State ex rel. Freeman v. Ponder
STATE OF NORTH CAROLINA Upon the Relation of ROY FREEMAN, GLENN REEMS, MARTY BUCKNER, and VAUGHN CARTER, v. E. Y. PONDER and HUBERT DAVIS STATE OF NORTH CAROLINA Upon the Relation of ROY FREEMAN, GLENN REEMS, MARTY BUCKNER, and VAUGHN CARTER, v. E. Y. PONDER and HUBERT DAVIS.

234 N.C. 294
Supreme Court of North Carolina
Decided October 31 1951

234 N.C. 300Hester Walton for the relators Roy Freeman, Glenn Reerns, Marty Buchner, and Vaughn Carter, appellees.

J. W. Ilaynes, A. E. Leake, and George A. Shuford for the defendant, E. Y. Ponder, appellee.

J. M. Baley, Jr., and Clyde M. Roberts for the defendant Hubert Davis, appellant.

* * *

¶1 Before the trial jurors were selected or sworn, Davis made a motion alleging in detail that the interests of the relators and Ponder were "identical and opposed to those of the defendant Davis" and praying "that the relators and defendant Ponder be permitted to exercise the six peremptory challenges to the jury allowed by statute to one party in'a civil action and that this defendant be permitted to exercise the six peremptory challenges to the jury allowed by statute to the other party to a civil action, or that the defendant . . . Ponder be, in the discretion of the court, designated as a party-plaintiff and that his answer be treated as a complaint." The motion was resisted by the relators and Ponder. The former alleged that they brought the "action in good faith and of their own volition as citizens and taxpayers of Madison County for the sole . . . purpose of having a judicial determination made of the . . . controversy ... as to who was legally entitled to hold the office of Sheriff of Madison County ... as a result of the election held November 7, 1950," and the latter asserted that he could not be made a party plaintiff because he did "not have leave of . . . the Attorney-General . . . to institute this action."

¶2 234 N.C. 301 Tbe trial judge ruled tbat tbe relators were entitled to six peremptory challenges under tbe provisions of G.S. 9-22, and entered an order denying "tbe motion of tbe defendant Davis tbat tbe defendant . . . Ponder be . . . designated as a party plaintiff and tbat bis answer be treated as a complaint." Tbe order recited, however, "tbat there are divers and antagonistic interests between tbe defendants Ponder and Davis" and made this adjudication: "It is ordered and decreed by tbe Court, in its discretion, tbat tbe number of challenges to each defendant be and is hereby increased to four, tbat is, tbe defendant Ponder is to have four challenges, and tbe defendant Davis is to have four challenges, under Section 9-23, General Statutes of North Carolina." Davis noted an exception to this order.

¶3 After Davis bad used four peremptory challenges, be undertook to challenge two of tbe trial jurors, namely, Tbad Bradford and Yance Hensley, peremptorily, and tbe trial judge disallowed such challenges on tbe ground tbat Davis bad already exhausted tbe peremptory challenges allotted to him by law. Davis took exceptions to these rulings.

¶4 He complains tbat tbe relators and Ponder sought tbe same relief, and tbat in consequence tbe order and rulings of tbe trial judge permitted "bis opposition to have ten peremptory challenges to his four."

¶5 Be this as it may, tbe propriety of tbe order and rulings relating to peremptory challenges is plain when due heed is paid to general rules of practice created by pertinent statutes. If we are to have a government of laws rather than one of men, lawsuits must be tried according to general rules of procedure established by law for all like cases. Judges cannot be expected or permitted to devise special rules on tbe spur of tbe moment to fit tbe supposed exigencies of particular trials.

