1969

Frank Riggle and Geneva H. Riggle v. Daines Manufacturing Company, and R. Daines, R. M. Daines and J. Norman Daines : Appellants' Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

FRANK RIGGLE and
GENEVA H. RIGGLE,
his wife,

Plaintiffs and Respondents,

vs.

DAINES MANUFACTURING COMPANY, a partnership, D. R. DAINES, R. M. DAINES and J. NORMAN DAINES,

Defendants and Appellants.

Case No. 11629

APPELLANTS' BRIEF

Appeal from a judgment of the
Third District Court of Salt Lake County
Honorable Stewart M. Hanson, *Judge*

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STATEMENT OF THE NATURE OF CASE

Plaintiffs sued on a promissory note and in defense, the Defendants pleaded usury. (R 1-2, 27, 28).

DISPOSITION IN LOWER COURT

The case was tried to the Court. From a judgment for the Plaintiffs against the Appellants and Defendants DAINES MANUFACTURING COMPANY, a partnership, D. R. DAINES, and J. NORMAN DAINES, appeal. (R 46-49)

RELIEF SOUGHT ON APPEAL

Appellants seek a reversal of the judgment in their favor, as a matter of law. (R 56)

STATEMENT OF FACTS

On July 8, 1954, Defendants borrowed $10,000.00, payable in five years, with interest at the rate of 6% per annum. Simultaneously with the loan, Defendants entered into a written agreement, which has been lost or destroyed, with the Plaintiffs to employ Frank Riggle for a period of five years at the rate of $150.00 a month, a total of $9,000.00, which was an additional consideration for the loan, a required inducement for its making. (Exhibit P-3, R 75, Exhibit D-7, R 114-115, 121, 77, 79-81, 94-95)

A few months later, on January 18, 1955, the Defendants organized a corporation, merged their business therein, and the corporation assumed the obligations of the note and employment contract and made payments on both. Thereafter, on July 1st, 1955, the corporation, as the substituted employer, entered into another written contract on the same terms and conditions as the contract with the partnership, for the remaining four years of the five-year period. (R 105, Exhibit D-7, Exhibit P-2, R 73, Exhibit D-4, R 82, Exhibits P-5 and P-6, R 97)

Prior to incorporation, the Defendants paid $450.00 on the note (Exhibit P-2, R 73) and $600.00 on the employment contract (Exhibit P-4 and P-5, R 97), and after incorporation, the corporation paid $1,731.78 on the note (Exhibit P-2, R 73) and $3,350.00 on the contract (Exhibit P-4 and P-5, R 97).

The Defendant Partnership and the successor

corporation was in business at Logan, manufacturing and selling store display appliances, to-wit display racks for bolted and rolled fabric materials, and the Plaintiff, Frank Riggle, approximately 60 years old, was engaged in the business of sharpening saws under the name of "Overnight Saw Service" at Ogden, Utah, (R 105, 66) which required all of his time, six days a week. (R 100-101)

The Defendants were in serious financial circumstances, were under-financed and limited to short-term loans, and they were unable to borrow money with which to pay their current obligations, which at that time, were approximately $10,000.00. These facts were well-known by the Respondent Riggle. Mr. Riggle had these facts verified by his nephew, an accountant. (R 106, 116, 67, 68, 69, 75-76)

The Defendants approached Riggle initially with the proposition of purchasing stock in the corporation to be formed, which Mr. Riggles considered and declined. (R 109)

Mr. Riggle demanded a bonus for the making of the loan, a doubling of his money, and various methods were discussed, involving 5% of the gross profits, a sweeping out of the Defendants' place of business occasionally at Logan, Utah. However, they finally agreed to a five-year consultation agreement, as mentioned, to accomplish this purpose. (R 76, 77, 78-79, 110-112, 121)

All parties felt that the Defendants were on the

verge of prosperity because of favorable negotiations with J. C. Penney Co. for an approved listing of their product. (R 116-119)

Mr. Riggle had been advised by his accountant nephew that the Defendants had a high potential for success. (R 69)

The ground was fertile for a usurious contract. The inducement for such a contract was not one-sided but was mutual. With the employment contract Mr. Riggle would double his $10,000.00 in five years (Exhibit P-3, R 73). With the pressing creditors out of the way and the J. C. Penney listing accomplished, the partnership believed it would be a thriving and profitable business.

