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 : Reply Brief

IN THE SUPREME COURT OF THE

STATE OF UTAH

RONALD D. JONES and PAMELA JONES, 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.	
AMERICAN COIN PORTFOLIOS, INC., a California corporation, and OAKWOOD MANOR CO., a California Partnership, Appellants and Counterclaim and Cross-claim Plaintiffs, 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. BOSHARD and A. RICHARD CALDER, Counterclaim and Cross-claim Defendants.	Supreme Court No. 19003 Third District Civil No. C-81-6225 REPLY BRIEF

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REPLY BRIEF OF APPELLANTS/DEFENDANT
AMERICAN COIN PORTFOLIOS, INC.
AND COUNTERCLAIM AND CROSS-CLAIM PLAINTIFFS

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

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Appellants/Defendant and Counterclaim and Cross Claim Plaintiffs, American Coin Portfolios, Inc. and Oakwood Manor Co. (hereinafter collectively referred to as "American"), through their attorneys of record, submit this Brief in Reply to Respondents' Brief on appeal (Respondents are hereinafter referred to as "Jones").

I. L. H. INVESTMENT HAS NEVER FULFILLED ITS COVENANTS AND OBLIGATIONS UNDER THE ORIGINAL OR REVISED COMMODITIES PURCHASE AGREEMENTS AND AMERICAN HAS RETAINED ITS SECURITY INTEREST IN THE SUBJECT PROPERTY.

Point I of the Jones' Brief asserts that "L. H. Investment strictly performed its covenants and obligations under the original Commodities Purchase Agreement." The Jones Brief, however, never confronts the critical facts or the controlling law. Jones never disputes that American advanced $200,000.00 to L. H. Investment in September 1980, that the debt was properly secured by the Trust Deed, and that the debt of $200,000.00 was never repaid to American in any form by anyone. Jones merely argues that because the January 1981 Revised Agreement and Note were executed, that the debt and the Trust Deed security were extinguished. The following cases, cited for the following controlling

positions in American's Brief, are never discussed, distinguished or even cited in Jones' Brief:

1) In Oakman v. Hurd Lumber & Woodwork Co., 230 N.W. 921 (Mich. 1930), the court was confronted with facts virtually identical to those here. The plaintiff was an intervening purchaser of the property who took his deed subject to a mortgage, as did Jones in the present case take his deed expressly subject to the Trust Deed of American. The court rejected plaintiff's argument that defendant's acceptance of substituted renewal notes discharged the mortgage, holding: "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. (emphasis added); accord Smith v. Thomas, 245 P. 399, 401 (Idaho 1926).

2) 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., 567 P.2d 176, 178 (Utah 1977); see Utah Code Annotated § 70A-3-802. It must clearly appear that it was the intention of the

parties to extinguish the debt represented by the original note. Interstate Trust Co. v. Headlund, Utah 543, 171 P. 515, 517-18 (1918); accord, Gray v. Kappos, 90 Utah 300, 61 P.2d 613, 615 (1936).

3) "The renewal agreement was sufficient not only to revive the indebtedness but to renew the original mortgage as well." Easton v. Ash, 116 P.2d 433, 437 (Cal. 1941); see Waynesboro Nat. Bank v. Smith, 145 S.E. 302, 305-06 (Va. 1928).

Jones does not address the fundamental distinction between the underlying debt--the $200,000.00--and the evidence of the debt--the note or renewal note. The Trust Deed secures the underlying debt, and a change in the form of the evidence of indebtedness is irrelevant. This proposition is amplified in 59 C.J.S. Mortgages § 461:

> Where a note secured by a mortgage is taken up, at or before its maturity, and a new or renewal note substituted for it, the mortgage continues as a security for the debt in its new form and there is no change in the rights or remedies of the mortgagee unless there is an actual agreement or mutual intention of the parties that the mortgage shall be discharged, or the debt regarded as paid, by the new note, or that the new note shall not be included within the security of the mortgage; and the one who claims such an agreement or understanding has the burden of proving it. (Emphasis added).