¶6 Tbe statutes codified as Article 41 of Chapter 1 of tbe General Statutes prescribe a specific mode for trying tbe title to a public office. Rogers v. Powell, 174 N.C. 388, 93 S.E. 917; Burke v. Commissioners, 148 N.C. 46, 61 S.E. 609; Ellison v. Raleigh, 89 N.C. 125. Such relief is to be sought in a civil action. G.S. 1-514; Cozart v. Fleming, 123 N.C. 547, 31 S.E. 822. But a private person cannot institute or maintain an action of this character in bis own name or upon bis own authority, even though be be a claimant of tbe office. Saunders v. Gatling, 81 N.C. 298. Tbe action must be brought and prosecuted in tbe name of tbe State by tbe Attorney-General, G.S. 1-515; or in the name of tbe State upon tbe relation of a private person, who claims to be entitled to tbe office, S. v. Carter, 194 N.C. 293, 139 S.E. 605; Harkrader v. Lawrence, 190 N.C. 441, 130 S.E. 35; Smith v. Lee, 171 N.C. 260, 88 S.E. 254; Stanford v. Ellington, 117 N.C. 158, 23 S.E. 250, 30 L.R.A. 532, 53 Am. S. E. 580; Rhodes v. Love, 153 N.C. 468, 69 S.E. 436; or in tbe name of tbe State upon tbe relation of a private person, who is a citizen and tax 234 N.C. 302 payer of the jurisdiction where the officer is to exercise his duties and powers. Midgett v. Gray, 158 N.C. 133, 73 S.E. 791; Barnhill v. Thompson, 122 N.C. 493, 29 S.E. 720; Houghtalling v. Taylor, 122 N.C. 141, 29 S.E. 101; Hines v. Vann, 118 N.C. 3, 23 S.E. 932; Foard v. Hall, 111 N.C. 369, 16 S.E. 420. Before any private person can commence or maintain an action of this nature in the capacity of a relator, he must apply to the Attorney-General for permission to bring the action, tender to the Attorney-General satisfactory security to indemnify the State against all costs and expenses incident to the action, and obtain leave from the Attorney-General to bring the action in the name of the State upon his relation. G.S. 1-516; Cooper v. Crisco, 201 N.C. 739, 161 S.E. 310; Midgett v. Gray, 159 N.C. 443, 74 S.E. 1050. A single action may be brought against all persons claiming the same office to try their respective rights to the office. G.S. 1-520.

¶7 Since Ponder had no leave from the Attorney-General permitting him to sue as a relator, he was incapacitated by law to prosecute the instant action against Davis. The trial judge could not confer upon Ponder the legal power denied to him by positive legislative enactment through the simple expedient of designating Ponder a party-plaintiff and treating his answer as a complaint. For this reason, the motion of Davis was rightly denied.

¶8 Challenges to the polls, i.e., to the individual jurors, are of two kinds: Challenges for cause; and peremptory challenges. A challenge for cause is a challenge to a juror for which some cause or reason is assigned. S. v. Levy, 187 N.C. 581, 122 S.E. 386. A peremptory challenge is a challenge "which may be made or omitted according to the judgment, will, or caprice of the party entitled thereto, without assigning any reason therefor, or being required to assign a reason therefor." 50 C.J.S., Juries, section 280. See, also, these North Carolina decisions: Oliphant v. R. R., 171 N.C. 303, 88 S.E. 425; Dupree v. Virginia Home Insurance Co., 92 N.C. 417. The right to challenge jurors for cause may be exercised without limit as to number so long as the cause or reason assigned is sufficient. 50 C.J.S., Juries, section 268. It is otherwise, however, with respect to peremptory challenges. A litigant cannot exercise any more peremptory challenges than the number allowed to him by law. S. v. Powell, 94 N.C. 965; Capehart v. Stewart, 80 N.C. 101.

¶9 The general rule regulating the right of peremptory challenge in civil actions is embodied in G.S. 9-22, which specifies that "the parties, or their counsel for them, may challenge peremptorily six jurors . . . without showing any cause therefor." This general rule limits all of the parties on one side of a civil case to a total of six peremptory challenges, no matter how numerous such parties may be. Bryan v. Harrison, 76 N.C. 360.