Plaintiff Riggle did not have $10,000.00 available; only $3,500.00, and he had to borrow $6,500.00 from his bank to complete the transaction. (R 70)

Riggle sharpened Defendants' saws they used in their business, for which he was separately paid. (R 84)

The employment agreement was for a five-year term. Mr. Riggle was to receive $150.00 per month, and he was required to make himself available for consultation during business hours at his office in Ogden and at the Defendants' office in Logan. The agreement provided that he would be paid an additional $50.00 per day for any time that exceeded three days in any month. (Exhibit D-7)

Mr. Riggle had no talent or business experience that would be of any value to the Defendants. He knew nothing whatsoever about their business. His business experience, while varied, was very limited. He was not an Engineer, and his College training was limited to a few weeks' course in forestry. (R 64-66, 85-87)

Although the Plaintiffs assert the employment agreement was entered into in the month of August, 1954, subsequent to the note, they agree that Riggle, before being placed on the Defendants' pay roll as of September 1, 1954, worked two or three months for nothing (R 94-95) and that Defendants agreed, during the negotiations for the loan, to employ Riggle as an inducement for its making. (R 79-81)

ARGUMENT

POINT I

THE COURT ERRED IN FINDING THAT THE PROMISSORY NOTE WAS NOT VOID BECAUSE OF USURY AS THE EVIDENCE ESTABLISHED AS A MATTER OF LAW THAT THE TRANSACTION WAS USURIOUS

The Note was executed and delivered on July 8, 1954, and is governed by the law then in effect, which made usurious contracts void. 15 - 1 - 6 U.C.A. 1953 with foot notes. Also see 44 - 0 - 6 U.C.A. 1943. 15 - 1 - 6 U.C.A. 1953 Annotated, with foot notes, reads:

> "All bonds, bills, notes, assurances, conveyances stock, pledges, mortgages and deeds of trust, and all other contracts and securities whatsoever, and all deposits of goods or other

things whatsoever, whereon or whereby there shall be reserved or taken or secured, or agreed to be reserved or taken or secured, any greater sum or greater value for a loan or forbearance of any money, goods or things in action that as above prescribed shall be void. Section 44-0-6, U.C.A., 1943"

"Repeal. This Section (L. 1907, Ch. 46, Sec. 5; C.L. 1907, Sec. 1241 x3; C.L. 1917, Sec. 3324; R.S. 1933 & C. 1943, 44-0-6) relating to the voiding of usurious contracts and securities, was repealed by laws 1955 Ch. 21, Sec. 2."

We recognize the Court will not reverse the Trial Court's findings and judgment if there is substantial evidence to support them, and that positive testimony of witnesses believed by the Trial Court is ordinarily regarded as sufficient to compel affirmance of Trial Court's findings, but it is not necessarily so under all circumstances. If the evidence in the light of attendant circumstances and countervailing testimony, and if, when so viewed, it appears so clearly and palpably unreasonable that no fact trier acting fairly and reasonably could accept it, then it must be rejected as a matter of law, and in fact determined otherwise by the appellant court. This is particularly so where the testimony in question was that of witnesses who had vital personal interest in the controversy. *Seybold vs. Union Pacific Railroad Co.*, 121 Utah 61, 239 Pac. 2d 174; *Continental Bank and Trust Co. vs. Stewart*, 4 Utah 2d 228, 291 Pac. 2d 890; 9 Wigmore Evidence, 3rd ed., Sec. 2494.

In *Continental Bank and Trust Co. vs. Stewart*,

supra, in an Opinion written by Chief Justice Crockett, the Court reversed the findings of the Trial Court, and in doing so said:

> "While it is true that the tstimony of a witness such as Mr. Cheney would ordinarily be regarded as sufficient to compel the affirmance of the trial court's finding, that is not necessarily so under all circumstances. Defendant is correct in arguing that even though the testimony standing alone might be sufficient to support a finding, it must always be appraised in the light of all the attendant circumstances and countervailing testimony. If when so viewed, it appears so clearly and palpably unreasonable that no fact trier acting fairly and reasonably could accept it, then it must be rejected as a matter of law, and the fact determined otherwise. This is particularly so here where Mr. Cheney had such a vital personal interest in the controversy, since it obviously would be greatly to his advantage if he could fix upon Mr. Stewart the responsibility of paying this large unsecured personal debt."

The evidence, in the light of attendant circumstances, reasonably and clearly established as a matter of law that the employment contract was an inducement for the $10,000.00 loan and rendered the loan usurious and void, irrespective of whether the employment agreement was entered into at the time of the execution and delivery of the Note or a few weeks later, as Riggle testified that the employment contract, which extended over a five-year period at the rate of $150.00 per month, was entered into pur-

suant to the Defendants' promise to do so in consideration of his making the loan. This is undisputed. (R 79-81)

The rule is that, where an agreement is finally consummated subsequent to the making of the loan to give usury, such, nevertheless, renders the loan usurious, where made pursuant to a promise made prior to or at the time of the making of the loan.

