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Burrell Oates Case

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THE BURRELL OATES CASE.[1]

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The old saying that it is an ill wind that blows no one good, seems about to receive another endorsement in the fact that race hatred is one of the influences now at work to force the Court of Criminal Appeals of Texas to cease its blind worship of technicalities. The fact that Burrell Oates, a negro, who has been convicted of murder in the first degree five times, is still unhanged, might not have stirred as much comment as it has but for the fact that Holly Vann, a white accomplice, was convicted the first time he was tried and promptly hanged. Texas doesn't understand why it should be so difficult to hang the negro. The Burrell Oates case is one of the facts forcing both of the present candidates for Governor of Texas to declare for court reform, which will put additional obstacles in the way of reversal of either civil or criminal cases.

Even one of the judges of the Court of Criminal Appeals who wrote an opinion reversing the Burrell Oates case has admitted that Oates is "probably a very guilty negro." One technicality after another has stood in the way of his conviction and the case is now pending for the fifth time, after five juries have declared the negro guilty and assessed his penalty at death. At the last trial of his case, Burrell Oates testified he had then been in jail six years, eleven months and one day. He has now been in jail about seven and a half years and his case has been before the Court of Criminal Appeals more than two months on the last appeal. Many lawyers who have examined the record in the last trial, declare there is good reason to think the case will again be reversed and remanded on a technicality and that the Court is for that reason delaying the handing down of its opinion until after the Democratic primaries in July, because another reversal would be an issue in the forthcoming primaries.

While the Court of Criminal Appeals cannot clear itself of the odium of these four reversals, not one of which touched the real merits

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[1]Citations in Burrell Oates Case.—51st Tex. Crim. p. 449. 50th Tex. Crim. p. 39. 48th Tex. Crim. p. 131. 56th Tex. Crim. p. 571. 103rd S. W. p. 859. 95th S. W. p. 105. 86th S. W. p. 769. 121st S. W. p. 370.

of the justice of the verdict it overthrew, fair persons must admit that the basic error was committed by the prosecutors and grand jury. Burrell Oates was indicted for the murder of Sol Aronoff, a merchant of Dallas, Texas, when he should have been indicted for robbery with arms, which is also a capital offense. Robbery with arms has been proved every time the case was tried, but to say who killed Sol Aronoff when more than one person fired a pistol in a small room while all were excited is difficult, as the trials of the case have shown.

Examination of the testimony of Mrs. Sol Aronoff leaves the reader in doubt as to whether she shot her husband by mistake or whether Burrell Oates shot him. The most careful scrutiny of that testimony does not remove the probability that she killed her own husband. At the same time, the law certainly intends that the jury shall be the sole judges of the facts, and they must have believed that Burrell Oates killed Sol Aronoff or they would not have held him guilty and assessed his punishment at death five times. The court insists upon intruding into this question, and questioning whether or not the juries understood the testimony.

The case of Burrell Oates is probably without equal in American jurisprudence. It stands forth as about the most conspicuous failure of the laws of a state to decide under present procedure with fairness and dispatch, whether a defendant is guilty or innocent.

The testimony which the court will read in the statement of facts now before it, is that Burrell Oates was convicted in 1892 in Fort Worth of killing another negro and sent to the penitentiary for a short term. In 1898, he was again convicted of killing a negro, this time in Dallas, and again he was sent to the penitentiary for a short term. This was brought out on cross-examination when the defendant was on the stand. Counsel for the defense objected and reserved a bill of exceptions. The defense devotes considerable attention to this testimony in the appeal. It has heretofore been a fairly well recognized proposition of law in Texas, that the conviction of a defendant so many years previous to the present trial should be considered immaterial and irrelevant testimony. However, the court may hold in this case that it was admissible as tending to show the value of the testimony of the defendant and the probability of its accuracy. This, however, remains to be seen.

Oddly enough, even such questions of law as this have been more or less scarce during the trial of this case because a great deal of matter which had no direct bearing upon the guilt or innocence of the defendant has been the cause of the previous reversals. It seems to one reading the record that every question of moment with regard to the admin-

istration of criminal and other statutes in Texas and the whole machinery of prosecution have had first trial with the Burrell Oates case.