¶10 234 N.C. 303 Tbe general rule is subject to this statutory exception: If there are two or more defendants, and their interests are diverse and antagonistic, the judge may in his discretion, apportion the six peremptory challenges among the defendants, or he may increase the number of peremptory challenges, so as to allow each defendant or class representing the same interest not more than four peremptory challenges. The statute which creates this exception, i.e., G.S. 9-23, expressly stipulates that "the decision of the judge as to the nature of the interests and the number of challenges shall be final."

¶11 The relators had plenary authority to make both Ponder and Davis party defendants in this action for the purpose of trying their respective claims to the Sheriffalty of Madison County. The law did not require them to assume a posture of neutrality between the rival claimants. Indeed, it contemplated that they should take such position in the litigation as they deemed consistent with- truth. The general statutory right to six peremptory challenges devolving upon them as all the parties on one side of the case was not annulled or impaired by their assertion that justice lay with Ponder, or by Ponder's concurrence in that assertion. The statute creating the exception to the general rule regulating peremptory challenges in civil actions clothed with finality the decision of the trial judge awarding four peremptory challenges to each of the defendants. These things being true, the exceptions to the rulings on the peremptory challenges are untenable.

¶12 In passing from this phase of the litigation, we think it not amiss to make some additional observations. In conformity with their statutory duties, the Madison County Board of Elections adjudged that Ponder was elected sheriff at the general election of 7 November, 1950, and the Chairman of the Madison County Board of Elections furnished Ponder with a certificate of election reciting that conclusion. G.S. 163-86, 163-91, and 163-92. The adjudication of the Board and the resultant certificate of election constituted conclusive evidence of Ponder's right to the

sheriffalty in every proceeding except a direct proceeding under Article 41 of Chapter 1 of the General Statutes to try the title to the office. Ledwell v. Proctor, 221 N.C. 161, 19 S.E. 2d 234; Cohoon v. Swain, 216 N.C. 317, 5 S.E. 2d 1; Cozart v. Fleming, supra; Gatling v. Boone, 98 N.C. 573, 3 S.E. 392; Swain v. McRae, 80 N.C. 111. Undoubtedly Davis could have obtained leave from the Attorney-General to bring such direct proceeding against Ponder and could have secured to himself as sole relator in such proceeding the statutory right to six peremptory challenges. Instead of asserting his claim to the office in the lawful mode, Davis undertook to establish it by a species of physical force. It necessarily follows that if he was disadvantaged by the rulings relating; to peremptory challenges, he was simply hoisted with his own petard.

¶13 234 N.C. 304 When the relators had produced their evidence and rested their case, Davis moved "that he be declared by the Court to he the duly elected Sheriff of Madison County." The judge denied the motion, and Davis excepted. The exception lacks validity. Under the Code of Civil Procedure, the relators and Ponder had the right to have the issues of fact joined on the pleadings tried by the jury. G.S. 1-172. The motion called on the judge to usurp the function of that body. Sparks v. Sparks, 232 N.C. 492, 61 S.E. 2d 356. Besides, all the evidence before the court at the time the motion was made tended to establish the election of Ponder.

¶14 Davis reserved exceptions to the admission of these writings : (1) The returns made by the registrars and judges of election in obedience to G.S. 163-85 stating the votes cast for the candidates for the office of Sheriff in the twenty-four precincts of Madison County; (2) the abstract of votes for county officers prepared by the Madison County Board of Elections in compliance with G.S. 163-88 reciting the votes cast for the candidates for the office of Sheriff in Madison County as a whole; and (3) a tally sheet kept by Ponder's witness, Winston Eice, who assisted in counting the ballots in the precinct known as Township No. 1 Ward 4. Inasmuch as the returns and abstract were official documents of the election officials, contained data germane to the issue, and were properly authenticated, they were admissible as substantive evidence. Roberts v. Calvert, 98 N.C. 580, 4 S.E. 127; 29 C.J.S., Elections, section 276. The tally sheet was identified by Winston Eice and two other witnesses, contained data agreeing with Winston Eice's testimony at the trial, and in consequence was competent to corroborate him. Bowman v. Blankenship, 165 N.C. 519, 81 S.E. 746.

