STEWART, CHARLES v. JONES, JONATHAN MARCH 1867 COUNTY OF ST. LOUIS 57611

OLD
65811

Be it Remembered that on March 18. 1865, there was filed in the office of the Clerk of the St Louis Court of Common Pleas a Petition in the words & figures following, to wit:

Charles Stewart, Plaintiff
vs
Jonathan Jones, Defendant

In the St Louis Court of Common Pleas April Term 1865 County of St Louis.

Petition

Plaintiff states, that on the eighteenth day of May 1861. the St Louis Court of Common Pleas rendered a judgment in favor of said Plaintiff against said Defendant for four thousand one hundred and ninety six 2/100 dollars and cost that on the fourth day of January 1865, the Clerk of said Court duly issued an execution on said judgment directed to the Sheriff of St Louis County and returnable to the April Term 1865 of said Court and being No 36, which said executions was delivered to and received by John C. Vogel Sheriff of St Louis County on the said fourth day of January 1865 that to satisfy the said executions the said Sheriff on the day & year last aforesaid levied upon and seized all & singular the title interest, property, estate interest & franchise of So in any manner belonging to Jonathan Jones in & to "Jones Commercial College" incorporated by an act of the General Assembly of the State of Missouri, Approved January 4th 1849 and after advertising the same according to law, the said Sheriff on the twenty first day of January 1865 sold at auction the said property

and franchises levied upon as aforesaid according to the Statute in such case made and provided & at said sale the said plaintiff was the highest, last and best bidder for the said property and franchise levied upon as aforesaid & that the same was struck off & sold to him at and for the price and sum of fifty dollars & by deed dated on the day and year last aforesaid the said Sheriff duly conveyed the same to said plaintiff, the said plaintiff having paid him for the same — That Ferdinand Henderson on the nineteenth day of November 1860 was the absolute owner of the said Jones Commercial College & the franchise of the same & the property connected therewith & on said day & year sold, delivered & conveyed the same to said Defendants at & for the price & sum of seventeen ~~thousand~~ one hundred dollars & that said defendant continued to be the owner of the same until said levy and sale as aforesaid — that at the time of said levy & sale, the said defendant was the absolute owner of said Jones Commercial College & the franchise of the same, that said plaintiff is now & has been ever since the said sale by the Sheriff as aforesaid the said defendant has had no interest whatever in & to said Jones Commercial College or the franchise of the same that contrary to equity & good conscience the said

The owner of said Jones Commercial College and the franchise of the same; that since the said sale by the Sheriff as aforesaid

3 defendant has since the said Sheriffs sale as aforesaid & is now using the said franchise of said Jones Commercial College — that said Defendant is insolvent wherefore said plaintiff asks for judgment — that said defendant be forever enjoined & prohibited from using the said franchise of said Jones Commercial College as aforesaid & for such other & further relief as he may be entitled to & to your honor may seem meet and proper & also for costs &c.

Lackland Rine & Jamison
Attys for Plaintiff

Charles Stewart makes oath and say that he believes the foregoing petition & the matter & things therein as stated are true

Sworn to & Subscribed before me on this 18 day of March 1865 } Charles Stewart

Leon J Papin Clerk

And on the same day the following summons was issued to wit

County of St Louis SS.

State of Missouri

Summon To the Sheriff of St Louis County — Greeting

We command you to Summon Jonathan Jones to appear before the Judge of our Court of Common Pleas on the first day of the next Term thereof, to be held in the City of St Louis within and for the County of St Louis on the First Monday of April 1865, then and there to

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answer the complaint of Charles Stewart as set forth in the annexed petition: And have you then and there this writ.

(L S) U S. Stamp

Witness Leon J Papin, Clerk of our said Court, with the seal thereof hereunto affixed, at office in the City of Saint Louis, this 18th day of March in the year of our Lord eighteen hundred and sixty five

Leon J Papin
Clerk

Sheriffs Return

Executed this writ in the County of St Louis on the 18th day of March 1865, by delivering a copy of the writ and petition as furnished by the Clerk to Jonathan Jones

John C. Vogel Sheriff
Jacob Weyard Deputy

Fees $1,50

Milage 25-
$1,75-

Two afterward to wit on April 7. 1865 the following Demurrer was filed, to wit:

Demurrer to Petition

And now the said defendants comes and demurres to the petition of the plaintiff in this cause.