Grannis vs. Stevens, 111 N.E. 263 (N.Y.); *Connor Airlines Inc. vs. Aviation Credit Corporation*, 280 F. 2d, 895 (5th Cir.)

In *Grannis vs. Stevens*, supra, the Court held that an employment contract entered into as an inducement for a loan a week or ten days subsequent to the making of the loan and pursuant to a promise eleven months prior to the loan was usurious. The Court said:

> "There was evidence that the loan was usurious. About eleven months before it was made and during plaintiff's suspension from the Stock Exchange, a memorandum in writing was delivered between the plaintiff and the brother of the defendants, which provided, inter alia, that if plaintiff was not reinstated in the Stock Exchange within the two months next following, he would sell his membership "and lend the proceeds thereof to Mr. Stevens, to be employed in his stock exchange business on terms to be later agreed upon, which will return Mr. Grannis not less than $10,000 a year." The moneys loaned were avails of the sale there provided for. The note was "with in-

terest at 6 per cent per annum." *About a week or ten days after the loan was made, the brother and the plaintiff entered into an agreement in writing* which provided that the plaintiff should be employed by the former and be paid $533 each month. Such sum was "to make up the balance" of $10,000 per annum, unpaid by the interest at 6 per centum per annum upon the amount of business he brought in. The plaintiff did not render any substantial service as an employee to the brother or his firm. The brother testifield, without contradiction, that he agreed to pay the plaintiff $10,000 a year for the use of his money in the firm, for the $60,000 he had in as capital; that plaintiff was supposed to draw at the rate of $933.33 each month, or $10,000 a year, and that the agreement to pay him $533 a month grew out of his having loaned the money. The plaintiff was paid for a period of six or seven months following upon the loan, pursuant to the agreements. Those facts permitted the trial court to decide that when the note was given, the agreement between the borrower and lender was that there should be taken for the loan of the money interest at a rate exceeding $6 upon $100 for one year, and that the note was therefore void. General Business Law (Consol. Laws, c.20) paragraphs 370-373. A transaction of the character of the agreement of employment between the brother and the plaintiff may be a mere device or subterfuge to conceal usury and be assailed as and found to be such. If the court can see that the real transaction was the loan or forbearance of money at usurious interest, its plain and imperative duty is to so declare and hold the security void . . ." (Emphasis added).

And in *Connor Airlines Inc. vs. Aviation Credit Corporation*, supra, a financing agreement which was not usurious when made was held to have been rendered usurious by its extension in conjunction with the subsequent amendment of a contemporaneous contract with a person other than the lender, which was intended as a device to evade the usury statute. The extension agreement was pursuant to the provisions in the original contract and entered into approximately three months subsequent. The Court said:

> "Where there is an intent on the part of a lender to make a loan or to extend a maturity for a greater profit than is permitted by law, the transaction is stained with usury even though it is cast in a form which was designed to give it a cloak of apparent legality. Courts do not permit the use of design or device to evade the purpose of the usury laws. *Griffin vs. Kelly*, Fla., 92 So. 2d 515; *Beacham vs. Carr*, 122 Fla. 736; 166 So. 456. The amount of a bonus exacted in connection with financing will be regarded as interest in determining whether the usury law has been violated, and this is true whether the bonus inures to the benefit of the lender, the agent of the lender, or to the benefit of another. *Speler vs. Monnah Park Block Co.*, Fla., 84 So. 2d 697; *Stoutamire vs. North Florida Loan Association*, 152 Fla. 321, 11 So. 2d 570; *Richter Jewelry Co. vs. Schweinert*, 125 Fla. 199, 169 So. 760; *Hopkins vs. Otto*, 118 Fla. 865, 160 So. 203. The fact that Smith Aircraft and Aviation Credit are separate corporate entities does not prevent the financing bonus from being treated

as a usurious exaction in view of the relationship, through L. B. Smith, of the two companies."

In taking into consideration that Riggle admits that he was placed on the payroll on September 1, 1954, and that prior thereto he worked for two or three months for nothing and the subsequent written agreement of July 1, 1955, with the corporation for four years, such is in line with the Defendants' testimony that, at the time of the execution of the note, there was a written agreement for five years. It was not a mere coincidence that the employment contract and the payment of the note ran for the same period — five years. Riggle testified:

"A. Along with the rest of the contract, you understand. We didn't have a contract agreement between this contract was drawn.

