1963

Freed Finance Company v. W. J. Preece, William V. Preece and Preece Motor, Inc. : Brief of Respondent

Utah Supreme Court

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Callister & Kesler; Mark Boyle; Attorneys for Plaintiff-Respondent;

IN THE SUPREME COURT
of the
STATE OF UTAH

FREED FINANCE COMPNAY,
a corporation,
Plaintiff and Respondent,

vs.

W. J. PREECE, WILLIAM V. PREECE and PREECE MOTOR, INC., a corporation,
Defendants,

WILLIAM V. PREECE,
Defendant and Appelant.

Case No. 9858

BRIEF OF RESPONDENT

Appeal from the Judgment of the
Third District Court for Salt Lake County
Hon. Merrill C. Faux, Judge

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Case No. 9858

BRIEF OF RESPONDENT

STATEMENT OF THE KIND OF CASE

This is an action brought by the plaintiff, Freed Finance Company, a corporation, against Preece Motor, Inc., a corporation, which was licensed to sell new and used automobiles under and by virtue of the laws of the State of Utah, for amounts due under the terms and conditions of the purchase of certain conditional sale contracts for the sale of automobiles from said Preece Motor, Inc.

Also against the individual defendants, W. J. Preece and William V. Preece, officers of Preece Motor, Inc., a corporation, under the terms and

conditions of an unconditional written guaranty to Freed Finance Company, guaranteeing the payment of any and all sums due and owing from Preece Motor, Inc. to Freed Finance Company.

DISPOSITION IN LOWER COURT

Preece Motor, Inc., a corporation, and W. J. Preece, an individual defendant, by their counsel, stipulated in open court that if proof were adduced, $10,000.00 would be found to be due and owing Freed Finance Company from Preece Motor, Inc.; that W. J. Preece, under and by virtue of said guaranty of the obligations of Preece Motor, Inc. to Freed Finance would be owing $10,000.00. Preece Motor, Inc. and W. J. Preece further stipulated that judgment could be entered against each of them for the amount of $10,000.00.

Wm. V. Preece, by his attorney, entered into a written stiplation with the attorneys for Freed Finance Company that if said Freed Finance Company adduced evidence in support of the allegations of its complaint, it could prove that Preece Motor Inc. was indebted in the sum of $10,000.00 to Freed Finance Company as of February 29, 1960. By virtue of said stipulation, judgment was entered against Wm. V. Preece in the sum of $10,000.00.

RELIEF SOUGHT ON APPEAL

The defendant and appellant, William V.

Preece, seeks reversal of the judgment entered against him, and dismissal of the action as against him. This respondent and plaintiff seeks an affirmance of said judgment of $10,000.00 as entered by the lower court in favor of Freed Finance Company as against William V. Preece.

STATEMENT OF FACTS

Freed Finance Company is a corporation organized and existing under and by virtue of the laws of the State of Utah, and was doing business in Salt Lake City, Utah, in the purchasing of notes and conditional sales contracts. (T. 75-76) That Preece Motor, Inc., prior to February, 1960, was engaged in the automobile business at Layton, Utah, in the selling of new and used automobiles. That Freed Finance Company was doing business with them in purchasing contracts. That is, conditional sale contracts in which the subject matter thereof was the sale of motor vehicles on the installment plan. It was doing business with them prior to 1960 as a partnership, that is, W. J. Preece and William V. Preece, doing business under the firm name and style of Preece Motor Co. That subsequent thereto, the assets of the partnership were transferred to a corporation known as Preece Motor, Inc., and that Preece Motor, Inc. did business as had been previously done by the partnership.

In February, 1960, M. R. Weiler, Vice Presi-

dent of Freed Finance Company, had a conversation with W. J. Preece, in which he stated that in order to continue business with the Preece Motor Inc., that the Freeds would have to have the personal endorsement of W. J. and William V. Preece, and that if this could not be done, it would be necessary to take over the company and close it out. That is, that they would not continue to do business with Preece Motor Inc., (T. 77-78) Mr. Weiler gave to Mr. Preece Exhibit 1, which is the guaranty agreement.

