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New Jersey Court of Errors and Appeals

STATE OF NEW JERSEY,
Plaintiff—Defendant in Error,
vs.
CHARLES L. LAVINE,
Defendant—Plaintiff in Error.

On Writ of Error to Supreme Court. 10

WRIT OF ERROR TO THE SUPREME COURT.

(Filed December 23, 1921.)

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NEW JERSEY, *ss*—The State of New Jersey, to the Chief Justice and other Justices of our Supreme Court of Judicature, GREETING:—

[SEAL]

Forasmuch as in the record and proceedings and also in the giving of judgment in a certain case, which was in our said Supreme Court of Judicature, before you, between the State of New Jersey and Charles L. Lavine, on a judgment and conviction rendered on a certain indictment, manifest error has intervened, to the great damage of the said defendant, as it is said; we being willing that the error, if any there be, should, in due manner, be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, that if judgment be thereupon given and affirmed, then you distinctly and openly send, under your seal, the record and proceedings aforesaid, with all things touching the same, to

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our Judges of our Court of Errors and Appeals in the last resort in all causes, at Trenton, on the third day of January, next, together with this writ, that the record and proceedings aforesaid being inspected, we may cause to be further done thereupon, for correcting that error, what of right, and according to the law of the State of New Jersey, ought to be done.

10 Witness, our Chancellor and President Judge of our said Court of Errors and Appeals, at Trenton aforesaid, the fifteenth day of December, 1921.

THOMAS F. MARTIN,
Clerk.

HENRY H. WITTSTEIN, and
JOHN H. KAFES,
Attorneys for Defendant.

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20 RETURN OF THE SUPREME COURT.

(Filed December 23, 1921.)

The answer of the Justices of the Supreme Court of the State of New Jersey within named. The record and proceedings whereof mention is within made, with all things touching and concerning the same, we do certify to the Court of Errors and Appeals of said State, in a certain schedule to this writ annexed, as within we are
30 commanded.

WILLIAM S. GUMMERE, *C. J.*

Writ of Error to Mercer County Court of Quarter Sessions.

WRIT OF ERROR TO MERCER COUNTY COURT OF QUARTER SESSIONS.

(Filed April 28, 1921.)

NEW JERSEY, *ss*: The State of New Jersey: To the Honorable Erwin E. Marshall, Judge of the Court of Quarter Sessions in and for the County of Mercer, GREETING:— [SEAL] 10

Because in the record and proceedings and also in giving of judgment upon a certain indictment against Charles L. Lavine, of the City of Trenton, County of Mercer and State of New Jersey, containing three counts, for attempted embracery, and for embracery, whereof before you he has been indicted and is therefore convicted on the second count of attempted embracery in the said indictment, by a certain jury of the county, taken between the State of New Jersey and the said Charles L. Lavine, as it is said, manifest error hath intervened to the great damage of the said Charles L. Lavine as from his complaint we have received information; we being willing, in his behalf to correct the error in due manner, if any there shall be, and that full and speedy justice be done to him, the said Charles L. Lavine, do command you that if judgment be thereon given, then that you distinctly and openly send, under your seal, the record and proceedings aforesaid, and also including the entire record of proceedings had upon the trial of said cause, with all things touching the same, to our Justices of our Supreme Court of the State of New Jersey, on the 5th day of May, next, 1921, and this writ, that the entire record and proceedings aforesaid being inspected, we may further cause to be done thereupon, for correcting that error, what of right and according to the laws of New Jersey ought to be done. 20 30

Witness the HONORABLE WILLIAM S. GUMMERE, Chief Justice of the Supreme Court of the State of New Jersey, at Trenton, this 15th day of April, Nineteen Hundred and Twenty-one.

ENOCH L. JOHNSON,
Clerk.

MARTIN P. DEVLIN and
JOHN H. KAFES,
Attorneys of Charles L. Lavine, Deft.

CERTIFICATE OF GRAND JURORS.

(Filed January 31, 1921.)

MERCER COUNTY, *to wit*:

BE IT REMEMBERED, That at a Court of Oyer and Terminer, holden at Trenton, in and for the said County of Mercer, on the third Tuesday of January, in the year of our Lord one thousand nine hundred and twenty-one, before the Honorable Thomas W. Trenchard, one of the Justices of the Supreme Court of Judicature of the State of New Jersey, and the Honorable Erwin E. Marshall, Judge of the Court of Common Pleas, in and for the said county, according to the form of the statute in such case made and provided, by the oath of John W. Manning, Robert A. Messler, Elijah E. Wright, Mahlon R. Margerum, Harry S. Pine, Howard N. Richards, Walter F. Smith, William J. Meloney, George B. Mather, Henry Coleman, Lambert Alpaugh, William R. Freas, Charles C. Hildinger, Charles F. McCoy, Josiah T. Allinson, Morris Urken, John M. Drechsler, Charles H. Weeks, William S. Bannerman, Bertrand L. Gulick, John Gladstone, Manus A. Fuld and George Hutchinson, having first alleged them to be conscientiously scrupulous of taking an oath, good and lawful men of the said County of Mercer, duly summoned, and then and there sworn, and charged to inquire for the State of New Jersey, in and for the body of the said County of Mercer.