The most recent and directly controlling case on the present facts is First Security Bank of Utah v. Proudfit Sporting Goods Co., 522 P.2d 123 (Utah 1976), which is discussed in detail in Americans' Brief at 14-16. In Proudfit an intervening lienholder claimed that the banks acceptance of a renewal note in an increased debt amount constituted payment of the underlying debt and therefore released the original Trust Deed security. This court rejected that argument. In Jones' Brief at 14, Jones states that Proudfit "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." L. H. Investment failed to pay the debt to American and executed the Revised Agreement and Note to extend the debt, which is the identical failure of performance as occurred in Proudfit, when the original note was substituted for a renewal note.

II. THE ACTUAL INTENT OF THE PARTIES, AS WELL AS THE CONTENTS OF ALL EXECUTED DOCUMENTS, INDICATES THE CLEAR AND EXPRESSED INTENT TO EXTEND THE DEBT AND THE TRUST DEED SECURITY INTEREST WITH THE EXECUTION OF THE JANUARY REVISED AGREEMENT AND NOTE.

In light of the undisputed fact that the underlying debt to American has never been paid, Jones can only prevail if 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." Proudfit, supra, at 124. Because L. H. Investment, the trustor, admits the validity and priority of the American Trust Deed, Jones, at 9-12 of his Brief, argues that the actual intent of the parties to extend the debt and security interest is irrelevant as to a third party, and Jones asserts that the intent of L. H. Investment and American must be drawn from the January 1981 written agreements. Jones Brief then argues at 12-15 that the January Revised Agreement and Note demonstrate an intent to extinguish the prior debt at that time. Jones' conclusion that the written documents show an intent to extinguish the prior debt is patently incorrect (see Section II C below, at 9 et seq.). However, even the initial assumptions of law are wrong.

A. The Actual Intent of the Parties to the Security Interest Determines Whether the Debt is Extinguished, Not the Words Used in the Contract.

The Proudfit case itself dealt with facts where the third party intervening judgment lienor had no knowledge or involvement in the transactions between the debtor and the holder of the Trust Deed. However, in finding that the renewal note continued to be secured by the Trust Deed, this Court

[illegible] that if an unpaid debt is to be deemed extinguished, the [illegible] intent of the parties must be shown. See also, Oakman, supra, and 59 C.J.S. Mortgages § 461, supra. The policy behind this rule is sound. Where the debt to the beneficiary under a Trust Deed has never been paid, the actual intent of the parties to the Trust Deed should control. The law does not favor a forfeiture. The continuation of the Trust Deed as security for the renewal note does not place the intervening lienholder in any worse position than he was prior to acceptance of the renewal note by the beneficiary under the Trust Deed. This is not a case where new money was advanced, or where an additional indebtedness that did not previously exist burdens the position of the intervening lien holder. Thus, the intent of the parties to the Trust Deed is controlling.

Jones' attempts to support the proposition that the intent is controlled by the language of the contract, by citing cases that have nothing to do with the priority of security interests in real estate (Jones Brief at 11-12). Jones cites the case of James Weller, Inc. v. Hansen, 517 P.2d 410 (Ariz. App. 1973). The Weller case deals with the issue of whether a land owner and a realtor were engaged in a joint venture so that the service of a lien claim on the construction company

constituted service on the realtor. On a theory analogous to apparent authority in the law of agency, the court found that as to third parties, the land owner and the realtor were engaged in a joint venture. Obviously, when persons act as joint venturers, they will be bound by the knowledge of their joint venturer even though the actual intent may be otherwise. This theory is not analogous to the situation where Jones had already taken its deed as security expressly subject to the American Trust Deed, and American chose to rollover or renew the Note, placing Jones in no worse position than Jones was prior to the renewal. The remaining two supporting cases cited on page 11 of Jones' Brief, do not warrant discussion. In the Stearn and Lepel cases, the courts briefly discuss the issue of whether a husband and wife are engaged in a joint venture, and the cases contain no discussion of real estate, trust deeds or intervening security interests.

B. Assuming, arguendo, that the Language of the Written Agreements Controls Intent as to Third Parties, Jones Was Not Such a Third Party.