Q. You talked?

A. That is right. I worked for them two or three months for nothing. . . ." (R 94-95)

We urge that it is unbelievable that Riggle, a 60-year-old man, would have parted with $10,000, $6,500 of which he had to borrow, without the bonus arrangement being reduced to writing and would have placed himself at the mercy of anyone in serious financial difficulty. He would not have left the $9,000 bonus to chance. (R 70).

However, as we pointed out, it makes no difference when the employment contract was entered into,

as it was agreed, prior to the making of the loan and as an inducement for the making of the loan, that such an agreement would be entered into.

An obligation, once usurious, is always usurious as long as its original existence continues and the transaction is not cured although a third party is substituted for and continues to pay the usury. The Court so held in the companion case of *Riggles vs. Daines Manufacturing Co.* 20 Utah 2d, 391, 438 Pac. 2d. 808, also see *Asperita vs. California Trust Company*, 322 Pac. 2d 265; *Westman vs. Dye*, (Calif.) 4 Pac. 2d 134; *Richardson vs. Foster*, 170 Pac. 321 (Wash.); *Fidelity Security Corporation vs. Vrugman*, 1 Pac. 2d 131.

Riggle knew that the Defendants were having serious financial problems, were up to their ears in debt, were desperate for money and unable to borrow money with which to pay their current obligations (R 67, 75-76) and this situation he took advantage of. In this regard he testified:

"Q. Well, they did tell you all this time, they were in trouble with their debts? I think you said that.

A. That is right. That is right.

Q. As a matter of fact I think you said they were in debt up to their ears?

A. That is right. That was what Rendell told me. He said, "We are in up to here (indicating). We are sunk."

Q. They also said they were having trouble

getting money to pay their debts, didn't they?

A. Well, I don't know as that was discussed. I assumed that, of course, but I don't know as I asked them any such question, if that came up. I supposed they wouldn't have been in if it hadn't been a dire necessity. I just assumed, I don't know." (R 75-76)

Riggles recognized that, because of the Defendants' dire need for money, this presented them with a "dream of a chance". He testified:

"A. That potential wasn't mentioned at that time at all. I mean that it wasn't discussed, you understand. We had worked that out, and that was between my nephew and Richard Potts and I about the potential, and I figured this, there was three young men with an exclusive feature. I just figured it was a dream of a chance." (R 78)

There is no question that the purported employment of Riggle for an approximate five-year period at the rate of $150.00 a month or a total of $9,000.00 was an inducement for the making of the $10,000.00 loan, a bonus to him. Riggle testified:

"Q. As a matter of fact it was agreed that you would — if you loaned them the $10,000.00 that they would put you on the payroll, wasn't it?

A. Eventually, yes. Not at a set time or when, nothing. It was futuristic, you understand. This was a general discussion and nothing definite was determined at that

time and they didn't put me on the payroll at that time.

Q. And they told you or said that the way to put this something additional to paying you the $10,000.00 would be to put you on the payroll, would be the way to handle it?

A. It wasn't nothing at all. He said that would be what it probably was.

Q. The way to pay you more than $10,000.00 was to put you on the payroll?

A. More than what?

Q. More than the 6 per cent interest. I mean, what you were to get on the payroll would not be credited on the note?

A. That is right.

Q. That would be an additional —

A. That is right.

Q. So in order to get you more there than your $10,000.00 at 6 per cent you would be put on the payroll to make it more than that, and you would get $150.00?

A. That is right.

Q. It was a separate deal as, if and when, and they agreed at that time, that the note was signed, that you would be put on the payroll, didn't they?

A. Eventually yes.

Q. But at that time they said, "We will put you on the payroll?"

A. Yes, that is right.

Q. And they did put you on the payroll?

A. That is right. Not at that time, however. They didn't put me on the payroll at that time." (R 79-80)

and in this respect, Riggle further testified:

"Q. What it finally ended up in you were supposed to get $150.00 per month?

A. That is right.

Q. From the payroll, and not to be credited on the note?

A. That is right.

Q. This has been discussed prior to lending the money, and it was discussed at the time the note was signed?

A. Before, during and after; yes, sir." (R 81)

At the time of the loan, Riggle was engaged in the business of "sharpening saws" at Ogden, which required his entire attention, for, as his wife testified on direct examination, because of their business they could only go to Logan on Sundays. She said:

"Q. All right. Now, did you take any trips to Logan?