It is presented in manner and form following, that is to say:

The bills herewith presented are true bills.

JOHN W. MANNING, *Foreman.*

WITNESSES BEFORE GRAND JURY.

(Filed January 31, 1921.)

MERCER OYER AND TERMINER.
JANUARY TERM, A. D. 1921.

I, John W. Manning, foreman of the Grand Jury at said Term, do hereby certify the names of the witnesses by me sworn, or affirmed, to give evidence before said Grand Jury—Richard C. Pilger, Mary Felsburg, Thomas Gore, Leroy Martin, William A. Doherty, William A. O'Hara, William J. Waldron, Thomas L. Maher, Frank Naples, Charles W. Deutz, John J. Clancy, Charles H. Coleman, George Fagg, Herman Fountain, Antonio Pirilli, Walter Green, Leslie A. Jameson, James A. Maguire, Harry Runiz, Stanley Wishnewski, W. Clifford Case, John Nolan, J. W. Foster, Nicholas Lewis, Harry Green, Lucy C. Smith, William H. Nutt, William A. Dooling, Robert Leahey, Anthony Leahey, Abe Rosenthal, Hyman Stern, Harry Stern, William Benbrosky, Wesley Myers, Ira Frost, Sophie Badstubener, Mary Kalolnysak, Harry P. Johnson, H. H. Bovie, Nellie Stalahen, Frederick C. Mapus, George D. Freudenmacher, Tony Harsonik, Albert Vehkronis, Rachel Lennox, Harriet Lennox, William Clow, Leon Bates, John McEllis, William Bentley, John Ecolevich, Philip J. Douress, Clara Nevius, Wm. A. Haney, Ella Nevius, Julia Grannage, Joseph Boyzath, Arthur Johnson, Hannah Tyler, Fred L. Snyder, Elizabeth Boyd, Michael Suta, John Markus, John Pavel, Joseph E. Stevenson, Ruth G. Stratton, Bessie Peters, Julia Palumbo, James Vitella, Stephen R. Smith, Mabel Hill, James T. Culliton, Frank McDermott, James S. Kirkham, John Fulkert, Rosie Supel, Frank D. Holmer, Junior, Mary Romano, Anna Rottgardt, William Jackson, Alfred Beers, Warren B. Clemmer, Peter Martin, Tony Winn, Marion Crum, Patrick Kerwick,

Witnesses Before Grand Jury.

Sadie Forker, Florence Forker, Cornelius J. McDonough, Joseph DeSantis, Carrie Maurey, John H. Force, Biaggio DiCarlo, Wolf Keiner, Wladyslaw Urbanowicz, Fred Yurodicz, Louis Gimpel, Jennie Olvero, Nettie Katzin, Constantino DeAccenzi, Herbert M. Sines, May L. Sines, Mollie Rubin, Burane Mitlowski, Samuel Haverstick, John Nonziato, William P. Walter, Leon A. Schockley, Leo Clancy, William A. Cleary, Edward J. Ennis, Elvina Denita, Tony Fisher, Edward J. Fletcher, Walter J. Blauth, Henry C. Blackwell, Walter Leonard, Mabel Bernasco, William E. Blake, Alexander J. Denne, Samuel L. Akers, Charles Myers, John H. Thompson, Daniel Shields, Richard Sullivan, Winifred Thompson, David Thompson, Claude Bamford, Anna Tracy, Margaret Treagular, Alfred Ousbin, Stella Ousbin, Mary Ousbin, Mary Harhigh, Frank Fowler, Ruth Lewis, Ellen L. Tomlinson, Herbert Mosley, Mrs. George Bonathan, Harry Caterson, Samuel Lowenburg, Louis Becker, Elmer Johnson, Percy Holt, Harry Riley, John Mezaros, William Darby, John Cavanaugh, Emma Wiggins, Elizabeth Craft, James Doherty, Peter Dimko, John Peksay, Jr., Inez M. Johnson, Ruth Griffith, Harry J. Ries, Daniel Pinto, James Ryan, Harry Anglum, Rosie Battaglio, Charles Green, Abe Becker, Joseph Zobolski, Henry Freeman, Eva Smith, Mamie Hill, Victoria Petraski, Anna Didranz, Ethel Bakey, Matilda Didranz, Elizabeth Schmidt, Clara Hill, Laura McCoy, Arthur Billingham, Ella Sandt, Frank Lenart, Susue Breitenbach, Bessie Breitenbach, John M. Curtis, James P. Callahan.

JOHN W. MANNING, *Foreman.*

Filed Jan. 31, 1921.

JOHN H. FETTER, *Clerk.*

INDICTMENT.

(Filed January 31, 1921.)

JANUARY TERM, A. D. 1921.