At the time Exhibit 1 (guaranty agreement) was given to W. J. Preece, there was filled in on the agreement the name of the company, the signatures on the financial statement, and all of the typewritten information was set forth therein. W. J. Preece, President, had also signed on Exhibit 1 for Preece Motor, Incorporated (Tr. 78, 79). There is no question that Mr. Weiler did not see either of the defendants, W. J. Preece or Wm. V. Preece, sign the document known as Exhibit 1, which is the guaranty agreement (Tr. 80). W. J. Preece and Wm. V. Preece did business under the firm name and style of Preece Motor Company as a partnership until 1959. In February of 1959, the assets of the partnership were then transferred to the corporation of Preece Motor, Incorporated, one of the defendants herein (Tr. 82). The defendants, W. J.

Preece and Wm. V. Preece took stock in the corporation in consideration of the assets of the partnership to the corporation of about fifty-fifty (Tr. 83). W. J. Preece testified that his signature appears on Exhibit 1 in the guaranty part as the President of Preece Motor, Incorporated, and that he signed the same (Tr. 83).

W. J. Preece testified that Mr. Weiler told him that it was necessary to have his signature as a guarantee, as well as his father's, and that without them they would refuse to do business with Preece Motor, Incorporated; that is, it was necessary to have the signatures of W. J. Preece and Wm. V. Preece, the former partners (Tr. 83). W. J. Preece testified that he signed his name on the back of Exhibit 1 on the guaranty part. That he also signed his father's name, Wm. V. Preece, on the same side. Mr. Preece testified that, thinking he had a power of attorney, he signed his father's name. That he executed Exhibit 1, that is, his father's signature, Wm. V. Preece, by virtue of a power of attorney (Tr. 84). Exhibit 2-P (Tr. 85, 86) was a power of attorney, as testified to by W. J. Preece as executed by Wm. V. Preece.

It was the only intent of the plaintiff to ascertain the truth and factual situation in this matter and, therefore, the following questions by the attorney for Freed Finance Company:

Q. (By Mr. Callister) Now am I to understand, Mr. Preece, that this power of attourney was to terminate upon your father's return from his mission?

A. (By W. J. Preece) Well, Mr. Callister, actually if you say do I understand it that way, my answer is *no*. * * * (Tr. 91). (Italics ours)

Mr. Weiler had asked W. J. Preece to get his father's signature on the guaranty (Tr. 92). Exhibit 1, the guaranty, was given to Mr. Weiler and nothing was said about the fact that the signature was his father's by virtue of a power of attorney (Tr. 92, 93). We quote the following (Tr. 93):

Q. Now if I understand you, you want us to believe that at the time you signed it that you thought you had a power of attorney but now that since you have had further thought on the matter, it is your impression that the power of attorney was to terminate upon your father's return, is that right?

A. No, that is not exactly right.

We quote the following with regard to the power of attorney, Exhibit 2-P (Tr. 94):

Q. (By Mr. Callister) Well, did he indicate to you the time in which this power of attorney would exist, was there anything said as to that?

A. (By W. J. Preece) No.

* * * *

Q. (By Mr. Callister) Well then, Mr. Preece,

it is a fact, isn't it, that you have testified that it was given to you for the duration of the absence from the states or the country by your father, was that right, and he so advised?

A. (By W. J. Preece) *No, sir, he didn't. This is three times I have told you that.* (Italics ours)

Mr. Weiler informed W. J. Preece that he would not continue to give credit to the corporation unless Exhibit 1 was signed by him and his father, Wm. V. Preece (Tr. 95).

Wm. V. Preece, appellant, testified as follows (Tr. 102):

Q. Well now, just tell us whether or not you had a conversation with him as to the time limit of the power of attorney?

A. I don't remember any conversation to that effect.

We quote the following (Tr. 103):

Q. Well now, Mr. Preece (W. V. Preece), take your time and think back. For you to have an understanding that this was only to be in force and effect during your absence while on a mission, wasn't there something said between you and your son with regard to that subject matter?

A. I don't think there was, I don't remember.

Q. Then how did you get the understanding as you said, you said there was an understanding that this was only to prevail,

that is the power of attorney, while you were absent from the States?

A. Well, that was my understanding in my own thinking. *There was never no agreement to that effect.* We never did have no conversation on it, as I remember. (Italics ours)

Q. And there was no agreement to that effect?

A. Not as I remember.

We further quote (Tr. 104):

Q. Well, now, surely, Mr. Preece (W. V. Preece), didn't you have some understanding as you state that this was only to last for the period of your mission?

A. There was no conversation to that effect.

Q. Well now, Mr. Preece, have you ever taken any action or taken any steps to terminate or to bring to an end this power of attorney, proposed Exhibit 2?