¶15 Davis also saved exceptions to the exclusion of testimony. The task of ruling on these exceptions is much simplified by focusing the judicial gaze on the basic principle which governs the admissibility of evidence.

¶16 To be admissible as substantive evidence, testimony must satisfy this twofold requirement: (1) It must be relevant; and (2) its reception must not be forbidden by some specific rule of law. Stansbury on North Carolina Evidence, section 77; Wigmore on Evidence (3rd Ed.), Sections 9-10.

¶17 Testimony is relevant if it reasonably tends to establish the probability or the improbability of a fact in issue. Johnson v. R. R., 140 N.C. 581, 53 S.E. 362; Pettiford v. Mayo, 117 N.C. 27, 23 S.E. 252; S. v. Brantley, 84 N.C. 766; S. v. Vinson, 63 N.C. 335; In re Cushman's Estate, 213 Wis. 74, 250 N.W. 873; Stansbury on North Carolina Evidence,

Section 78. For this reason, the relevancy of evidence in a civil action is to be tested by the pleadings, which define the facts put in issue by the parties. Parrish v. R. R., 221 N.C. 292, 20 S.E. 2d 297.

¶18 234 N.C. 305 There is no allegation in the case at bar that any illegal votes were cast or counted for the defendant Ponder. The pleadings raise this single issue of fact: Were the returns from five specific precincts, to wit, Township No. 1 Ward 4, Township No. 6, Township No. 7, Township No. 8 Ward 2, and Township No. 15, altered after they were signed by the registrars and judges of election and before they were canvassed by the county board of elections by falsely crediting Ponder with more votes than the number actually received by him and Davis with fewer votes than the number really cast for him ?

¶19 Davis excepted to rulings of the trial judge excluding these things: The registration and poll books of the nineteen precincts whose returns were not in dispute; testimony showing that on the first Monday in December, 1950, Davis, who had been excluded from the office by the adjudication of the county board of elections, undertook to qualify as sheriff by signing an oath and executing a bond in the forms prescribed by statute; testimony indicating that the number of county ballots delivered by the county board of elections to each precinct prior to the election exceeded the number of county ballots allegedly east in the precinct at the election; testimony pointing out that W. Flynn, whose name was recorded on the poll book of Township No. 1 Ward 4, died at some undisclosed time before the trial; testimony showing that P. Griffin, Floyd Rector, and Mrs. Will Searcy did not vote in Township 1 Ward 4 on 7 November, 1950; testimony suggesting that Hugo Wild, a witness for Davis who stood by the polling place in Township No. 1 Ward 4 most of the day, did not see C. Ammons, L. Ammons, Pl. L. Bridges, Dillard Gentry, Mrs. Dillard Gentry, Jim Gentry, Elisha Griffin, Mrs. P. Griffin, T. Griffin, W. Griffin, Will Hensley, H. Hoyle, Ola Hunter, Mrs. Zade Merrill, F. Reese or C. Rice vote in Township No. 1 Ward 4 on 7 November, 1950; testimony tending to show that Troy Ramsey, a private person who did not testify in the cause, had two official ballots marked Democratic in his possession on 7 November, 1950, and made an unsuccessful effort to bribe Lee F. Briggs, a qualified voter in Township No. 1 Ward 4 and a witness for Davis, to place such marked ballots in the box in a surreptitious manner when he cast his own ballot; testimony pointing out that on the day before the election B. J. Ledford, the registrar of Township No. 6, where a total of 282 votes were allegedly given to both candidates for the sheriffalty, delivered to F. Ray Frisby a copy of the registration book for that precinct, showing that 373 persons were qualified to vote in Township No. 6; testimony indicating that one of the judges of election in Township No. 6 was not acquainted with J. R. Boyd, J. R. Brown, M. J. Clark, H. M. Roberts, Mrs. H. M. Roberts, H. C. Vaughn, B. M. West, and John West, whose names appeared on the registration book of that precinct; testimony showing that J. B. 234 N.C. 306 Austin, A. J. Brown, Mrs. A. J. Brown, Ray Brown, H. E. Carter, P. V. Carter, Lawrence Hagan, Minton Robinson, and Mrs. Minerva Sprouse, whose names appeared on the registration book of Township No. 6, were dead at the time of the trial; testimony merely disclosing that Banie Lusk, the registrar of Township No. 8 Ward 2, went to Marshall, the county seat, “to see what . . . returns had been reported from No. 8” after he had assisted