MERCER COUNTY, *to wit*:

The Grand Inquest of the State of New Jersey, in and for the body of the County of Mercer, upon their respective oath 10

Present, That Charles L. Lavine, late of the City of Trenton, in the said County of Mercer, on the tenth day of January, in the year of our Lord one thousand nine hundred any twenty-one, with force and arms, at the City of Trenton, aforesaid, in the County aforesaid, and within the jurisdiction of this Court, a certain issue in an action at law having been joined between Charles L. Lavine, as plaintiff, and Nathan Aroniss and Hyman Gerofsky, as defendants, in the Mercer County Court of 20 Common Pleas, before the Honorable Erwin E. Marshall, Judge of the said Mercer County Court of Common Pleas, was therein pending and a certain jury of the said County of Mercer was empanelled and returned to try the same; whereupon the said Charles L. Lavine, well knowing the premises and being a common embracer of jurors, and devising and wickedly and corruptly and unlawfully intending to hinder the due and lawful trial of the said issue by the jurors aforesaid empanelled and returned to try the said issue, did then and there unlaw- 30 fully, wickedly, corruptly and unjustly, on behalf of the said Charles L. Lavine, the plaintiff, solicit and persuade one James P. Callahan to see and talk with the jurors of the said jury empanelled and returned for the trial of the said issue in favor of the said Charles L. Lavine, and did then and there say and utter to the said James P. Callahan divers words and discourses by way of commendation of the said Charles L. Lavine, the plaintiff, to wit—"Do you know any of the jurors; see them tonight and get them to do something for me"—and the said Charles

L. Lavine then and there unlawfully and corruptly did move and desire the said James P. Callahan to solicit and persuade the jurors empanelled and returned to try the said issue to give a verdict for the said Charles L. Lavine, plaintiff in said issue, contrary to the form of the statute in such case made and provided, and against the peace of this State, the government and dignity of the same.

10 The Grand Inquest aforesaid, upon their oath aforesaid, do further present, that the said Charles L. Lavine, on the tenth day of January, in the year of our Lord nineteen hundred and twenty-one, with force and arms, at the City of Trenton aforesaid, in the County aforesaid, and within the jurisdiction of this Court, a certain issue in an action at law having been joined between Charles L. Lavine, as plaintiff, and Nathan Aroniss and Hyman Gerofsky, as defendants, in the Mercer County Court of Common Pleas, before the Honorable Erwin E. Mar-
20 shall, Judge of the said Mercer County Court of Common Pleas, was therein pending and a certain jury of the said County of Mercer was empanelled and returned to try the same; whereupon the said Charles L. Lavine, well knowing the premises and being a common embracer of jurors, and devising and wickedly and corruptly and unlawfully intending to hinder the due and lawful trial of the said issue by the jurors aforesaid empanelled and returned to try the said issue, did then and there unlawfully, wickedly, corruptly and unjustly, on behalf of the
30 said Charles L. Lavine, the plaintiff, solicit and attempt to persuade one James P. Callahan to see and talk with the jurors of the said jury empanelled and returned for the trial of the said issue in favor of the said Charles L. Lavine, and did then and there say and utter to the said James P. Callahan divers words and discourses by way of commendation of the said Charles L. Lavine, the plaintiff, to wit—"Do you know any of the jurors; see them tonight and get them to do something for me"—and the said Charles L. Lavine then and there unlawfully and corruptly did desire and attempt to move the said

James P. Callahan to solicit and persuade the jurors empanelled and returned to try the said issue to give a verdict for the said Charles L. Lavine, plaintiff in said issue, contrary to the form of the statute in such case made and provided, and against the peace of this State, the government and dignity of the same.

The Grand Inquest aforesaid, upon their oath aforesaid, do further present, that the said Charles L. Lavine, on the tenth day of January, in the year of our Lord nineteen hundred and twenty-one, with force and arms, at the City of Trenton aforesaid, in the County aforesaid, and within the jurisdiction of this Court, a certain issue in an action at law having been joined between Charles L. Lavine, as plaintiff, and Nathan Aroniss and Hyman Gerofsky, as defendants, in the Mercer County Court of Common Pleas, before the Honorable Erwin E. Marshall, Judge of the said Mercer County Court of Common Pleas, was therein pending and a certain jury of the said County of Mercer was empanelled and returned to try the same; whereupon the said Charles L. Lavine, well knowing the premises and being a common embracer of jurors, and devising and wickedly and corruptly and unlawfully intending to hinder the due and lawful trial of the said issue by the jurors aforesaid empanelled and returned to try the said issue, did then and there attempt to corrupt and influence and to incline the jurors of the said jury empanelled and returned for the trial of the said issue to be more favorable to the said Charles L. Lavine than to the said Nathan Aroniss and Hyman Gerofsky, and did then and there by promises and persuasions and entreaties and threats and letters and other sinister means, solicit and attempt to persuade and incline one James P. Callahan to see and talk with the jurors of the said jury empanelled and returned for the trial of the said issue in favor of the said Charles L. Lavine, and did then and there attempt, by indirect and unfair and fraudulent practices and arts and contrivances and words, to wit—"Do you know any of the jurors; see them tonight and get them to do something for me"; contrary to the form of the statute in such case made and provided, and against the peace of this State, the government and dignity of the same.

A. Dayton Oliphant,
Prosecutor of the Pleas.

ENDORSEMENT ON INDICTMENT

MERCER OYER AND TERMINER
January Term, A. D. 1921

THE STATE *vs.* CHARLES L. LAVINE	Indictment for Embracery.

A. DAYTON OLIPHANT,
Prosecutor of the Pleas.

A True Bill.