A. No sir.

We further quote (Tr. 109):

Q. (By Mr. Callister) Then if I understand you correctly, at no time did you ever have any conversation with your son with respect to the length of time which this power of attorney would be in effect?

A. (By Wm. V. Preece) That is correct.

ARGUMENT

POINT I.

THERE IS SUFFICIENT EVIDENCE IN THE RECORD TO SUPPORT THE TRIAL COURT'S FINDING AND CONCLUSION AND JUDGMENT.

This court has announced certain cardinal rules that must be kept in mind with respect to the soundness of the trial court's conclusion and judgment. These are that the judgment is endowed with a presumption of validity; that the party attacking it has the burden of affirmatively showing that it is in error; and that the evidence and all inferences that fairly and reasonably may be drawn therefrom must be viewed in the light most favorable to it. *Cheney* vs. *Rucker*, 381 P.2d 86. *Charlton* vs. *Hackett*, 360 P.2d 176.

There is ample and sufficient evidence in the record to support the trial court's finding that W. J. Preece, by virtue of a power of attorney from Wm. V. Preece, appellant herein, affixed the name of Wm. V. Preece to the guaranty (Exhibit 1).

W. J. Preece, the son, testified that Mr. Weiler told him that it was necessary to have his signature as a guarantee, as well as his father's, and that without them they would refuse to do business with Preece Motor, Incorporated; that is, it was necessary to have the signatures of W. J. Preece and Wm. V. Preece, the former partners (Tr. 83). W. J.

Preece testified that he signed his name on the back of Exhibit 1 on the guaranty part. That he also signed his father's name, Wm. V. Preece, on the same side. Mr. Preece testified that, thinking he had a power of attorney, he signed his father's name. That he executed Exhibit 1, that is his father's signature, Wm. V. Preece, by virtue of a power of attorney (Tr. 84). Exhibit 2-P (Tr. 85, 86) was a power of attorney, as testified to by W. J. Preece as executed by Wm. V. Preece.

No action or steps were ever taken by Wm. V. Preece to terminate or bring to an end the power of attorney (Ex. 2) (Tr. 104).

We are taking the liberty of repeating, for the convenience of the court, excerpts of the testimony in support of the judgment.

> Q. (By Mr. Callister) Now am I to understand, Mr. Preece, that this power of attorney was to terminate upon your father's return from his mission?
>
> A. (By W. J. Preece) Well, Mr. Callister, actually if you say do I understand it that way, my answer is no. * * * (Tr. 91).

We quote the following (Tr. 93):

> Q. Now if I understand you, you want us to believe that at the time you signed it

that you thought you had a power of attorney but now that since you have had further thought on the matter, it is your impression that the power of attorney was to terminate upon your father's return, is that right?

A. No, that is not exactly right.

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Q. (By Mr. Callister) Well, did he indicate to you the time in which this power of attorney would exist, was there anything said as to that?

A. (By W. J. Preece) No.

* * * *

Q. (By Mr. Callister) Well then, Mr. Preece, it is a fact, isn't it, that you have testified that it was given to you for the duration of the absence from the states or the country by your father, was that right, and he so advised?

A. (By W. J. Preece) No, sir, he didn't. This is three times I have told you that.

Mr. Weiler informed W. J. Preece that he would not continue to give credit to the corporation unless Exhibit 1 was signed by him and his father, Wm. V. Preece (Tr. 95).

Wm. V. Preece testified as follows (Tr. 102):

Q. Well now, just tell us whether or not you had a conversation with him as to the time limit of the power of attorney?

A. I don't remember any conversation to that effect.

We quote the following (Tr. 103):

Q. Well now, Mr. Preece, take your time and think back. For you to have an understanding that this was only to be in force and effect during your absence while on a mission, wasn't there something said between you and your son with regard to that subject matter?

A. I don't think there was, I don't remember.

Q. Then how did you get the understanding as you said, you said there was an understanding that this was only to prevail, that is the power of attorney, while you were absent from the States?

A. Well, that was my understanding in my own thinking. There was never no agreement to that effect. We never did have no conversation on it, as I remember.

Q. And there was no agreement to that effect?

A. Not as I remember.

We further quote (Tr. 104):

Q. Well, now, surely, Mr. Preece, didn't you have some understanding as you state that this was only to last for the period of your mission?

