

3409 *Cuddard, J.*

— IN THE —
SUPREME COURT
— OF THE —
State of Colorado.

ANTONIO BENEDICT,
Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE
OF COLORADO,
Defendant in Error.

No. 3409.

*Error to District Court in and for the
County of Gilpin.*

ABSTRACT OF RECORD.

J. McD. LIVESAY,
Attorney for Plaintiff in Error.

FILED IN
SUPREME COURT,

— OBSERVER PRINT. CENTRAL CITY.

SEP 20 1884

James M. Miller
CLERK

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ABSTRACT OF RECORD.

FOLIO.

1 Caption of Transcript of Record.

Arraignment, which appears in words and figures follows; "Be it remembered, to-wit, that heretofore and on the fifteenth day of June, 1894, the same being one of the days of the June term, A. D., 1894, of said Gilpin County District Court, the following proceedings, inter alia, were had and entered of record, to-wit;

| | | |
|-------------------|---|--------------|
| THE PEOPLE, ETC., | } | ARRAIGNMENT. |
| VS | | |
| ANTONIO BENEDICT. | | |

At this day comes A. D. Bullis, Esq., who prosecutes the pleas of the People in this behalf and presents to the Court a "True Bill" of information which is sworn to by the said District Attorney and endorsed by the Judge, (folio 2) and thereupon it is ordered by the Court that a *capias* issue for said defendant returnable forthwith, which is accordingly done.

And the said defendant is brought into Court, and it satisfactorily appearing to the Court that said defendant is of Austrian nationality and unable to understand or speak the English language, it is ordered by the Court that Fortunio Delsasso be assigned as an interpreter to assist him herein during the proceedings of this trial, and thereupon the said defendant, Antonio Benedict is arraigned and this said information here read to him and he is required to plead thereunto. (folio 3) (Amended by order of the Court. See proceedings of twelfth day, June term, 1894, at page 245 of this record.)

Whereupon he answers and saith that he is "Not Guilty" in manner and form aforesaid as in and by

this said information he stands charged. And of this he put himself upon the country and the District doth the like. And thereupon on motion of said District Attorney, it is ordered by the Court that this case be set for further hearing on Wednesday, the 20th instant, at 9:30 o'clock, A. M.

4 And thereupon capias issued, in the usual form.
6 Information. Body of information, as follows, to-wit: "that Antonio Benedict on the eleventh day of June, 1894, at the County of Gilpin did then and there feloniously, wickedly and against the order of nature have venereal affair with a certain cow, and then and there feloniously, wickedly and against the order of nature did carnally know the said cow, and did then and there feloniously, wickedly and against the order of nature with the said cow did commit and perpetrate the abominable, detestable and infamous crime against nature of buggery, contrary to the form of the statute in such case made and provided and against the peace and dignity of the said the People of the State of Colorado."

Signed by Arthur D. Bullis, District Attorney, sworn to by him, and sworn to by Martin Sax, on the fourteenth day of June, 1894.

8 "And the said Information has endorsement there on as follows, to-wit: "Filed this 15th day of June, A. D., 1894 Richard Harvey, clerk. And "People's witnesses, Martin Sax, Osala Sax, John Dollar, Humphrey Vaughn, (folio 9) Joseph Shinneman,"

Record M, page 235, June 20th, 1894.

Beginning of trial, swearing of jury, taking evidence, etc.

- 11 Resumption of trial on the 21st day of June, evidence all heard and submission of the case to the jury
- 12 Instructions given by the Court on behalf of the People numbered from 1 to 5 inclusive.
- 16 Instructions prayed for by defendant and granted by the Court.
- 24 to 28 Instructions prayed for by defendant and refused by the Court.
- 28 Instruction prayed for by defendant and refused by the Court: "No. 9. The Court instructs the jury that there is only one criterion by which the guilt of men is to be tested, and that is whether the mind is criminal; that the essence of an offense is the wrongful or evil intent, without which it cannot exist; that there must be union or joint operation of act and intention, and if under the evidence in this case either element was lacking, then your verdict should be for the defendant."

"J. McD. Livesay, Attorney for Defendant."

"Refused, Clayton F. Becker, Judge."

"Refusal to give excepted to by defendant. J. McD. Livesay, Attorney for Defendant."