JOHN W. MANNING,
Foreman.

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JUDGMENT.

(Filed April 15, 1921)

And afterwards, to wit, on Monday, the thirty-first day of January, in the year of our Lord one thousand nine hundred and twenty-one, at a session of the said Court of Oyer and Terminer, as aforesaid, being as yet of the term of January aforesaid, the said indictment was by the said Court of Oyer and Terminer handed, set and transmitted to the Court of Quarter Sessions of the said County for trial according to the form of the statute in such case made and provided, and a rule to that effect then and there duly made and entered upon the record of each of the said courts respectively; and afterwards, to wit, on the third day of February, in the year of our Lord nineteen hundred and twenty-one, at a session of the said Court of Quarter Sessions in and for the said County of Mercer of the term of January, of the year of our Lord nineteen hundred and twenty-one, before the

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Judgment.

Honorable Erwin E. Marshall, Judge of the Court of Quarter Sessions, at Trenton, in the County of Mercer aforesaid, cometh the said Charles L. Lavine, in his proper person according to the conditions of the recognizance by himself and his pledges in that behalf heretofore made and now here touching the premises in the said indictment above specified and charged upon him being asked in what manner he will acquit himself thereof he says that he is not guilty thereof and of this he puts himself upon the Country and A. Dayton Oliphant, Prosecutor of the Pleas of the said County of Mercer, who prosecutes for the State in this behalf does likewise the same; therefore let the said indictment be continued until a jury thereupon come here before the said Judge aforesaid, at Trenton, in the County of Mercer. Whereupon let a jury thereupon come, to wit, on Wednesday, the thirtieth day of March, in the year of our Lord nineteen hundred and twenty-one, of the January Term, nineteen hundred and twenty-one, before the Honorable Erwin E. Marshall, Judge of the Court of Quarter Sessions, in and for the said County, twelve good and lawful men of the County of Mercer aforesaid, by whom the truth of the matter may be better known and who are not of kin to the said Charles L. Lavine, to recognize upon their oaths whether the said Charles L. Lavine be guilty as charged in the indictment aforesaid above specified or not guilty, because as well the said A. Dayton Oliphant, who prosecutes for the State in this behalf as the said Charles L. Lavine, have put themselves upon the said jury and the jurors of the said jury by Walter Firth, Sr., Sheriff of the said County of Mercer and Raymond A. Schroth, Jury Commissioner of the said County of Mercer, for this purpose empanelled and returned agreeably to the statute in such case made and provided, to wit, George W. Stolte, Jr., Jacob Perrine, David Shapiro, George C. Lutz, George Kohlmayer, Charles C. Hand, Michael Stahovski, George W. McFarland, Benjamin Hendrickson, Martin Parker, Joseph Plumeri and James A. Grant,

Jr., who having been elected, tried and sworn to speak the truth of and concerning the premises upon their oath, and after evidence from witness produced by James Hammond, the Assistant Prosecutor of the Pleas, and the case of the State had rested, and John H. Kafes, one of the attorneys for the defendant, moved for a direction of a verdict, which was denied by the Court, and an exception allowed to defendant and John H. Kafes, one of the attorneys for the defendant moved that the State elect upon which count of the indictment it relies, which was allowed by the Court and James Hammond, the Assistant Prosecutor of the Pleas for the State replied that the State elects to rest its case on the second count in the indicment that of attempted embracery and abandoned the first and third counts in the indictment, and the defendant rested its case without calling any witnesses. Martin P. Devlin, one of the attorneys for the defendant, moved for a direction of a verdict, which was denied by the Court, and an exception allowed to defendant and after arguments presented to the Judge of the said Court by John H. Kafes, one of the attorneys for the defendant, as well as by James Hammond, Assistant Prosecutor of the Pleas, and after a charge by the Court the jury retired to consider their verdict and having agreed upon their verdict come again into Court and by their foreman do say they find the defendant gulity on the second count of attempted embracery in the indictment and so say they all, on him above charged in the form aforesaid and as by the said second count in the said indictment aforesaid is above supposed against him, and thereupon the said Charles L. Lavine was remanded for sentence until Friday, the fifteenth day of April, nineteen hundred and twenty-one, at which last mentioned day the said Charles L. Lavine, being present before the said Court of Quarter Sessions, and it being forthwith demanded of the said Charles L. Lavine, if he hath or knoweth of anything to say wherefore the said Judge as aforesaid here ought not upon the premises and verdict aforesaid to pro-

ceed to judgment against him, who by his attorneys Martin P. Devlin and John H. Kafes, makes a motion before the Court for an arrest of judgment upon the following reasons:

1. That the second count of the indictment and upon which count the jury convicted the defendant does not charge a crime.

2. That the second count of the said indictment upon which the jury convicted the defendant does not charge the crime of attempted embracery. 10

3. That the testimony upon which the jury found the defendant guilty does not constitute the crime charged in the second count of the said indictment.