It is undisputed that Jones took his deed expressly subject to American's Trust Deed for $200,000.00 (R. at 19). There is also no dispute that the indebtedness secured by American's Trust Deed was rolled over in October and November.

1980, prior to Jones taking his Deed. Jones, admits that these rollovers in October, November and December did not extinguish the debt to American or release the prior Trust Deed (see Jones Brief at 12-13). Therefore, Jones took his deed subject to the Trust Deed and the rollover procedure, which had already occurred on two occasions. The only function of the January 1981 Revised Agreement and Note was to formalize this rollover procedure.

Additionally, even after the execution of the January 1981 Revised Agreement and Note, Jones continued to acknowledge the validity and priority of the American Trust Deed. On February 16, 1981, 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 was expressly subject to American's Trust Deed (R. 400). As late as May 5, 1981, after American had recorded its Notice of Default, Jones' attorney delivered written instructions directing the recording of an escrowed warranty deed from Jones to L. H. Investment upon certain conditions (R. 408), which escrowed warranty deed expressly recites the continuation of the American Trust Deed (R. 396).

Jones was not an innocent third party without notice, but took subject to the Trust Deed and the rollover procedure,

and acknowledged the validity of the Trust Deed until almost the commencement of this action to stop American's trustee' sale.

C. The Express Language of the Revised Agreement & Note establishes the Clear Intent to Continue the Debt to American and the Security of the Trust Deed.

Jones' Brief at 12-13 states that the October 1980 Amendment to the original Commodities Purchase Agreement remains secured by the September 1980 Trust Deed because the October Amendment recited that it was supplemental to the previous agreement, whereas the January 1981 Revised Agreement contains a boiler plate integration clause, which states that the Agreement supersedes all prior agreements of the parties.*

Jones, however, completely ignores six distinct provisions and aspects of the January Revised Agreement that clearly indicate on the face of the documents that there was no intention to extinguish the prior debt or agreements or release the Trust Deed security:

(1) The original September 1980 Commodities Purchase Agreement and the October Amendment thereto

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*Jones also erroneously asserts at 13 that the January Revised Agreement recites full performance of the original Commodities Purchase Agreement.

are attached to the Revised Agreement as Exhibit "A". (See Recital C on page 1 of Revised Agreement R. 293-301).

(2) Paragraph 29 on page 8 of the Revised Agreement states that all Exhibits annexed to the Revised Agreement are expressly made a part of the Agreement. "All references to this Agreement,. . . shall deem to refer to and include this Agreement and all such Exhibits and writings. Any breach or default under the provisions of any of such writings shall, for all purposes, constitute a breach or default under this Agreement and all other such writings." Thus, the prior agreements and debt were not only not extinguished, but by the express language of paragraph 29, were kept alive under the Revised Agreement and could be the subject of a default.

(3) Paragraph 1 on page 2 of the Revised Agreement specifically states that L. H. Investment "shall continue to apply the Two Hundred Thousand Dollars ($200,000.00) advanced by American Coin. . ." (Emphasis Added). Thus indicating no payment of the $200,000.00 and no intent to extinguish this underlying debt.

(4) Paragraph 7 on pages 3 and 4 of the Revise Agreement specifically recites that the September Trust Deed to American "shall be extended and shall provide security for the performance of all obligations under this Agreement and Trust Deed Note." The intent is thus not only clear to continue the debt, but to continue and "extend" the Trust Deed Security for the underlying debt.

(5) The fact that the January 1981 Agreement is called a "Revised" Agreement indicates the intent of the parties to continue the prior Agreement, with certain modifications, and not an intent to extinguish the entire debt and enter into a totally new transaction.

(6) Recitals C through H of the Revised Agreement outline the September 1980 Original Commodities Purchase Agreement as well as the October, November and December rollover's as a continuous transaction, and never indicate that there has been a payment or satisfaction of the underlying debt.

Importantly, Jones never attempts to show any substantive differerce between the rollover procedures employed in October and November 1980, prior to the time Jones took his

Agreement and the procedure formalized in the January Revised Agreement and Note. Jones' argument is essentially that if the rollover procedure utilized in October, November and December had not been formalized by the January Revised Agreement, that American's Trust Deed would continue to secure the $200,000.00 debt to this date, but that because of the written formalization of the identical rollover procedure, the security interest of American has somehow been lost.