A brief review of the crime for which Burrell Oates has been repeatedly convicted will assist in a clear understanding of the points of law, which have resulted in these numerous reversals and re-trials. On the night of November 29th, 1904, in a suburb of Dallas, Sol Aronoff, a Russian Jew storekeeper, was held up by a white man and a negro. During the hold-up his wife came into the store with a pistol and fired at the negro. The white man fired several shots and Sol Aronoff dropped to the floor, fatally wounded. He died a few minutes later on a bed in the adjoining room, to which his wife took him. The white man and the negro rifled the cash drawer and departed running. They were seen by several persons, but could not be identified. The police hauled in the usual number of suspects and eventually found a white man who knew about the plans for the hold-up and told the story. He was not exactly an accomplice, but he knew enough to be a very valuable informant to the police. On his confession, if such it may be termed, Burrell Oates and Holly Vann, a white man, were held. They had already been under arrest, having been caught in the first police drag-net. Mrs. Aronoff went to the jail and failed to identify the negro or the white man. The police, nevertheless, decided to hold an examining trial in the case of Burrell Oates, and when Mrs. Aronoff came into the court room to testify she took one look at Oates and fainted, declaring before she did so that he was the man, and expressing surprise that she had not recognized him when she saw him at the city jail. Undoubtedly one of the principal points of difficulty about this case is the action of Mrs. Aronoff. She was deeply affected by the tragic death of her husband and she speaks English with some difficulty. While she seems to make herself clear enough to the jury, she is not so to the court, for the issue has actually been submitted as to whether or not she didn't herself kill her husband when she shot at the negro. The only thing that stands against this proposition is the improbability that she could have missed fire when she was probably within two feet of her husband at the time of the shooting. Nevertheless, the testimony seems altogether unsatisfactory, and the court has several times indicated this fact.

Going into the decisions of the Court of Criminal Appeals one finds that this case was first reversed and remanded for new trial on April 12, 1905. Judge Henderson wrote the opinion and Judge Brooks dissented. In fact, a divided court will be found almost throughout the history of the case. The point was made by the defense that the manner of selecting the jury had not given the usual number of veniremen and

talesmen from which to choose. Note that it was not charged that the man didn't get a fair trial or that jurors who were prejudiced were selected. The point was clearly a technicality. It was shown that if the law had been followed to the letter, the attorneys would have had a larger number of men from which to select a jury and that the law intended they should have this larger number. Judge Brooks held that the error of the trial court was certainly a harmless error, but he stood alone, and the case went back for another trial.

On May 9th, 1906, the case was again reversed. This time Judge Davidson wrote the opinion and again Judge Brooks dissented. Judge Davidson held that the court had made an error in its statutory charge with reference to how the testimony of an accomplice should be regarded by the jury. He also held that the issue as to whether or not Mrs. Aronoff had shot her husband by mistake should have been submitted by the judge in his charge to the jury. Again the case was sent back for another trial.

The next time it was reversed by the Court of Criminal Appeals was on May 15, 1907. This time, however, Judge Brooks wrote the original opinion and affirmed the case. When a rehearing was asked, Judge Brooks was absent and Judge Davidson wrote an opinion reversing and remanding the case. He again called attention to the charge of the trial judge to the jury. He pointed out specifically that the judge, in charging the jury on the worth of the testimony of an accomplice, had said that the testimony of the accomplice must tend to connect with other testimony that tends to show the guilt of the defendant. Judge Davidson didn't like that word "tend." He said the testimony must not only "tend" but it must positively show the guilt of the defendant, and must positively connect with other testimony. He said that to use the word "tend" substituted suspicion of guilt for the guilt itself and the case was sent back for another trial. This was not all that Judge Davidson called attention to, but it was the point which he considered the most important.

On June 23, 1909, the case of Burrell Oates was again reversed and remanded by the Court of Criminal Appeals. This time Judge Brooks wrote the opinion and again affirmed the case. The dissents were based on queer grounds this time. When the motion for a re-hearing came along, Judge Davidson called attention to the fact that the jury had discussed the Holly Vann case and had seemed to consider the verdict in that case as bearing upon the Burrell Oates case. Vann, who was the white accomplice of Burrell Oates, had been tried and convicted and given a death penalty. Some of the jurors, it was alleged, were deter-

mined that nothing less should be given Burrell Oates. Judge Davidson cited a long line of opinion to show that this constituted reversible error, and that the case should be sent back. Judge Ramsey also disagreed with Judge Brooks about affirming the case, but for another reason. It seems that when the case had been tried the last time, W. H. Nelms, who had prosecuted it the first time was District Judge. Therefore, he could not be the judge in this case. Governor Campbell asked the Attorney General's Department what to do about it, and the Attorney General answered to appoint a special Judge to try the case. The odd part about it all is that Mr. Lemmon, who was appointed by the Governor, seems to have handled the case in the ablest manner of all. There was no evidence of error in the record, when it came up from him, but Judge Ramsey held the Governor had no right to appoint a special judge to try a case than had the porter in his office. He writes one of the most earnest opinions he has ever handed down, in making this point, and he refers to Burrell Oates as "probably a very guilty negro," but says that it is necessary to have the court which tries him, authorized by the Constitution. Judge Davidson agreed with Judge Ramsey about this matter, although he did not write an opinion covering that phase of the case.