A. There was no conversation to that effect.

Q. Well now, Mr. Preece, have you ever taken any action or taken any steps to terminate or to bring to an end this power of attorney, proposed Exhibit 2?

A. No, sir.

We further quote (Tr. 109):

Q. (By Mr. Callister) Then if I understand you correctly, at no time did you ever have any conversation with your son with respect to the length of time which this power of attorney would be in effect?

A. (By Wm. V. Preece) That is correct.

From the foregoing there is no question that the judgment entered by the trial court finds support. In a law action the question on appeal is not whether the evidence would have supported a judgment in favor of appellant, but whether the judgment entered by the trial court finds support in the evidence. *Green* vs. *Equitable Life Assurance Society of the United States*, 284 P.2d 695.

The Supreme Court will not redetermine facts found by the fact finder in a lower court of law cases if, in the light most favorable to the respondent, the evidence is sufficient to sustain such findings. *Gibbons and Reed Co.* vs. *Guthrie*, 256 P.2d 706.

On appeal from the judgment of the court try-

ing facts, question for Supreme Court is, not which party should be believed, but whether there is evidence directly or inferentially supporting trial court's decision, which must be upheld, if inferences supporting lower court's conclusions on probabilities of circumstantial evidence may be drawn therefrom, though Supreme Court might have stressed inferences adverse to such conclusion had it tried case. — *Lym* v. *Thompson*, 184 P.2d 667, 112 Utah 24.

The review of the Supreme Court in law cases is limited to the determination of whether or not there is competent evidence to support the judgment of the trial court. — *Dahnken* v. *George Romney & Sons Co.*, 184 P.2d 211, 111 Utah 471.

POINT II.

W. J. PREECE ACTED WITHIN THE PROVISIONS OF THE POWER OF ATTORNEY IN EXECUTING THE GUARANTY, AND THE POWER OF ATTORNEY HAD NEVER BEEN TERMINATED AND WAS IN FULL FORCE AND EFFECT AT THE TIME OF THE EXECUTION OF THE WRITTEN GUARANTY.

Questions concerning agents holding powers of attorney, that is, concerning attorneys in fact, are not substantially and basically different from those pertaining to agents generally, 3 Am. Jur. 2d, Page 434, Section 24.

The power of attorney, Exhibit 1, is the broadest type of power of attorney that could be drawn.

It, without question, authorizes the execution of the written guaranty by W. J. Preece.

> Moreover, the principal is bound when the agent and a third person have acted in regard to an object permitted in he power granted, even though the mode of action is open to question, and the court, upon a critical examination of the language used, might be of the opinion that a different construction would be more correct. If the authorization is ambiguous because of facts of which the agent has no notice, he has authority to act in accordance with what he reasonably believes to be the intent of the principal, although this is contrary to the principal's actual intent; if the agent should realize its ambiguity, his authority, except in the case of an emergency, is only to act in accordance with the principal's intent. The rule thus stated places upon the principal the burden of reasonable mistakes made by the agent in the interpretation of his authorization caused by facts of which the agent has no notice. 2 AM. Jur. 35, § 33. See cases cited.

The execution of Exhibit 1, was within the scope of the power of attorney.

The relation of principal and agent can be terminated only by the act or agreement of the parties to the agency, or by operation of law. 3 Am. Jur. 2d, Page 440, Section 34. See cases cited.

The burden of proving the termination of an agency is on the principal, and once established, the agency, if the termination is not shown, is presumed to continue. *Exchange State Bank* v. *Occident Eleva-*

tor Company, 24 P.2d 130. 3 Am. Jur. 2d, Page 706, Section 348. See cases cited.

When the agency has once been shown to have existed, the relation will be presumed to have continued, in the absence of anything to show its termination; and the burden of proving a revocation or other termination of an agency is on the party asserting it. 3 Am. Jur. 2d, Page 440, Section 34. See cases cited.

In the case before this Honorable Court, there was no specified time for the duration of the power of atorney; from the facts and circumstances in this case there was no conversation between the parties as to its termination date; therefore, it would be presumed to have continued to be in force and effect until terminated by the principal.

In view of the fact that the power of attorney did not have an expiration date, and that there was no agreement between the principal and agent as to its termination, that the trial court rightfully concluded that it was in force and effect until such time as it was terminated by the principal. The son, W. J. Preece, testified very emphatically that at the time he executed the guaranty, Ex. 1, inserting his father's name, he did so, thinking he had the right to do so by virtue of the power of attorney.