4. That the testimony upon which the jury found their verdict does not constitute the crime of attempted embracery as charged in the second count of the indictment, and the Court having heard the motion denied same and allowed the defendant an exception, whereupon all and singular the premises being seen and by the said Judge here fully understood, it is considered and adjudged and the Court do order on the conviction that the defendant be confined in the Mercer County Workhouse for a period of six months and do pay a fine of five hundred dollars together with costs of his prosecution. 20

RETURN OF MERCER QUARTER SESSIONS. 30

(Filed April 28, 1921.)

The entire record and proceedings of the indictment, plea, trial and conviction and judgment, including the entire record of the proceedings had upon the trial of said cause, whereof mention is within made, with all things concerning the same to the Supreme Court of Judicature of New Jersey within specified at the day and place within contained, we certify in a certain schedule to this writ annexed as we are commanded.

ERWIN E. MARSHALL,
Judge.

CERTIFICATE OF CLERK.

(Filed April 28, 1921.)

COUNTY OF MERCER,
10 STATE OF NEW JERSEY, } ss.

I. JOHN H. FETTER, Clerk of the Court of Oyer and Terminer and Clerk of the Court of Quarter Sessions, do hereby certify that the foregoing is the entire record and proceedings and judgment in the case of The State of New Jersey vs. Charles L. Lavine, as the same remains on file and of record in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal of said
20 [SEAL] Courts at Trenton, this twenty-eighth day of April, A. D. 1921.

JOHN H. FETTER,
Clerk.

TESTIMONY.

MERCER COUNTY COURT OF QUARTER SESSIONS.
JANUARY TERM, 1921.

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THE STATE
vs.
CHARLES L. LAVINE. } On Indictment for Embracery.

Transcript of shorthand notes of testimony, etc., taken in the above stated matter on the trial thereof before Hon. Erwin E. Marshall, Judge, and a jury, at the Court House, Trenton, New Jersey, on Wednesday, March 30, 1921.

Appearances—JAMES HAMMOND, Esq., Assistant Prosecutor of the Pleas, for the State; MARTIN P. DEVLIN, Esq., and JOHN H. KAFES, for the Defendant.

(Jury called and sworn.)

(Mr. Hammond opened for the State.)

JAMES P. CALLAHAN, sworn for the State.

Direct examination by Mr. HAMMOND. 10

Q. Mr. Callahan, you are an officer of this court?

A. I am.

Q. You were an officer of the court on the tenth day of January last?

A. I was.

Q. And you were at the court on that day?

A. I was.

Q. Do you recollect the jury being drawn in an issue then pending between Charles L. Lavine, plaintiff, and Nathan Aroniss and Hyman Gerofsky, defendants? 20

A. I do.

Q. On the tenth day of January did you see Mr. Lavine?

A. I did.

Q. What part of the day did you see Mr. Lavine?

A. It was before recess. He came in the office where I have a desk.

Q. Where do you have a desk?

A. In a room adjoining the Prosecutor's office.

Q. What hour do you recall Mr. Lavine saw you? 30

A. I would say near eleven—eleven-thirty; along there; I do not know just exactly the exact time. He came in and he had a jury list.

Q. By a "jury list" what do you mean?

A. One of these (indicating).

Q. One of these pamphlets?

A. Yes, sir. And he asked me if I knew any of the jurors on there and I looked it over and said I did, and he asked me to mark with a pencil the names of the men that I knew, which I did, not knowing at the time

what he intended to do with it, and he took the list and came in here.

Q. When did you next see him, Mr. Callahan?

A. After Court adjourned.

Q. That is, when it adjourned for recess?

A. At night.

Q. What time would that be.

10 A. I would say around four-thirty.

Q. Where did you see him at four-thirty?

A. In the corridor.

Q. What part of the corridor?

A. Right out near the steps here; between the steps and the office; you might say opposite the first office door; I think Room 8.

Q. What was said by Mr. Lavine to you and what did you say to him?

A. He asked me to step down to the lower end of the 20 hall with him, which I did, and he showed me the names of the jurors that were pulled for his case.

Q. Was it a written list, do you know?

A. No; he had the regular list.

Q. What do you mean when you say he showed you a list?

A. He had them marked off, who were on the jury.

Q. They were marked off on the pamphlet that you had given him?

A. Yes, and he asked me if any of them were on there 30 that I knew and I said, yes, there was one in particular, Mr. Joseph Whitely, a hardware dealer at the corner of Chestnut and Rusling, I think his place is.

Q. On this panel?

A. No; that was in the October Term.

Q. And you say his name is, what?

A. Joseph Whitely, a hardware dealer. That is when he got very particular, if I knew him, and I told him I knew him, and he said, "Will you see him tonight for me and see if you can't do something for me on that case?"

Q. Then what happened?

A. Well, I stood there a little while talking with him and then I came back to the office and he went out.

Q. When you went out of the door where did you go to, from the door here?

A. When I met him?

Q. Yes. Did you have that conversation just by this door (indicating) or——

A. No; we went all the way down the corridor, near the probation office.

Q. What have you to say as to the number of people in the upper end of the corridor?

A. Down there?

Q. This end.

A. There were quite some around this end.

Q. And down there?

A. No one at all; we were there alone.

Q. When did you next see Mr. Callahan?

A. I did not see him until the next morning in court.

Q. Did you have any further conversation about this case?

A. No; I haven't had any conversation with him since.

Cross-examination by Mr. KAFES.