This case has excited statewide comment, not all of which has been serious. In fact the Bar Association of the State has had a lot of fun with the oddities of the Burrell Oates case. At the banquet in connection with the Texas Bar Association convention in Fort Worth in July of 1908 Yancy Lewis of Dallas, one of the ablest lawyers of Texas, spoke facetiously of this case as follows:

"The case came up in the District Court of Dallas County. Now, gentlemen, it came to pass that these individuals demanded a severance as was their constitutional right, and a white man who held the victim was put to trial and convicted. He appealed, as was his right, to the Court of Criminal Appeals, and the judgment was affirmed, and he was hanged. All these things are facts of history. The colored man was put to trial; the court appointed counsel to represent him; he also was convicted and the death penalty assessed, and his counsel said: 'I would not be satisfied in my own mind if I did not have the appellate tribunal review the proceedings,' and they were accordingly reviewed, and the Court of Criminal Appeals, ignoring the fact this ignorant African had got religion, reversed the case. Everybody then buckled up his belt and took a new hold. This ignorant African says: 'I have seen the New Light; I want to know if I can get out of here and commit suicide.' But his spiritual adviser told him that he must not lay hands upon him-

self; that he must be executed according to law. He said, 'Let the law pronounce its judgment,' and they went to trial a second time. He was convicted, but the lawyer appointed by the court said: 'I could not afford to have a man hanged without having the proceedings reviewed,' and so he appealed the case. The negro felt his wings sprout under his coat, and he said: 'Gentlemen, I have but one request to make, and that is that I may be transported to an eternity of bliss as quickly as it suits your convenience. Can you organize a mob that will expedite these matters?' His spiritual adviser said to him that that would not be an execution according to law, and they took him up to the Court of Criminal Appeals, and they reviewed the case under our magnificent system, and reversed the case. He had been tried a third time under these conditions with a similar result. A third time his spiritual adviser has said to him: 'You must not commit suicide, you must be executed according to law.' A fourth time the case has been reversed—the celebrated case of Burrell Oates, associate with Holly Vann, who was hanged the first turn out of the box. Now what confronts us? I speak of clients—'our clients.'

"This poor African cannot be hanged according to law, and he cannot pass off the stage otherwise. When you talk about our clients, what are you going to do about it? Here is this poor African sitting at the bars on the second floor of the Dallas County jail, with four convictions and four times ready to enter upon his journey. Four times he has felt his wings sprouting under his garments. Now he is getting old. He was a young man when he committed the crime—he was a young man. Now he is middle-aged. Gentleman, I am getting old—an old man—but never will I surrender the belief—the simple faith—that if I wait long enough and all of us pull together, he can finally get hanged according to law under the magnificent jurisprudence that has been handed down from the fathers."

Again at the Bar Association banquet in Austin in 1909, Yancy Lewis referred to the Burrell Oates case as follows:

"But there is another side to the picture gentlemen. At Fort Worth a year ago I told you of the mournful and pitiable predicament of Burrell Oates who, with a white man that was hanged on the first turn of the box, in Dallas, killed an old Jew merchant and was defended by an appointee of the court, and who for five years lingered in the Dallas jail in the hope that ultimately he might be hanged according to law. I have come to you and say that again his case has been reversed upon the proposition that the Governor was without authority to appoint the judge who convicted him, the truth being that it had been given up by

the community that there was not a lawyer in Texas who, under our present system, could convict a man defended by an appointee of the court and make the conviction stand. I hope, gentlemen, that, at some future time, your children or mine shall hear the result of that historic case, and that Burrell Oates has finally achieved the consummation of having been hanged under our present system, according to law. And in that, mark you, there is no aspersion nor intent to reflect upon those who hold upright and firm the proposition that according to the written law, the law shall be administered. To them all honor, to them all credit. It is, however, an arraignment, in my judgment, of a system which in its consummations and in its results does not seem to be greatly superior to the system which obtained in Nippur and Susa, 5000 years ago, nor greatly superior to the snapshot man in China at the present time, where they say that if a man like Leon Ling committed murder in China they would hang his father and his mother, his brothers and sisters and his aunts and his uncles. In the jurisprudence of China they have crude and coarse notions of jutsice, but they obtain results."

In justice to the Court of Criminal Appeals of Texas, it must be stated that the number of Texas cases in which there is real error is large. In a state where public school facilities are limited, where most of the population is rural and far from railroads, where race hatred not only against the negroes, but against Mexicans runs high, and the bitter fight between prohibitionists and anti-prohibitionists is continuous, there is necessarily a great deal of blundering and a great deal of prejudice exhibited in the courts. Juries do sometimes find a defendant guilty on insufficient testimony to warrant a conviction. District Attorneys make direct appeals to prejudice in their speeches to juries and the examination of witnesses frequently becomes nothing more than a wrangle between counsel and a person testifying, not through obedience to an order of the court, but because of malice, prejudice, or bias. But to the large number of cases which must be reversed because of harmful error in the trial, the Court of Criminal Appeals of Texas has added, year after year, scores of other cases in which the briefs of appellants contained nothing more than sophistry, sometimes clever and more often disgusting. And to make the situation still worse, the rural communities persist in sending to the legislature, year after year, scores of young lawyers who are looking forward to making a living by defending persons indicted by grand juries and who are therefore putting new difficulties in the way of District Attorneys at every session.