- 30 Verdict. "We, the jury, in the above entitled cause find the the defendant guilty in manner and form charged in the Information. N. D. Owen, Foreman." Defendant excepts to the verdict and gives notice that he will file a motion to set aside the verdict and for a new trial. It is ordered by the

Court that said motion be filed on or before the 30th instant, and that the motion be argued on July 5th, 1894.

31 June 30th, defendant filed motion for a new trial, and affidavits in support of said motion. Said motion for a new trial is in words and figures as follows to-wit:

STATE OF COLORADO

GILPIN COUNTY.

} SS

IN THE DISTRICT COURT.

THE PEOPLE OF THE
STATE OF COLORADO

VS

ANTONIO BENEDICT.

} MOTION FOR A NEW TRIAL.

Now comes the defendant, by J. McD. Livesay, his attorney, and moves the Court to set aside the verdict of the jury and to grant him a new trial in this cause, and for the following reasons, to-wit:

- 32
- 1 Because the Court erred in giving the instructions asked for by the District Attorney and each and every one of them.
 - 2 Because the Court erred in giving instruction No. 4, asked for by the District Attorney.
 - 3 Because the Court erred in not giving the instructions asked for by the defendant.
 - 4 Because the Court erred in not giving instructions Nos. 7, 8, and 9, asked for by defendant.
 - 5 Because the verdict is contrary to the evidence.
 - 6 Because the verdict is contrary to the law.

7 Because the evidence showed that the defend
33 ant at the time of the alleged commission of said of
fense, was not capable of forming an intention, did
not know the distinction between good or evil, and
did not know right from wrong.

8 Because said verdict as returned by the jury is
informal, insufficient and void.

9 Because the defendant did not have a public
trial.

10 Because the defendant was not allowed a pub-
lic trial.

11 Because the defendant has not had a trial ac-
cording to law.

12 Because the defendant was and is an idiot or
of unsound mind.

J. McD. Livesay, Attorney for defendant.”

34 to 50 Affidavits in support of motion for a new trial.

All the affidavits are entitled, “The People, etc.,
vs. Antonio Benedict.

34 “John Dimler, of lawful age, being duly sworn
on oath according to law, deposes and says; that he
was one of the jurors on the trial of the above entit-
led action; that from the evidence adduced on the tri-
al of said cause and from the appearance of the defend-
ant on the witness stand deponent believed and be-
lieves that the defendant was at the time of the alleg-
ed commission of said crime of sodomy, an idiot, or
of such a low order of intelligence that he was incap-
able of forming any intention, of knowing the distinc-
35 tion between good and evil, or right from wrong.

Properly signed and sworn to. *

- 36 "Peter McFarlane, of lawful age, being duly sworn on oath according to law, deposes and says: That he was one of the jurors on the trial of the above entitled case; that the jurors were of the opinion that the accused was weak or simple minded and not capable of realizing the full nature of the crime of which he was convicted, and that a paper to that effect was prepared, to be presented to the Court with the verdict, but that the jurors did not know the propriety of such a course and the same was withheld; and deponent further says that from the evidence adduced on the trial of said case and from the appearance of the defendant on the witness stand he believes that the defendant is an idiot, or verging on idiocy, and seriously doubts that the defendant at the time of the commission of said offence knew what he was doing, or was capable of distinguishing or discriminating between right and wrong." Subscribed and sworn to.
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- 38 "Horatio E. Hazard, of lawful age, being duly sworn on oath, according to law deposes and saith: That he was one of the juror on the trial of the above entitled action; that from the evidence adduced on the trial of said case and from the appearance and demeanor of the defendant on the witness stand deponent believes that the defendant is and was at the time of the commission of the alleged offence of sodomy, an idiot or verging on idiocy, and that the defendant at the time of the alleged commission of the

said crime of sodomy, did not know what he was doing and did not know the distinction between good and evil and was not accountable for what he did
39 Subscribed and sworn to.