Q. You are connected with the Prosecutor's office, aren't you?

A. I am a court attendant assigned to serve subpoenas from the Prosecutor's office.

Q. Have you any other connection with that office?

A. Not that I know of.

Q. Do you have a desk in there.

A. Yes, sir.

Q. You do other work for the Prosecutor of the Pleas?

A. Nothing only serve subpoenas. I occasionally serve a warrant.

Q. In fact you do a great deal of work for them; you are in there all the time, aren't you?

A. No; I would not say I was in there all the time.

Q. You mean you are not in there twenty-four hours out of twenty-four, but nearly all the time while you are over here?

A. Well, yes; quite a good portion of my time.

10 Q. What other work do you do, if any?

A. What do you mean, for the office?

Q. Yes.

A. Nothing only serve subpoenas and occasionally a warrant, if there is any warrants come in.

Q. Have you any other occupation outside of the office?

A. No.

Q. That is all you do then, attend court and serve subpoenas and warrants for the Prosecutor's office?

20 A. Yes.

Q. Are you an officer of this court?

A. Court attendant.

Q. Sworn in as an officer?

A. Sworn in as a constable.

Q. By the Sheriff?

A. No, sir; I was elected from the ward that I live in.

Q. Sworn in by anyone over here?

A. Not here, no.

Q. You receive a salary as a court attendant?

30 A. I do.

Q. Were you on duty on this date in question?

A. I was.

Q. What time did you go on duty that morning?

A. I could not just say. I usually drift in about nine thirty.

Q. That was a civil case. You do duty in both the civil and criminal courts?

A. When I am working in here as a court attendant, I do, yes.

Q. Were you actually on duty on that day?

A. Yes, but I was not in here working as court attendant that day. I was in the Prosecutor's office.

Q. You say you saw Lavine in the morning?

A. He saw me.

Q. Or whichever way you want to put it. Do you remember the date?

A. Monday, January tenth. 10

Q. 1921?

A. 1921.

Q. What time in the morning was it he saw you?

A. Why, as I said before, around eleven, or it may have been a little after or it may have been before.

Q. Was the trial on at that time?

A. No, sir.

Q. Had the jury been empanelled?

A. Not yet

Q. Had the trial started? 20

A. No; the trial was not started until the next day. It was supposed to start the next day.

Q. You say that he had a calendar?

A. He did.

Q. And asked you whether you knew any of the men on the jury list?

A. He did. He had me mark them with a pencil.

Q. And you marked the names of the men you knew?

A. I did.

Q. And gave the calendar back to him? 30

A. Yes.

Q. Did he tell you at that time what he wanted you to mark them for?

A. No; he did not.

Q. Did you know?

A. No; I did not.

Q. Was there anything more said or done between you at that time?

A. Nothing.

Q. Merely to mark names?

A. That is all—a general conversation. We talked; I do not know just what on.

Q. But it had nothing to do with this?

A. Nothing to do with that.

Q. You did not know the purpose of him asking you?

A. Not then, no.

10 Q. You did not know what he wanted the names marked for?

A. I did not.

Q. You did not know what case he expected to utilize or use these names or anything at all, save the fact that he asked you if you knew any of the men whose names appeared on the list?

A. No; I did not know what he intended to use them for, but I knew he had a case on in here.

Q. But you did not know for what purpose he asked

20 you?

A. No; not at that time, no.

Q. You did not know whether he was asking you for someone else or for himself?

A. No; I did not.

Q. Now, you say you saw him—when next?

A. Somewhere around four-thirty, after court adjourned for the day.

Q. The same afternoon?

A. The same afternoon.

30 Q. Here in the court house?

A. Out in the corridor.

Q. And where do you say you actually saw him the second time?

A. Well, you know where Captain Hartman's desk is——

Q. Just tell the jury.

A. Right up here in the corridor, I think Room 8, right outside, beside the door; between this door (indicating) and there.

Q. In the corridor?

A. Yes.

Q. Did any other persons see you talking to him at that time?

A. I do not know.

Q. That you know of?

A. None that I know of, no.

Q. Now just state what was the first thing he said to you? 10

A. He called me down the corridor. He said, "Come on down here, Jimmy." And we went on down the lower end, leaned against the radiator there——

Q. In the afternoon?

A. When court adjourned.

Q. In the afternoon?

A. Yes, same afternoon, when Court adjourned.

Q. You went down the lower part of the corridor?

A. Yes. 20

Q. Go ahead.

A. We both leaned against the radiator there near the Probation Office.

Q. Go ahead.

A. And he showed me the names of his jurors. He asked me which ones on there it was I knew and I recall very well the name of Joseph Whitely, and he asked me if I would not go out and see Mr. Whitely and see if I could not get him to do something for him on his case.