Jones Brief at 13 argues that the execution of a new promissory note in January, 1981 provides evidence that the January Revised Agreement and Note were intended to extinguish the underlying debt. Of course, American's original brief cited several cases where this court and other jurisdictions have held that mere execution of a renewal note does not raise the presumption that the debt has been extinguished (See Appellant's Brief at 13-17). However, Jones does not review the provisions of the January 1981 Note, which clearly indicate within the Note itself that the intent of the parties was not to extinguish the debt or release the security interest (R. 290-92):

> (1) Attached to the January Note were not only the 1981 Revised Agreement, but also the original Commodities Purchase Agreement and the October

Amendment. The Note recites in the second paragraph that it is given in acknowledgement of the sum of $200,000.00 paid by American "in accordance with the terms of the agreements attached hereto and marked Exhibit "A".

(2) The last sentence in the second paragraph of the Note states that the note shall be deemed paid in full upon strict performance under the attached "agreements".

(3) The third paragraph of the note specifically recites that it is secured by the September 1980 Trust Deed.

(4) The fact that the January Note was in the face amount of $219,000.00 is of no consequence. This amount is merely the original $200,000.00 advanced by American, plus the $19,000.00 discount premium to be paid pursuant to the terms of the original Commodities Purchase Agreement.

The conclusion that the Revised Agreement and Note were intended to extinguish the debt and security interest is not only directly contrary to numerous provisions of the Revised Agreement and Note, but is completely untenable in light of the standards set forth in Proudfit: Taking of a

renewal note does not extinguish the debt unless such clearly appears as the intent of the parties.

III. THE JANUARY 1981 REVISED AGREEMENT AND NOTE DID NOT CONSTITUTE A FUTURE ADVANCE.

Point II of Jones Brief at 15-20 sets forth the red herring "future advance" argument. Jones argues that "since the obligations under the original Commodities Purchase Agreement were fully performed and the original. . . Note thereby fully paid," then the January Revised Agreement constitutes a future advance of new debt that should not be secured under the Trust Deed's "dragnet clause". This argument is adequately addressed in American's original Brief at 18-19. The underlying $200,000.00 indebtedness to American was never paid, extinguished or released, therefore there was no advance at all in January, 1981, future or otherwise. American does not rely on the dragnet clause of the Trust Deed.

All cases cited by Jones deal with the security for advances of new, additional money by the lender subsequent to an intervening lien. This is not an issue in cases like the present, dealing with rollovers of debt or renewal notes. See Proudfit; Oakman Hurd Lumber; Gray v. Kappos; Easton v. Ash; Interstate Trust v. Headlund, supra, and other cases cited above and in Appellant's Brief.

Jones Brief at 12 states that the case of Vaughan v. Crown Plumbing and Sewer Service, Inc., 523 S.W.2d 72 (Tx. Civ. App. 1975) has "facts strikingly similar to the present case. In Vaughan, the mortgagee asserted a prior security interest for new loans and advances of money subsequent to the purchase of the property by Crown, which were in addition to the original indebtedness. In fact, the mortgagee was the mortgagor's attorney and one such alleged new advance was for subsequent unpaid attorney's fees owed to the mortgagee. Id. at 74, 76. The court found that these new subsequent loans were not reasonably contemplated in the Trust Deed. Id. at 76-77. In the present case there was no new advance or additional loan whatsoever, but only the original indebtedness. This unpaid $200,000.00 indebtedness to American was obviously within the contemplation of Jones when Jones took his deed, because the deed by its express terms is subject to the debt and Trust Deed.

In any event, the cases dealing with whether a dragnet clause will cover a future advance, state that the question is whether such was intended by the parties. See First Security Bank v. Shiew, 609 P.2d 952, 955-56 (Utah 1980) and other cases cited in Appellant's Brief at 19. At a minimum, American has a right to a trial as to the intent of the parties.

IV. THE PRINCIPLES OF EQUITABLE SUBROGATION, EQUITABLE SUBORDINATION AND EQUITABLE MORTGAGE REQUIRE THAT AMERICAN RETAIN ITS SECURITY INTEREST.