Because the petition does not states facts sufficient to constitute a cause of action. in this

1st. It appears by the charter of "Jones Commercial College" refered to in the petition, that neither Jonathan Jones, nor any other person, has any property right, title or interest salable on execution. in the "Franchise" of said College

2nd. It appears from the petition that "Jones Commercial College" is a Chartered litterary Institution duly organized under the laws of this State, and the "franchise" of a litterary Institution is not in this State be sold on execution against any individual

3d. It appears from the petition that the Plaintiff on an execution against Jonathan Jones seized the franchise of a Chartered Institution and sold it as he would a thing or a horse, the property of Jonathan Jones, and defendant says such a sale is void and of no effect

4th. It appears from all the facts alleged in the petition that the Plaintiff has no right or title to the franchise of "Jones Commercial College and is not entitled to the relief or orders asked for in his petition

Hill & Jewett
Attys for Defendant

And afterwards, to wit on Dec. 14. 1865 the following proceedings were had to wit

Judgment of Court on Demurrer

Charles Stewart }
vs
Jonathan Jones }

The demurrer to the petition being fully considered by the Court, is sustained, and leave is given plaintiff to amend, and the plaintiff declining to amend on motion of the defendant. It is considered by the Court that the plaintiff take nothing by his suit in this behalf but that the defendant go thereof without day and recover of the plaintiff his

& costs therein expended and have execution therefor

Appeal Granted

And afterwards to wit, on December 27: 1865 the following further proceedings were had to wit

Charles Stewart }
vs
Jonathan Jones } The plaintiff files an affidavit for an appeal and an appeal is allowed him to the Supreme Court from the judgment herein, and he files an appeal Bond which is approved by the Court

Which bond is in the following words and figures, to wit:—

Bond

Know all Men by these Presents. That we Charles Stewart as principal and Horace F Reed and John Hunn as securities, are indebted to Jonathan Jones, in the sum of one hundred and fifty dollars for the payment whereof we bind ourselves, our heirs executors and administrators jointly and severally, firmly by these presents. Sealed with our seals and dated at St Louis this twenty seventh day of December one thousand eight hundred and sixty five.

The conditions of this obligation is such, that whereas said Charles Stewart has appealed from the judgment rendered against him and in favor of said Jonathan Jones being No 177 to April Term

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1865, in the St Louis Court of Common Pleas for the costs dollars and cents together with costs. Now if the said Appellant shall prosecute his appeal with due diligence to a decision in the Supreme Court, and shall perform such judgment as shall be given by the Supreme Court, or such as the Supreme Court may direct the St Louis Court of Common Pleas to give, and if the judgment of such Court, or any part thereof be affirmed, that he will comply with and perform the same so far so it may be affirmed, and will pay all damages and costs which may be awarded against him by the Supreme Court, then this obligation to be void, otherwise to remain in full force

Charles Stewart {Seal}
Horace F. Breed {seal}
John Aunn {seal}

Approve by the Court
Dec 27th 1865
Attest Leon J. Pappin
Clerk

Affidavit for Appeal

Charles Stewart being duly sworn upon his oath says, that the appeal in the above entitled cause is not made for vexation or delay, but because this affiant believes that said appellant the affiant is aggrieved by the judgment and decision of said Court in said cause.

Sworn to and Subscribed before me this 27th Dect 1865

Charles Stewart

Leon J Papin Clerk

State of Missouri } ss. I F A A Schneider,
County of St Louis } clerk of the Circuit Court
within and for the County
aforesaid having the custody and control of the records
and papers of the said Court of Common Pleas, do cer-
tify the above and foregoing to be a full, true and
correct Transcript of the Record and proceedings in
the above entitled cause as fully as the same remain
in my office

In witness whereof I hereto
set my hand and affix the seal
of the Circuit Court at office
in the City of St Louis this
Third day of March 1866

F. A. A. Schneider,
Clerk

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1866 March 19th assignment of Errors filed

~~48~~ ~~234~~ ~~48~~ 48

March Term 1867

Charles Stewart

vs ? Appellt

Jonathan Jones

Respt

Appeal from Common Plea

Jackland Cin & Jamison

Atty for Appl

Hill & Jewett for

Respondent

Filed Mch. 3d, 1866

C. T. Tilden

CCR

$10.00 pd by atty

$5.00 paid by attys

1866 March 19 Asst of errors filed

1867 April 9 Stmt & brief of Res filed

" " 10 " " " Aplt "

" " 11. Sub on brief

" " 22 Affirmed

Charles Stewart, Apt,
vs
Jonathan Jones Res,

IN SUPREME COURT,
March TERM, 18 66
No. 252

AND now come, the said Appellant and say, that in the record and proceedings of the Court below, in the above entitled cause, there is manifest error, and for error said Appellant assign the following, to wit:

1. That said Court admitted improper and illegal testimony offered by ~~Appellant~~ Respondent
2. That said Court rejected proper and legal testimony offered by Appellant
3. That the Court gave to the Jury improper and illegal instructions.
4. That the Court refused to give to the Jury proper and legal instructions offered by Appellant
5. That the verdict was against the evidence.
6. That the verdict was against law.
7. That the verdict was against both law and evidence, and against the law under the evidence.
8. That the verdict was against the weight of evidence.
9. That the judgment was rendered in favor of the Respondent when it should have been rendered for the Appellant
10. That said Court overruled the motion for a new trial, made by Appellant
11. That said Court erred in sustaining the demurrer to the petition of Appellant

Lockwood Colton & Jamison
for Apt,

And now come the Respondent and for joinder in error say, that there is no error in the record and proceedings of said Court in said cause, as assigned by said Appellant

Hill & Jennett
for Resp.

No. 232,
March Term 1866

Charles Stewart, Apt,
vs
Jonathan Jones
Res

Assignment of
Errors.

Filed Mch 19 1866
O. T. Fitzback
Clk

Charles Stewart
vs Appt
~~Jones~~ Jonathan Jones

Supreme Ct
March 7, 1867
St Louis Co

Statement:

On the 24th of January 1849 (vide acts of 1849 page 148) a charter was granted to Jones Commercial College, by which Jonathan Jones was authorised to appoint certain professors of different branches of learning, who together with him should be and constitute a body corporate & theory & their successors, under the Name & Style of Jones's Commercial College. In May 1861 (the 16th day) the Teff & appellant obtained a judgment against Jonathan Jones, & by virtue of an execution issued on the same, advertised the Franchise of said corporation, to be sold at public auction as the property of Jonathan Jones. At said auction the Sheriff offered what he called the "Franchise" of said College for sale & declared it "sold" to the Teff & appt for the sum of 50 dollars. Afterwards this action is brought in which

the Pff declares that he bought said "Donchire" of said commercial college at auction as aforesd & alleges that the Dfts Jones still continues & carry on said commercial college under & the name & style of "Jones Commercial College" & that the Pff is the owner of the same & that said Jones & his associates have no right to the use of the same, & asks that said Jones be enjoined & restrained from any more using the name of "Jones Commercial College"

To this petition the Dfts respondent demurred, on the ground that the "Donchire" said college was not liable to be sold on an execution & that the Pff took nothing by his pretended purchase.

This demurrer was sustained by the Court below & Pff appeals to this Court.

Hill & Jewett for Resps.

Brief

The act referred to in the statement creates a literary institution & confers on Jones & his associates the power

to conduct a commercial college & grant diplomas to graduates as evidence of their attainments in the branches taught in the college

The whole object & spirit of the Charter would be defeated, if the franchise could be sold on execution against one or all the Professors — It can no more be sold, than the commission of a Notary Public could be sold on execution against him, unless the Sovereign power which grants the franchise, also provides that it may be sold on execution Chapter 63 of the Rev Stat. of 1855 which provides what may be sold on execution contains no clause ~~that~~ giving the ~~most~~ least possible right to sell a franchise of any corporation, much less that of a literary institution. The act creating it certainly ~~contains~~ contains no clause giving the power to sell the franchise on execution, & we know of no statutory provision that can cover the ~~sa~~ transaction

To the point that a franchise is not subject to be sold on

execution, without some express provision of the statute to that effect, we refer to the following authorities
Arthur v Cora & R R Bank 9 Smedes & Marshall p 431
States v Rives 5 Iredell 306
Pierce v Emery 32 N. H. p 507-508
Angel & Ames on Corp - (8. Ed.) § 191 & note on p 160
Commonwealth v Smith & als 10 Allen 455

We believe the above cases fully establish the point & we do not find any case that holds a different doctrine

In the case of the Tenobscot Boom Corporation v Lamson 16 Maine 224 it is decided that the grant of corporate powers to one person & his "associates & successors" does not require of such person that he should take associates before ~~such~~ the act can take effect or corporate powers be exercised, but virtually confers on him alone the right to exercise all the corporate powers thereby granted

Hill & Jewett
for Resp.

No 58

Stewart

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Jones

Supt bt

March/67

Statement & brief

for Resp.

Hill & Jennett

Filed April 9 1867

O. T. Fishback Clk

per E. P. McCarty Dep

Charles Stewart }
vs. Supreme Court
Jonathan Jones }

Appellant's Statement:

This is an action brought by the Plaintiff against the Defendant. asking that the Defendant be enjoined and prohibited from using the Franchise of "Jones Commercial College".