Q. Now, do you say that was the same afternoon, the afternoon following that morning? 30

A. I do; yes, sir.

Q. I understand you to say a moment ago that case did not come up until the next morning.

A. The jury was drawn; the jurors were all in the box that afternoon when Court adjourned.

Q. Did he see you at four-thirty?

A. Yes, sir.

Q. And then he showed you the list?

A. He did.

Q. And he asked you if you knew any of those men?

A. If any of the men I knew was on there.

Q. And you replied, "Yes, I know—" James Whitely, is it?

A. Joseph Whitely, a hardware dealer on Chestnut Avenue.

Q. A hardware dealer of this city. Did you tell him
10 you knew any other man on that jury?

A. There were others on there that I knew, but not personally.

Q. Not whether you did as a fact. I only want to know what you told him.

A. He was the only one that I knew personally.

Q. That was Joseph Whitely?

A. Joseph Whitely.

Q. The hardware dealer?

A. Yes.

20 Q. Did you tell him you knew any other men on that jury?

A. There were men on there that I knew by name.

The Court—That is not the question.

Q. Answer the question, Mr. Callahan.

A. No.

Q. Then you merely mentioned the name of Whitely?

A. Whitely was the man that was mentioned.

Q. To Mr. Callahan?

A. To Mr. Lavine.

30 Q. Then it was he said what?

A. "You go out there tonight and see him and see if you can't get him to do something for me on that case."

Q. Now, did he say, "You go out and see him tonight—" and so forth?

A. He did.

Q. Or did he say what you have said on two prior occasions, "Will you go out and do it?"

A. "Go out."

Q. Then you were mistaken when you said he said, "Will you go out and see Mr. Whitely for me."

A. He asked me to go out.

Q. Just what were his exact words, "Will you see him for me" or what?

A. He asked me to go out and see him then and see if he would do something for him on his case.

Q. No. I want his exact words, just as he used them, in the tense that he used them to you. 10

A. I am using them just as nearly as I possibly can.

Q. Don't characterize it as to the tense of what he said, but give me his exact words, as if he were speaking to you now. Now, what did he say?

A. Why, he said, "Go out and see him" and see if I could get him to do anything for him on his case.

Q. He did not say, "Will you go out and see him for me?"

A. He may have said "Will you" or he may have said the other. I cannot specify right down to the exact word now. 20

Q. All right. What reply did you make?

A. I did not make any reply; I did not say I would or I would not.

Q. You said nothing?

A. Nothing.

Q. Did he say anything more to you?

A. He kept on the same drift all the time and the last word he said on leaving me, "See him; go out and see him." 30

Q. He said it so often? First he would say it in one syllable and then in another, but all to the same import?

A. Yes.

Q. "Go out and see him." Or, "Go out and see him for me and see what you can do for me."

A. Yes.

Q. What did you say to the latter part when he said "See him for me."

A. I didn't say anything. I didn't say I would or I would not. I just listened to him.

Q. You know, being connected with the Court and the Prosecutor's office, that you would have no right to see any juror in advance of a trial, don't you?

A. Certainly I do.

Q. And you know it would be a crime to approach a juror and attempt to influence him in his judgment in the trial of any case?

10 A. I do. That is the reason it was not done.

Q. You knew that?

A. Certainly.

Q. Then when he said this to you, "Will you—" did you intend to see any juror empanelled in that case?

A. I certainly did not.

Q. Did you attempt, in any way, that is directly or indirectly—I mean now even attempt in any way—to reach any juror sworn in that cause?

A. Absolutely not.

20 Q. That is the case between Lavine—the civil suit of Lavine against Gerofsky and Aroniss—did you attempt in any way, either directly or indirectly?

A. Neither.

Q. And never meant to?

A. I certainly did not.

Q. Now, did you see any juror in that cause for Lavine?

A. No; certainly not.

Q. Did you ever intend to see any juror for Lavine?

30 A. No, sir.

Q. You were not a member of the panel, were you?

A. I was not.

Q. Then you never did any act of any kind or description in furtherance of what Lavine had asked you for?

A. I did not.

Q. And you never intended to, did you?

A. I did not.

Q. Then your activities with Lavine were merely confined to this private conversation in the lower part of the corridor?

A. In his effort to get me to see the jurors.

Q. And where no one overheard what was said?

A. No one that I know of.

Q. I understood you to say there was no one down there but there were a number of people in the upper side here. 10

A. Up in this end.

Q. You were not a juror—

The Court—He has answered that question.

Q. ——on that panel at that time and neither were you sworn as one of the trial jury in that case. I think I asked you that, but Mr. Devlin wanted me to be sure about it.

A. You asked that question and I anwered "No."

Q. Now, Mr. Callahan, you are not related to Mr. Lavine? 20

A. I am not.

Q. Not employed by him to do anything?

A. No, sir.

Q. He is under no obligations to you whatever?

A. No, sir.

Q. Nor was at that time, was he?

A. No, sir.

Q. Nor you to him?

A. I don't think so.

Q. Nothing more than mere friends; that is, acquainted with each other. 30

A. That is all.

Q. You were not obliged to do anything that he wanted you to do, were you?

A. Not in the least.

Q. It was of your own volition to do anything for him or not, just as you saw fit?

A. Yes; I was under no obligations to him nor he to me.

Q. Now, you remember being sworn in the summary hearing of this matter before His Honor, Judge Marshall, don't you?

A. I do.

Q. You gave testimony at that time, did you not?

A. Some.

Q. You were called as a witness and testified as to
10 what took place before you and Lavine, were you not?

A. I was called in.

Q. Called in before Judge Marshall?

A. Yes.

Q. And you were sworn to tell what happened? You were sworn, weren't you?

A. I was.

Q. And you were asked to tell what happened?

A. Yes.

Q. And you said this: Question by Mr. Oliphant:
20 "Mr. Callahan, you are an officer of this court?" Answer: "I am." Question: "Were you seen by any of the parties to this suit last evening?" Answer: "Yes." By the Court (Judge Marshall): Will you state who it was and what was said?" Answer: "Mr. Lavine asked me if I knew any of the members on the panel or on the jury and I said I knew a couple of them, and he asked me if I would try to see them for him." You do not say anything there about the calendar, do you?