This guaranty was accepted by the plaintiff and respondent in good faith, and based upon the

guaranty, extended credit to the Preece Motor Company. If it had not received the guaranty as executed, it would not have extended credit, as the record shows. Relying upon the guaranty agreement, the plaintif and respondent extended credit, and as a result thereof suffered a loss in excess of $10,000.00. The father, Wm. V. Preece, was a substantial owner of the corporation, and by the extension of credit to the corporation had the possibility of being benefited by the same.

It would seem to us that it would be outrageous to permit the appellant, Wm. V. Preece, to avoid this obligation under the facts and circumstances in this case. Freed Finance Company was an innocent party to the transaction, and based upon the document as presented to it, extended credit.

It is hard to believe that W. J. Preece would, without authority and with intent to deceive and defraud, forge his father's signature to a document. Therefore, W. J. Preece no doubt believed honestly and sincerely that he had the power and authority to execute the same for and on behalf of his father, under and by virtue of the power of attorney. If he, W. J. Preece, believed it was still in force and effect, there apparently was no termination date agreed upon and it was to remain in force and effect until terminated.

It must be remembered that the father and the

son, Wm. V. Preece and W. J. Preece, respectively, were engaged in the automobile business and at the time in question were operating it under a corporate entity, having transferred their partnership interests to the corporation.

The Utah cases cited by the appellant on page twenty of his brief do not apply to the factual situation in this case.

The power of attorney specifically provides that it is to be in respect to all matters of any nature whatsoever in which he, Wm. V. Preece, may be interested or concerned.

Wm. V. Preece had a very substantial interest in the business of the corporation, being a large stockholder. The execution of Exhibit 1 was certainly for his benefit as a stockholder. Wm. V. Preece admitted that there was never any conversation with his son as to the time limit of the power of attorney (Tr. 39). This negative, without question, the implication that Wm. V. Preece now tries to introduce into this case, that is, that it was his intent that it should only apply while he was on his mission. That is, that it was to terminate when he returned from his mission. This was not conveyed to his son. W. V. Preece testified (Tr. 103) that there was no agreement to the effect that the power of attorney was only to prevail while he, W. V. Preece, was absent from the states. This,

without question, disposes of the appellant's argument in his brief that it was the intent that the power of attorney was only to be in force during his absence from the states while on his mission. W. J. Preece (Tr. 93), in answer to counsel's question that the power of attorney was given for the duration of the absence from the state or the country by his father, and that his father so advised him, stated very emphatically: "No, sir, he didn't. This is three times I have told you that".

Under the testimony as we have set forth in this brief, could it be said that the son, W. J. Preece, was told that the duration was only for the mission, and that it should only be exercised during his father's absence from the states? The answer is, of course, no. We feel that it would be a miscarriage of justice to now permit the father, who was a substantial stockholder of the corporation, just because there is now a loss, to repudiate a power of attorney given without any conversation as to its duration; no time fixed in the power of attorney for its termination; and the son, acting in accordance with his understanding of the power of attorney, to now have it repudiated?

Without question, the father, Wm. V. Preece, did not intrdouce any evidence whatsoever, or did he sustain the proof that there was a termination date, or that it was an agreement between the par-

ties that it should be only for the duration of the mission.

The evidence is to the contrary. What was in his mind is not evidence, and cannot be controling.

Certainly, Wm. V. Preece cannot sustain a reversal of the trial court's judgment, based upon an assumption of what he thought it was, or what his intent was, which was not expressed orally or in writing. It would be outrageous for W. V. Preece to repudiate a power of attorney by saying it was his intent, although not expressed in writing or orally, that a power of attorney was to be for a period of his mission.

CONCLUSION

It is the position of this plaintiff and respondent that the power of attorney definitely empowered W. J. Preece to execute the guaranty; that in view of no definite time of duration, and the fact that there was no agreement between the parties as to its termination date, that it remained in full force and effect until terminated by the principal. This having never been done, the guaranty as executed by W. J. Preece for and on behalf of Wm. V. Preece, was valid and binding.

It is the further position of this plaintiff and respondent that there is sufficient evidence in the record to support the trial court's finding and con-

clusion and judgment. It cannot be contended that the judgment entered by the trial court does not find support in the evidence. Without any question of a doubt, the evidence as introduced supports the judgment of the trial court. There is evidence directly supporting the trial court's decision and, therefore, the judgment should be upheld.

Respectfully submitted,

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