“John Benedict, of lawful age, being duly sworn on oath according to law, deposes and says: That he is the brother of the defendant, Antonio Benedict that the trial of the defendant took place in said court on the 20th and 21st days of June, 1894; that
40 immediately prior to the commencement of said trial the Hon. Clayton F. Becker, Judge of said court, ordered the public excluded from the court room during said trial; that nobody excepting members of the bar, officers of the court, students at law and the witness testifying should be permitted in the court room during said trial; that in pursuance of said instructions or order the sheriff of said county kept the door of the said district court room locked most of the time during said trial and excluded all persons therefrom except those hereinbefore mentioned, and
41 that during the small portion of time when said court room door was not locked during said trial that none was permitted to enter and remain in said court room during said trial, except those hereinbefore mentioned, and that the public was absolutely prohibited and prevented from entering into or remaining in the District Court room or Court during the trial of said cause, and which trial occupied nearly two days. And deponent further says that the defendant has and had many friends and acquaintances in said Gilpin Coun-

ty who were desirous of and who would have attend-
42 ed the trial of said cause had they not been prevented
from so doing by said order and instruction and the
action of said sheriff and deputy sheriff in excluding
the public from said court and room during said tri-
al." Subscribed and sworn to.

"John Eilman, of lawful age, being duly sworn
43 on oath according to law, deposes and says: That
he was one of the jurors on the trial of the above en-
titled action; that from the evidence adduced on the
trial of said case and from the appearance and de-
memeanor of the defendant on the witness stand, he, de-
ponent, believed and believes that the defendant is an
idiot, or verging or bordering on idiocy, and deponent
seriously doubted and doubts from the evidence in
the case and the appearance and demeanor of the de-
44 fendant on the witness stand that the defendant at the
time of the alleged commission of the crime of sod-
omy knew what he was doing, or was capable of know-
ing right from wrong." Subscribed and sworn to."

"William Williams, of lawful age, being duly
sworn on oath according to law, deposes and saith:
That he is and has been under-sheriff of said Gilpin
County for about five years last past; that he was
present most of the time during the trial of defend-
ant charged with sodomy; that said trial took place
45 in the District Court room at Central City, Colorado,
before Hon. Clayton F. Becker, Judge of said Court,
and occupied nearly two days, the 20th and 21st days
of June, 1894; that by the order of said Judge just

before the beginning of said trial the public was excluded and kept from said court and court room during the time of the trial of said cause; that no persons excepting the members of the bar, officers of the court, students at law, and witnesses when testifying, were permitted or allowed in said court room during
46 said trial; that during most of the time of the trial of said cause the door of said District Court room was kept closed and no one permitted to enter or remain except those hereinbefore mentioned." Subscribed and sworn to.

"Thomas Hooper, of lawful age, being duly sworn on oath according to law, deposes and says: That he is and has been for about five years past the sheriff of said Gilpin County; that the trial of the said defendant, Antonio Benedict, charged with sodomy, took place in the District Court room at Central City, Colorado, before Honorable Clayton F. Becker, Judge; said trial commencing about 10 A. M. of June 20th, 1894, and ending about five o'clock P. M. of the 21st day of June, 1894; that just prior to the commencement (just before the calling of a jury in said case) of said trial the said Judge ordered deponent to clear
48 said court room of the spectators and not to permit any person excepting the members of the bar, officers of the court, students at law and the witness testifying to be or remain in said court or court room during the trial of said cause; that deponent, acting under said order, excluded the public from said court and court room during the whole time of said trial; that the

door of said court room was kept locked most of the time during said trial, and that when said door was not locked it was kept closed or shut, and that no one
49 except those hereinbefore mentioned was permitted to enter or remain in said court room during said trial; that the public under said order of the Judge during the whole of the trial of said cause was kept from and out of said court and court room." Subscribed and sworn to.

50 Motion for a new trial argued and submitted on July 5, 1894. Motion denied. Defendant excepts.

51 On July 6, 1894, defendant filed a motion in arrest of judgment, which motion is in words and figures as follows: "Now comes the defendant, by J. McD. Livesay, his attorney, and moves the Court to arrest the judgment herein, and for the following reasons, to-wit:

1 Because the record does not show that the defendant was furnished, previous to his arraignment, with a copy of the Information and a list of the jurors and witnesses.

2 Because the verdict is insensible, informal, insufficient and void.

3 Because the defendant did not have and was not allowed a public trial.

4 Because the defendant has not had a trial according to law.

52 5 Because the court erred in overruling defendant's motion for a new trial.

6 Because the Information is insufficient.

7 Because the affidavits of jurors filed here show that said verdict was returned through a misapprehension or mistake and is not a true verdict.

J. McD. Livesay, Attorney for Defendant

53 Record M, page 244. Motion in arrest of judgment denied by the Court. Defendant excepts. Prisoner is sentenced to the state penitentiary.

