and Note Because The Obligations Under the New Agreement Were Voluntary and Not Obligatory.

The general rule regarding priority between an original lien holder who makes a future advance to the mortgagor and a

third party who acquires an interest in the mortgaged property after creation of the initial lien, but before the future obligation is incurred by the mortgagor is that if the future advance is voluntary rather than obligatory and the mortgagee has notice of the intervening third-party's interest, the interest of the third party takes priority. Osborne, Nelson & Whitman, §12.7, supra.

This rule was applied by the trial court and affirmed by this Court in Western Mortgage Loan Corporation v. Cottonwood Construction Co., 424 P.2d 437 (Utah 1967). The following analysis of this rule was suggested by the Court in First Security Bank of Utah v. Shiew, supra:

. . . In a case where there is no obligation to make future advances, a mortgage, which purports to secure future advances, cannot do so until such advance has been made. Until such time, the provision merely represents an expression of the intention of the mortgagor and mortgagee that the mortgage shall operate as a security for the obligations of the mortgagor with respect to such advances, if and when such obligation arises. Thus, these provisions, at most, represent an offer by the mortgagor to provide the security of the mortgage for such advances if and when they are made. . . .

Id. at 956.

In the present case American Coin had no obligation to enter into the January 22, 1981 Agreement and Note. Their acts were purely optional and voluntary. Jones' deed was recorded December 8, 1980 and American Coin therefore had

notice of it when it voluntarily entered into the new Agreement. As explained by the Court in Shiew, supra, the dragnet clause represented merely an offer by L. H. Investment to secure future obligations with the September 1980 Trust Deed when they arose. When the obligations arose in January 1981, however, L. H. Investment had already conveyed the property to Jones. Accordingly, the obligations which arose at that time could not be secured by the subject property under the 1980 Trust Deed.

In addition to the three legal grounds set forth above supporting the ruling of the trial court, there is a basic policy reason for not extending the September 1980 trust deed lien to the obligations created under the January 1981 Agreement and Note. Real property is commonly sold in this state subject to existing trust deed liens. In such transactions, it is important that the buyer know exactly to what liens his title is subordinate. If dragnet clauses were enforceable against third persons whose interests in the property are known to the parties at the time the future advance is made, the seller could create further encumbrances on the property after selling it and the buyer would not know the extent of the liens having priority. In that case a buyer may pay a substantial purchase price, but end up with no equity in the property. The existing practice in this

state of buying property subject to a prior trust deed with a magnet clause is obviously based on the assumption that the existing lien cannot be increased or extended to other obligations created by agreement between the mortgagor and mortgagee after the sale. A contrary rule would necessarily and unfairly prejudice the buyer and make the prevailing practice of selling property subject to a trust deed lien totally impracticable.

POINT III.

THE DOCTRINES OF EQUITABLE SUBROGATION,  
EQUITABLE SUBORDINATION AND EQUITABLE  
MORTGAGE ARE NOT APPLICABLE IN THE PRESENT  
CASE.

Appellants urge the Court to apply the doctrines of equitable subrogation, equitable subordination and equitable mortgage to the facts of the present case in order to prevail on this appeal. These doctrines are totally inapplicable to this case for the following reasons:

A. Equitable Subrogation.

Subrogation is the substitution of a person who satisfies a claim or debt in place of the creditor so that he succeeds to the rights of the creditor in relation to the debt or claim. Hartford Fire Insurance Company v. Western Fire Insurance Company, 597 P.2d 622, 629 (Kans. 1979).

The law in Utah with respect to equitable subrogation was reviewed extensively in Martin v. Hickenlooper, 59 P.2d 1139 (Utah 1936) where the Court recognized that there are two kinds of subrogation, "legal" and "conventional". Legal subrogation, commonly referred to as equitable subrogation, arises "where the person who pays the debt of another stands in the situation of a surety or is compelled to pay to protect his own right or property." Id. at 114 (quoting Bingham v. Walker Brothers Bankers, 75 Utah 149, 283 P. 1055 (1929)). Conventional subrogation "occurs where one is under no obligation to make payment, and who has no right or interest to protect, pays the debt of another." Stated simply, legal subrogation arises by operation of law, whereas conventional subrogation arises from contract or the agreement of the parties. Hartford Fire Insurance Company v. Western Fire Insurance Company, supra at 629. State Farm Mutual Assets Insurance Company v. Foundation Reserves Insurance Company, 471 P.2d 737, 741 (N.M. 1967). Equitable subrogation is not applicable to the present case for the following four reasons:

First, American Coin did not pay off a lien held by another party. The Trust Deed lien, originally held by American Coin was extinguished by L. H. Investments' performance and satisfaction of obligations under the

Commodities Purchase Agreement. (See Point I). American Coin's interest in the Note and Trust Deed were fully extinguished at the time the second Agreement and second Note were executed January 22, 1981. Therefore, American Coin did not pay the lien on the Subject Property and cannot be subrogated to the prior lien.

Second, assuming, arguendo, that American Coin paid the prior indebtedness, equitable subrogation cannot be applied in the present case because American Coin would have paid its own obligation and succeeded to its own rights as creditor. Subrogation by definition contemplates "the substitution of one person in the place of another with reference to a lawful claim, demand or right, . . ." Blacks Law Dictionary, 4th Ed. at 1595. There is no basis for the application of the doctrine of equitable subrogation where the creditor is the same person both before and after the debt had been paid. A common thread which runs through all cases dealing with equitable subrogation is that the person who pays the creditor is a separate and distinct person from that creditor. (See, generally, those cases cited in Martin v. Hickenlooper, supra).

