IN THE SUPREME COURT OF THE STATE OF COLORADO.

ANTONIO BENEDICT, Plaintiff in error,	)	
vs.	)	No. 3409.
THE PEOPLE OF THE STATE OF COLORADO, Defendant in error.	)	

It is stipulated and agreed by and between the Defendant in errror and the Plaintiff in error, that the Plaintiff in error may and shall have ..... additional ~~days~~ time, that is, until the 31st day of ~~November~~ December, 1894, inclusive, in which to file his brief and argument in the above entitled action.

Eugene Engley
Atty Genl
For Defendant in error.

M. S. Livingston
Atty, for Plaintiff in error.

Nov. 9th, 1894.

IN

THE SUPREME COURT

of the

State of Colorado.

Antonio Benedict, Plaintiff in Error,	)	
vs.	)	No. 3409.
The People of the State of Colorado, Defendant in error.	)	

Petition for Re-hearing.

The plaintiff in error respectfully petitions this honorable court to re-consider the opinion of this court filed herein, and to grant plaintiff in error a re-hearing herein upon the following point or proposition:

1. This court erred in assuming or holding that the defendant had a public trial.

Argument.

The court say that the fact that the defendant did not have a public trial is called to their attention by what purport to be affidavits of some of the officials, which the clerk certifies were filed in the case, in which it is stated, that the court made an order excluding from the court room during the progress of the trial all persons except members of the bar, officers of the court, students at law and witnesses in the case.

Purport to be affidavits? They are affidavits. And it is a mis-take when it is stated that the court made an order excluding, etc. The affidavits of the sheriff and under-sheriff and of John Benedict, brother of the defendant, show that just before the beginning of the trial the

judge ordered or told the sheriff to clear the court room of the spectators. No order of the court was entered of record concerning the matter and the affidavits do not say that there was. The affidavits simply state what the judge told the sheriff to do and what the sheriff did. The direction or order given by the judge, not being entered of record the matter could be presented in no other way than by affidavits.

In the case of Stone vs. the people, 2 Scammon p. 326, cited by plaintiff in error, in his argument, the matter was presented by an affidavit. And then again it is a mistake when it is assumed that the witnesses were permitted to remain during the trial. The affidavits show that the witness testifying was the only one permitted to be or remain in the court room during the trial. The order or direction given by the judge to the sheriff may or may not be considered an order of the court, but whether it is considered an order of the court or not, if it is not entered of record, it is impossible to present the same by an authenticated copy of the record, and it seems to me that the matter of presentation is immaterial so long as it is presented in the best form possible. What occurred seems to me to be the material thing. The facts stated in the affidavits are not denied, and must be taken to be true.

It is stated that in a criminal case the trial must be public, not secret. Somehow or other I cannot come to the conclusion that the officers of the court, attorneys at law, students at law, and the witness testifying form or compose the public. And then again it is difficult for me to assume or say that all except those persons enumerated have a morbid curosity for indecent details and are drawn thither for the purpose of having their curosity gratified. But if I were to come to a different conclusion, I doubt if any discrimination should be made between a lawyer and a miner or a farmer, or any other person in that respect.

I have examined the authorities cited by the court. Bishop on crim-

inal proceedure, Sec. 959, says substantially that publicity does not absolutely forbid temporary shutting of doors, and that the requirement is fairly met, if without partiality or favoritism, a reasonable proportion of the public is suffered to attend, etc. In the case at bar the doors were permanently and securely closed during the whole trial for two days and only a favored few were permitted to attend.

Cooley on Constitutional Limitations uses substantially the same language as Mr. Bishop, but cites no cases.

In 92 Mo., 542, the court held that the right to the defendant in a criminal case to a public trial is not violated, where after admitting the public, until the seats of the court room are filled, those seeking admission are excluded. It seems that in that case while the jury were being impanelled, the sheriff for a short time, without the knowledge of the court kept the door closed refusing admittance, and that when the court became aware of it, an order was made by the court as above stated, and it is strongly intimated that if the public had been excluded while there was unoccupied room it would have been error.

In the 22 Texas, App. 36 it was held that it was not error for the doors to be closed temporarily - during the cross examination of one witness - in order to expel a boisterous and insubordinate audience, when it was impossible to discover the particular individual creating the disturbance.

The 65 Cal., 223, simply quotes the assertion or opinion of Judge Cooley, and that is about all there is of it.

In the case reported in the 73 Cal., 222, it seems that the order was made to preserve order, and that in addition to the officers of the court, the reporters of the public press, friends of the defendant and persons necessary for her to have on the trial were allowed to remain.

I do not think it can be doubted that the order or direction was given by the judge as set forth in the affidavits. And if given, I do

not understand how it can be asserted that no prejudice was done to the defendants. The constitution guarantees to the defendant in a criminal case a public trial; and it seems to me, if that is shown, it should not be required of the defendant to show that he was prejudiced, or that he objected or did not consent to it, or that he did not waive his right. Every presumption in a criminal case is in favor of the defendant. If the defendant did not object to the instructions of the judge to the sheriff or consented to it, an opportunity was presented to the people to show the same by counter-affidavits on the motion for a new trial. The affidavits were filed in support of the motion for a new trial; are papers in the case; and as I take it, are a part of the record. The affidavits show that the proceedings were not regular; that the supreme law of the Commonwealth which guarantees to the accused a public trial was violated, and the facts stated in the affidavits not being denied or questioned, there being an opportunity for the People to deny the facts stated therein, if they believed them not true, it would seem a strange doctrine of criminal law that throws the burden upon the accused or the presumptions against him.

The decision of this court seems to have turned or hinged on matters not thought of or touched by myself and attorneys of defendant in error in our briefs and arguments. And under the circumstances I do not feel that the matter has been presented by me in the manner in which it probably ought to be presented. This court may be right in the view that it takes. But I consider the matter -the right to a public trial- an important one, and if this honorable court can consistently grant a re-hearing, I would be pleased to give the matter all the time and attention it merits and present the proposition in a manner somewhat satisfactory to myself.

Respectfully submitted,

[illegible]