It is unnecessary for American to rely upon equitable doctrines to establish its security interest priority, because the secured indebtedness was never satisfied and the Revised Agreement and Note expressly recite that they continue to be secured by the Trust Deed. Jones attacks the application of the equitable doctrines by again stating that L. H. Investment extinguished the debt by executing a renewal note, and thus arguing that the equities favor Jones.

The principle behind the equitable doctrines is to do justice between the parties. American took a first Trust Deed position and advanced $200,000.00, which was never repaid. Jones took his deed with knowledge of, and expressly subject to, the American Trust Deed. Jones never changed his position, or in any way relied on an alleged extinguishment of the American debt. In fact, after the execution of the January Revised Agreement, Jones executed a trust deed to a third party, which trust deed's legal description again recited that it was subject to American's trust deed. (R. at 398-400). The intent of all partes, including Jones, was to continue the priority of American's security interest.

V. THE LOWER COURT'S SUMMARY JUDGMENT RULING WAS PLAIN ERROR.

The result reached in the court below was particularly inappropriate in light of the summary judgment posture of the case. American brought its summary judgment motion, with no cross-motion from Jones. The Court, in the order prepared by Jones' counsel, did not merely deny American's motion, but recited that the January 1981 Revised Agreement and Note were not secured by the Subject Property. Although the court appeared willing to change this order on rehearing, by the time the court issued its order months later, the court, without explanation, summarily denied American's Motion to Amend, Vacate or Reconsider.

Jones argues that because counsel for American stated in oral argument that there were no disputed facts to rule on American's own Motion for Summary Judgment, that somehow American is estopped from now claiming that there are disputed facts when the court in effect granted Summary Judgment for Jones. To obtain Summary Judgment, American only needed to show non-payment of the underlying debt, and no extinguishment of the debt or release of the Trust Deed would be presumed. Oakman v. Hurd Lumber and Woodwork Co., supra, at 921; Smith

Jones, supra, at 401; Marking Systems, Inc. v. Interwest Film Corp., supra, at 178. However, for Jones to be granted Summary Judgment, Jones had to show the "clear" intent of the parties to extinguish the debt through execution of the Revised Agreement and Note, because the debt was admittedly never paid. Proudfit, supra, at 124. The intent of the parties to extinguish the debt and release the Trust Deed was at a minimum a disputed issue of fact.

Furthermore, the court's order that American had no security interest in the Subject Property, leads to an absurd result. American has shown that Jones took his deed as a security interest only in connection with a sale of diamonds by Jones (see Appellant's Brief at 6). Indeed, L. H. Investment has instituted suit against Jones to declare the Jones deed invalid (Third District Court, Civil No. C81-1858). If Jones has only a security interest in the Subject Property, then even assuming, arguendo, that Jones security interest is prior to American's, American still has an interest in the Subject Property, because L. H. Investment, the grantor to both Jones and American, admits the validity of American's Trust Deed while contesting the Jones' deed in a separate action. However, the order appealed from completely divests American of any interest in the Subject Property.

CONCLUSION

Jones never addresses the controlling facts and law. The debt to American was never paid, satisfied, released or extinguished in any form. The 1981 Revised Agreement and Note that Jones relies on to show the necessary intent to extinguish the debt, specifically attach and incorporate all prior agreements, recite the continuing obligations, and expressly provide that they continue to be secured by the prior Trust Deed.

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.

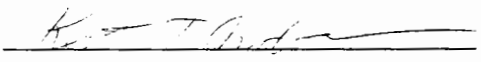
Respectfully submitted, this 2nd day of September, 1983.

JONES, WALDO, HOLBROOK & McDONOUGH

By _____
Kent T. Anderson
Attorneys for Appellants

CERTIFICATE OF HAND-DELIVERY

I hereby certify that I caused to be hand-delivered a true and correct copy of the foregoing Reply Brief on this the 2nd day of September, 1983 to David G. Williams, Esq., Snow, Christensen & Martineau, 10 Exchange Place, 11th Floor, Salt Lake City, Utah 84110.



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