Third, even assuming, arguendo, that American Coin paid the indebtedness, the circumstances of the present case do not come within any recognized basis for subrogation. Legal



subrogation cannot be applicable to the present case because American Coin was neither a surety nor was it compelled to make any payment to protect its interest. A party is compelled to make a payment to protect its interest in those cases where it must do so or lose its interest such as where it is a co-owner of the property.

Likewise, conventional subrogation is inapplicable. The Court in Martin v. Hickenlooper, supra at 1141, held "[c]onventional subrogation occurs where one who is under no obligation to make payment, and who has no right or interest to protect, pays the debt of another . . ." The Court further held that in order to come within the principles of conventional subrogation the lender had to be " . . . in no way related to the property or in any way required to protect an interest . . . ." Id. at 1151. American Coin is not entitled to the application of the doctrine of conventional subrogation since it had a right or interest in the property and was related to the property as the lien holder.

Fourth, equitable subrogation will be applied only "where no innocent parties will suffer or no right has intervened." Id. at 1142. "Subrogation will not be permitted where it will work any injustice to others." Transamerica Insurance Company v. Bowes, 29 Utah 2d 101, 505 P.2d 783, 786 (1972).

In the present case, Jones did not assume the obligations of L. H. Investment, it took title to the property subject to those obligations. Jones reasonably expected that those obligations would be satisfied by L. H. Investment, as they in fact were. To give American Coin a security interest in the property by applying equitable subrogation would unduly prejudice Jones' rights with respect to the property. The amount of prejudice is clear, \$200,000. When L. H. Investment satisfied its obligations thereby extinguishing the Trust Deed Note and Trust Deed, Jones' equity in the property increased by \$200,000. This was in accord with Jones' understanding that the obligations of L. H. Investment would be satisfied on or before December 22, 1980.

B. Equitable Subordination and Equitable Mortgage.

An equitable mortgage is created when one party advances money upon the faith of or agreement by the debtor that he will have a security interest in property of the debtor for the satisfaction of his debt. It is well-settled that the equitable lien or mortgage takes effect at the time of the transaction between the parties. Garnett State Savings Bank v. Tush, 657 P.2d 508 (Kans. 1983). In Fitzgerald v. Fitzgerald, 155 PP. 791 at Syl. ¶ 1 (Kans. 1916), the court held that a lender becomes an equitable mortgagee of the property from the time the agreement is made.

While an equitable mortgage creates equitable interests in the property, those interests are subject to prior liens. Schmelzle v. Key, Inc., 452 P.2d 41 (Colo. 1969). Equitable mortgages are also subject to prior known equitable interests. 55 Am.Jur.2d, Mortgages § 10 at 200-201. Therefore, even if the doctrine of equitable subordination and equitable mortgage were applicable in the present case, American Coin's interest in the Subject Property vested at the earliest on January 22, 1981 when the 1981 Revised Agreement and Note were executed. All legal and known equitable interests existing prior to that date would have priority over the interest of American Coin.

In their brief, American Coin refers to 55 Am. Jur.2d Mortgages § 332 at 399 for the proposition that an equitable mortgage "is effective not only against the parties thereto, but also against others who secure their interests with knowledge of the rights of mortgagee." (Brief of appellant at p. 22). The quotation from which the above-recited reference was taken is as follows:

A mortgage which is operative to transfer an interest in the mortgaged property to the mortgagee in equity only is effective, like other equities, not only against the parties thereto, but also against others who secure their interests in the property as volunteers or with notice of the rights of the prior mortgagee.

55 Am. Jur.2d Mortgages § 332 at 399 (emphasis supplied).

It is apparent that the above-quoted provision is applicable only to those who secure their interest in the property with notice of a prior equitable mortgage.

American Coin's equitable mortgage could not have been prior to the Jones' interest. Jones recorded their deed to the Subject Property on December 8, 1980. The equitable mortgage claimed by American Coin could not have been created until January 22, 1981. Jones could not have had notice of American Coin's equitable mortgage until nearly a month and one half after their deed had been delivered to them.

#### CONCLUSION

The trial court's ruling was proper and should be affirmed for the following reasons:

1. The obligations and covenants under the original Commodities Purchase Agreement were strictly and fully performed by L. H. Investment. Strict Performance of those obligations constituted payment in full of the obligation.
2. The obligations under the new Agreement and Note dated January 22, 1981, could not be secured by the September 1980 trust deed because: (a) the trust deed lien was extinguished before the new obligations arose, (b) they were incurred after the property had been conveyed to Jones, (c) the obligations under the new Agreement and Note were

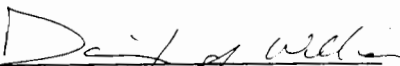
voluntary and not obligatory, and (d) a contrary ruling would be inconsistent with the prevailing practice of selling real property in this state subject to trust deed liens.

3. The doctrines of equitable subrogation, equitable subordination and equitable mortgage are not applicable in the present case and cannot provide American Coin a security interest in the Subject Property prior to that of Jones.

DATED this 29th day of July, 1983.

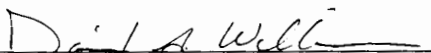
Respectfully submitted,

SNOW, CHRISTENSEN & MARTINEAU

By   
David G. Williams  
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CERTIFICATE OF SERVICE

I certify that I served two copies of this Brief on Kent T. Anderson of Jones, Waldo, Holbrook & McDonough, 800 Walker Bank, Salt Lake City, Utah 84111, Attorneys for Appellants on July 29, 1983, by placing the same in a preaddressed envelope and depositing it in the Unites States Mail, first class postage prepaid.

  
David G. Williams