in counting and recording the votes cast in his precinct; and testimony of Claude Davis, an agent of the State Bureau of Investigation and a witness for the defendant Davis, describing the appearance of the entry on the return for Township No. 15 reciting the votes allegedly cast for the candidates for the house of representatives.

¶20 All of this testimony was properly excluded. None of it had any relevancy to the only controverted issue in the case, i.e., whether the returns from the five specified precincts were altered in the manner alleged between the time they were signed by the precinct officials and the time they were canvassed by the county board of elections. We indulge this observation at this juncture: The evidence indicating that certain persons whose names appeared on the registration books of two of the precincts were dead at the time of the trial does not reasonably tend to establish anything except the tragic truth that registered electors are subject to the unhappy mortality which is the inescapable lot of all mankind.

¶21 The evidence proffered by Davis tending to show that more than twenty-five persons voted for him in Township No. 6 was rightly rejected under his own pleading. His answer alleged with absolute positiveness that only twenty-five ballots were cast for him in that precinct.

¶22 Davis noted exceptions to the exclusion of the testimony of the witnesses George Bridges, E. Y. Ledford, and Abner Wild as to the contents of certain documents which had been received in evidence. This testimony was clearly incompetent under the specific rule of law which declares that a writing is the best evidence of its own contents. S. v. Ray, 209 N.C. 772, 184 S.E. 836; Harris v. Singletary, 193 N.C. 583, 137 S.E. 724.

¶23 The trial judge correctly held that the hearsay rule precluded Davis from introducing the statements made by his counsel to the witness Judson Edwards "that more people voted than there were names listed on poll books in some precincts" and "that returns in some precincts were changed"; the statements made by unidentified persons to the witness Claude Davis, an agent of the State Bureau of Investigation, concerning various events allegedly happening in Madison County at the election of 7 November, 1950; the statement allegedly made by Troy Ramsey to the witness Andy Gosnell that the latter was to use $7.50 handed to him by the former to pay Lenora Gosnell, a registered voter in Township No. 1 Ward 4, for voting; and tbe statement made by Winston Rice, a private person who assisted the precinct officials of Township No. 1 Ward 4 in counting ballots, to the witnesses W. B. Robinson and Clyde Wallin that Davis led Ponder by 30 votes in Township No. 1 Ward 4 after all ballots cast in that precinct had been counted. Merrell v. Whitmire, 110 N.C. 367, 15 S.E. 3. It is noted, in passing, that Davis offered the last mentioned statement in evidence before Winston Rice became a witness in the case, and that he did not tender the same a second time to impeach Winston Rice after the latter took the stand for Ponder and deposed that the final count in Township No. 1 Ward 4 "was Davis 128 and Ponder 117." 4 C.J.S., Appeal and Error, Section 291b (3).

¶24 Davis excepted to the ruling of the trial judge sustaining the objection of the relators and Ponder to this question propounded to Judson Edwards, a witness for relators, by counsel for Davis: "Did you

check the poll books in any of the precincts to determine if more votes were counted than were on the poll book in that precinct ?" This ruling occasioned Davis no harm, for the witness Edwards would have replied "I did not" if he had been permitted to answer. A like observation applies to the exception to the action of the trial judge upholding the objection of Ponder to this question asked his witness George Bridges by counsel for Davis: "I ask you if you don't know that he (i.e., Will Hensley) has been moved for seven years from your precinct ?" The witness Bridges had already testified that he did not know Will Hensley.