The Plaintiff in his petition states that on May 18th 1861. he recovered judgment against the defendant for $4196 20/100 & costs. That on Jany 4th 1865 an execution was issued on said judgment and that the Sheriff to satisfy the same "levied upon and seized all and singular the title, interest, property estate interest and franchise of and in any manner belonging to Jonathan Jones in and to "Jones Commercial College incorporated by an act of the General Assembly of the State of Mo. Approved Jany 4th 1849." and that after advertising the same the said property and franchises was sold by the Sheriff to the Plf. he being the highest bidder.

The petition also alleges "that Ferdinand Henderson on the 19th Day of Nov. 1860. was the absolute owner of said "Jones Commercial College. and of the franchise of the same and the property connected therewith and on said day and year sold delivered and conveyed the same sold delivered and conveyed the same to Deft. for the sum of $17.100 and that said Deft. continued to be the owner of the same until

the levy and sale by the Sheriff to Plt." "That at the time of said levy and sale. the said Deft. was the absolute owner of said Jones Commercial College and the franchises of the same. That since the said said sale the Plt has been the owner of said Jones Comm. College and the franchises of the same. but that since the said sale to the Plt. the Defl. has contrary to Equity and good conscience been using and is now using the said franchise of Jones Commercial College. Therefore Plt asks that Defendant be enjoined from using said franchise &c

To this petition the Defl demurred on the ground that the said "Franchise" of Jones' Commercial College" was not such an interest as could be sold under Execution. and that by the petition Plt. did not show that he had any right to the said Franchise.

The demurrer was sustained and the Plt declining to amend judgment was rendered for the Defendant on the demurrer.
Hence this appeal—

It is submitted that under our law every valuable interest which a party has in any property whether corporeal or incorporeal, provided it be of such a nature that the creditor can be subrogated to the rights of the debtor, is subject to levy under execution —

In Rankin vs. Harper 23 Mo. 586. the court say, "our law subjects all that a man has as property to the payment of his debts" —

In this case there is a valuable interest belonging to the Deft. which has been seized in payment of an execution against him, and it would seem to operate as a fraud against the creditors of the Deft. if he can exercise and enjoy an interest so valuable, exempt from the payment of his debts —

We have been unable to find any authorities on this subject either for or against the doctrine here contended for, and so submit the question for the consideration of the court on the pleadings

Cline & Jamison
Pet. Appe

Charles Stewart
vs.
Jonathan Jones.
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Supreme Court.
March. Tr. 67.

Appellants Statement & Brief

Filed April 10. 1867
C. J. Fishback clk
per E. M. Carty Dep

Cline & Jamison
for Appts

In the Sup Ct. Mo
March T. 1867.

Charles Stewart Appl^t.
v.
Jonathan Jones Res.

Appeal from Com Pleas.

Opinion of the Court.

This is an action brought by the appellant against the respondent asking that the respondent be enjoined and prohibited from using the franchise of Jones' Commercial College. A demurrer was sustained to the petition and the cause was appealed. In 1849 the Legislature of Missouri incorporated Jonathan Jones, and such associates as he might select for professors, as a body corporate under the name of Jones' Commercial College, for the purpose of teaching the elementary and practical parts of mercantile and commercial education. Afterwards the appellant recovered

judgment against Jones, and the sheriff in pursuance of an execution issues on the same, levied upon certain property, including the franchise of the College, and at the sheriffs sale the appellant became the purchaser. This proceeding is a novel one under our laws. The act of incorporation does not authorize a sale of the franchise on execution, and the franchise as it has no tangible or corporeal existence, we do not see on what principle it could be levied upon. It is not among the enumerated interests which are the subjects of levy and sale in the statutes under the title of execution, and as it is entirely an artificial being created solely for certain purposes, it cannot be seized, transferred and used by others, without express provision to that effect. The assets, goods, chattels and property of a corporation may be sold on execution, so as to entirely arrest its useful uses, or clog its operations, but

the franchise is not a subject of sale and transfer unless the law by some positive provision has made it so, and pointed out the mode and method by which the sale and transfer may be effected, (Hall v Sullivan R Co 21 Law Rep, 138; State v Rives 5 Iredell 304; Arthur v Com & R B of Vicksburg 9 Sm & M 431)

Judgment affirmed

The other judges concur.

David Shapleigh

Charles Stewart
v
Jonathan Jones

Opinion of the
Court Hagner

Filed April 22, 1867
O. T. Fishbackett
per E. M. Cartz Dep

Affirmed