A. Well, I say. Yes. Of course, we were free only on Sundays.

Q. Did you take many Sundays up to Logan?

A. Yes." (R 100-101)

Mr. Riggle, the saw sharpener, except as such, never performed any service for the Defandants, nor

was it intended he should, and while his contract of employment provided that he was to give advice in in business and in metal engineering, neither his experience nor training qualified him as a business or metal engineering consultant. Riggle's business experience, while varied, was very limited. He was not an Engineer, metal or other wise, nor did Defendants' business require one. His college training was limited to a short course in forestry. He knew absolutely nothing about Defendants' business. Yet, according to the employment agreement, Defendants agreed to pay him $150.00 a month for five years, for consultant advice 45 miles away at Ogden, with the provision of an additional $50.00 a day for each day spent in Logan in excess of three days a month when his services were required there. (R 64-66, 85-87, Exhibit D-7).

In this respect, in part Riggle testified:
ness, he said:

"Q. And other than your enterprise, as your mining interest, have you ever been in any other kind of business?

A. No.

Q. Have you operated a business?

A. No. Employment is all, that is right.

Q. Other than your saw. Well, let me ask you this. On the mining, were you on a salary or were you —

A. No, I was working for myself. When I worked in the Lake Shore Mine, I worked

on a salary, of course. I was sharpening steel and doing blacksmith work.

Q. And you did some prospecting work too, I believe?

A. Yes, I prospected a great deal. (R 85)

An again, as to his limited business experience and that he knew nothing of the Defendants' business:

"Q. And other than that, that was your business experience in the business world. Outside of that you — and your saws, you have been on salary all your life?

A. That is right.

Q. Now, did you know anything about the manufacure of display equipment?

A. Nothing at all, other than seeing the products and having seen them in the plant up there.

Q. Did you ever have any experience selling anything like this?

A. No.

Q. You didn't have any experience with the Daines people in selling for them, did you?

A. No, sir. (R 86-87)

Actually, the Plaintiffs and Defendants merely maintained a social relationship. They visited back and forth with each other occasionally, had dinner and went boating together. (R 115)

It is inconceivable, except for the purpose of providing the Plaintiff with a bonus for the loan, and to evade the usury laws, at Plaintiff's request, that De-

fendants would obligate themselves in such amounts, for a five-year period, for such non-professional services, especially when they could get qualified professional advice from personnel at Utah State University and others, on a problem basis and without obligating themselves on a long-term, five-year contract.

When Riggle was pressed, on cross-examination, he could relate only three instances where he gave so-called advice on matters of so-called importance, namely (1) about the lawn mower business, a business in which he was engaged, and then for the purpose of his sharpening lawn mowers for them; (2) the marine business, a business foreign to him and in which he had no experience; and (3) he complained about the Defendant's $3,000 office, which turned out to be an area of about 15 feet by 15 feet partitioned from the manufacturing area because of noise. (R 91-92, 93, 98, 125)

That Plaintiff's and Defendants' employment agreement, mutually arrived at, was a sham and a device to evade the usury laws is apparent from a mere cursory reading of Riggle's testimony, and establishes this as a matter of law.

CONCLUSIONS

1. The evidence by clear and convincing proof, without contradiction, established that the $10,000.00 loan was conditioned by the Plaintiff receiving a bonus of $9,000.00. To effect this purpose a spurious employment contract for the purpose of evading the usury laws of this State was entered into, which rendered the transaction usurious and void.

2. In the light of Riggle's testimony that he worked two or three months for nothing before he received his first salary payment on September 15, 1954, there is no question that the employment agreement was entered into at the time of the making of the note.

3. That Riggle did not perform any service, nor was it intended he do so, and that the employment agreement of $9,000.00 was a bonus for the making of the loan of $10,000.00 and a device to evade the usury laws, and the Note is void.

4. That whether or not the contract of employment was entered into on July 8, 1954, or in the month of August the same year, or by a subsequent written agreement on July 1, 1955, the loan was nevertheless usurious, and this is so whether the Court considers the employment was for a four- or five-year period, for the employment contract was a bonus and an inducement for the loan, no matter when entered into.

We urge that the evidence in this case, even when

limited to the testimony of the Plaintiffs Riggle, establishes as a matter of law that the transaction was usurious and that this Court should reverse the judgment of the District Court and direct it to enter Findings of Fact and Conclusions of Law and Judgment in favor of the Appellants.

Respectfully submitted,

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