54 Defendant excepts to judgment and prays an appeal, etc.

Record M, page 245. To amend Records. "A this day comes again A. D. Bullis, Esq., District Attorney, who prosecutes the pleas of the People in this behalf, and the prisoner is again brought into court and by his attorney, James McD. Livesay also comes. And it having come to the knowledge of said District Attorney that the record in the arraignment of the said defendant, Antonio Benedict, fails to show that the accused was furnished with a copy of the Information, a list of the People's witnesses and a list of the jurors, and thereupon moves the Court that the clerk be permitted to amend the said record as to show the fact that said defendant was furnished with a copy of said Information, a list of the People's witnesses and a list of the jurors at the time he was arraigned and before he was required to plead thereto. The Court being now sufficiently advised in the premises by the statements of the District Attorney and the Clerk of the court, therefore, it is ordered by the Court that the clerk be and hereby is instructed to so amend said record as to show the fact that said accused was fur-

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nished with such copy of information, list of People's witnesses and list of jurors before he was required to plead thereto." Defendant excepts to said motion and order of the Court.

Certificate of the Clerk of the District Court, which certificate is in the words and figures as follows:

"I, Richard Harvey, Clerk of the District Court of Gilpin County, in the state aforesaid, do hereby certify the above and foregoing to be a true, perfect, complete and full transcript of the record and that the copies of the papers filed are true and correct copies of all papers excepting subpoenas and papers from J. P.'s court in a certain cause lately pending in said court, on the criminal side thereof, wherein the People of the State of Colorado are plaintiffs and Antonio Benedict is defendant. In witness whereof, I have hereunto set my hand and affixed the seal of of said court, at Central City, this 11th day of July, A. D. 1894. Richard Harvey, Clerk." (Seal of District Court.)

ASSIGNMENT OF ERRORS.

| | | |
|--|---|-----------------------|
| STATE OF COLORADO | } | SS |
| IN THE SUPREME COURT. | | |
| To the September Term, 1894, of said Court. | | |
| ANTONIO BENEDICT, | } | ASSIGNMENT OF ERRORS. |
| Plaintiff in Error, | | |
| vs | | |
| THE PEOPLE OF THE STATE | } | |
| OF COLORADO, | | |
| Defendant in Error. | | |
| Now comes Antonio Benedict, the Plaintiff in Error | | |

(and Defendant), by J. McD. Livesay, his attorney, and says that there is manifest error in the record and proceedings in said cause, in the District Court of the first Judicial District of the State of Colorado, in and for the County of Gilpin, as follows, to-wit:

1 The Court erred in not allowing the defendant a public trial.

2 The Court erred in not giving or allowing defendant a trial according to law, that is, in giving defendant a private and not a public trial.

3 Because defendant did not have and was not allowed a public trial.

4 Because the verdict in said cause was returned through a misapprehension or mistake and was not and is not a true or correct verdict, as shown by the affidavits of several jurors filed in support of the motion for a new trial.

5 The Court erred in ordering and permitting the record to be amended after the defendant was sentenced, and without any evidence or affidavits as a basis or reason therefor.

6 Because the evidence showed that the defendant at time of the alleged commission of said offence was not capable of forming an intention; did not know the distinction between good or evil; did not know right from wrong.

7 Because the evidence and the affidavits of several of the jurors showed and show that the defendant was an idiot or verging on idiocy or imbecility to or in such a degree that he was incapable of discriminating between

right and wrong, and was not accountable for what he did

8 The Court erred in denying defendant's motion for a new trial.

9 The Court erred in denying defendant's motion in arrest of judgment.

10 The judgment or sentence of the Court is contrary to the law and the evidences.

11 The Court erred in giving the instructions prayed for by the District Attorney, and each and every of them.

12 The Court erred in giving instruction No. 4, prayed for by the District Attorney.

13 The Court erred in refusing to give the instructions prayed for by the defendant.

14 The Court erred in refusing to give instructions Nos. 7, 8, and 9, prayed for by the defendant.

35 The verdict is insensible, informal, insufficient and void.

16 The verdict is contrary to the law.

17 The verdict is contrary to the evidence.

By reason whereof the plaintiff in error prays that said judgment may be reversed and the defendant discharged.

J. MCD. LIVESAY,
Attorney for Plaintiff in Error.