¶25 We have now reviewed all exceptions to the exclusion of evidence save Exception No. 65, which was taken under the circumstances delineated below.

¶26 The trial of the action engrossed the attention of the Superior Court for virtually two weeks. Upwards of a hundred persons were subpoenaed from their employments to testify as witnesses. They gave voluminous evidence. P. E. Runnion, a private citizen and a witness for Davis, testified without objection that he assisted the precinct officials in Township No. 1 Ward 4" in counting the ballots after the polls were closed; that he used a tally sheet in such undertaking; that the final count in the race for Sheriff in Township No. 1 Ward 4 was "Ponder 107 and Davis 132"; and that such final count appeared on the face of his tally sheet, which was received in evidence without objection. The witness Runnion undertook to testify to the additional fact that at the termination of the counting he told the persons present at the polling place that "Davis had 25 majority." The trial judge rejected this additional fact on objection by Ponder.

¶27 The testimony of Runnion as to the extrajudicial statement made by him at the polling place was not admissible as substantive evidence. But 234 N.C. 308 it was competent to corroborate bim as a witness, for be gave similar evidence on tbe trial. S. v. Spencer, 176 N.C. 709, 97 S.E. 155.

¶28 Davis offered tbe excluded testimony of tbe witness Runnion generally; Ponder made a general objection to its admission; and tbe trial judge sustained sucb general objection. Davis merely noted bis Exception No. 65 to tbis ruling. He did not ask tbe judge to admit tbe testimony for tbe limited purpose for wbicb it was competent, i.e., to corroborate Runnion as a witness. There is sound authority and reason to support tbe view that tbe trial judge cannot be charged with legal error in excluding tbe evidence under these circumstances. Stansbury on North Carolina Evidence, section 27 (f) ; 4 O.J.S., Appeal and Error, section 281.

¶29 It is unnecessary, however, for us to make any adjudication on tbis precise point. For tbe purpose of tbis particular appeal, it will be taken for granted that the trial judge made a legal misstep when be excluded tbe testimony of Runnion as to bis statement at tbe polling place that "Davis bad 25 majority" in Township No. 1 Ward 4. Even so, tbe rejection of tbis statement must be held harmless on tbe present record. It is not conceivable that tbis comparatively inconsequential bit of corroborative evidence would have affected tbe verdict of tbe jury in any degree bad it been admitted in evidence on tbe protracted trial of tbe action in tbe Superior Court. Call v. Stroud, 232 N.C. 478, 61 S.E. 2d 342; S. v. Mundy, 182 N.C. 907, 110 S.E. 93. For tbis reason, we are unwilling to bold that

tbe exclusion of tbis small piece of corroborative evidence compels us to inflict upon tbe parties, tbe taxpayers, and tbe witnesses tbe monstrous penalty of a new trial.

¶30 We have studied tbe twenty-two exceptions to tbe charge with great care. None of them are tenable. When tbe charge is read as a whole, it reveals that the judge stated tbe evidence correctly, summed up tbe contentions fairly, and explained tbe law accurately. Tbe rulings as to issues were sound. Tbe issues actually submitted were joined on tbe pleadings and were sufficient to present all controverted matters to tbe jury. Lloyd v. Venable, 168 N.C. 531, 84 S.E. 855. Tbe remaining exceptions are formal and merit no discussion.

¶31 An ancient axiom asserts that no wretch e'er felt tbe baiter draw with good opinion of tbe law. It cannot be gainsaid, however, that tbe appellant has no just cause to complain. He has bad a fair trial in point of law in tbe Superior Court before an able and learned jurist who safe-guarded all bis legal rights with tbe cold neutrality of tbe impartial judge. Tbe controverted issue of fact was decided against bim on sufficient evidence by a disinterested jury, tbe body created by law to determine truth from conflicting testimony. He has, indeed, bad bis day in court.

¶32 234 N.C. 309 The judgment of the Superior Court will be upheld, for the record shows that there is in law

¶33 No error.