A. No.

30 Q. Why not? You were asked to tell.

A. I didn't know it was necessary to tell it at all.

Q. Do you mean to say as a court officer you did not think it was necessary to tell it all when Judge Marshall brought you in to tell what took place?

A. I thought I told enough.

Q. You did not think it was necessary to tell it all; was that it—just "Yes" or "No." You did not think it was?

A. I thought I told him enough to convince him that he had done it.

Q. You did not think it was necessary to tell it all.
A. Not that; no. The other led up to that.
Q. You know you are supposed to tell the truth and the whole truth after being sworn?
A. Well, I did.
Q. You did not tell it all.
A. Even if I did not tell it all, but left a little out, that don't say I am not telling the truth. 10
Q. You did not tell all you knew about it?
A. That may be.
Q. That is a fact, isn't it?
A. Yes, at that time.
Q. All right. "By Mr. Devlin: Mr. Lavine is one of the parties in this case." Isn't he?
A. Yes.
Q. "I will bring him in. The Court: All right. By Mr. Oliphant: Anything else said, Mr. Callahan?" Answer: "No; that is all—" he said to you. Is that 20 right?
A. As far as that went there, yes.
Q. You said this, didn't you?
A. Yes.
Q. Now, then, questions by Mr. Macpherson: "Where did this take place?" Answer: "In the corridor." Is this right?
A. It is.
Q. "Did he give you any directions as to what to do?" Answer: "No, he just requested that I see them." Is 30 that right?
A. It must be.
Q. Well, is it.
A. Whatever is there, that is what I answered at that time; yes.
Q. "Did he offer you anything for your services? A. Not a thing; no, sir." Is that right?
A. Sure. I have not said that he did.
Q. No; did you say that to Judge Marshall?
A. Yes.

Q. And that is true, as a matter of fact? He did not?

A. No, he did not.

Q. Did he suggest what you should say to them?" Answer: "No." Is that right?

A. Yes.

Q. He did not, did he?

10 A. He did not suggest any words; no.

Q. All right. "Q. Is that all that was said? A. That was all that was said." Is that right?

A. That is right.

Q. "Q. No suggestions?" Answer: "No suggestions or no promises, no offers." Did you make that reply?

A. Yes, sir.

Q. "Q. After this was said, what if anything did you do?" Answer: "Nothing." Is that right?

20 A. That is right.

Q. Now, you did not say anything to the court, after being sworn in this cause, about this Mr. Whitely, the hardware man, did you?

A. I did not mention any name; no.

Q. Why didn't you mention his name when you were called in before Judge Marshall to state what you knew about this matter?

A. No one asked me his name.

Q. But you were asked to tell the whole truth about this, weren't you?

30 A. I did.

Q. You did not tell Mr. Whitely's name?

A. I was not asked.

Q. Is that the reason?

A. I presume so. If I had been asked I would have mentioned it.

Q. That is the only reason, is it?

A. Why, certainly.

Q. You reported the matter to Mr. Oliphant?

A. I mentioned it to Mr. Kirkham.

Q. He is connected with your office?
A. Yes, sir.
Q. And you finally mentioned it to Mr. Oliphant, didn't you?
A. Mr. Kirkham drew Mr. Oliphant's attention to it.
Q. Mr. Kirkham is chief of the detective force in the Prosecutor's office?
A. Yes. 10
Q. Then Mr. Kirkham mentioned it to Mr. Oliphant and Mr. Oliphant called you in?
A. That is the idea.
Q. Mr. Oliphant and Mr. Alex. Budson were the attorneys for Gerofsky and Aroniss, were they not?
A. I believe so.

Re-direct examination by Mr. HAMMOND.
Q. Had you served any papers or done any work whatever for Mr. Lavine? 20

Mr. Kafes—Objected to. It is irrelevant to the issue, and it is not re-direct examination. It is absolutely irrelevant and immaterial to this issue.

The Court—I do not see how it could have any relevancy to the issue itself.

Mr. Hammond—No more than Mr. Kafes asks if he ever did any work for the—

Mr. Kafes—If he will confine it to papers in this case I will withdraw the objection—if he did 30 any work in the Gerofsky and Aroniss case I will withdraw the objection.

The Court—All right.

Q. Did you?
A. Not in that case.
Q. But you have in other cases?

Mr. Kafes—That is objected to.

The Court—Yes; I cannot see the relevancy of that.

Q. How soon after this occurrence did you call this matter to the attention of Mr. Kirkham?

A. The first thing in the morning.

Q. That is, on Tuesday morning?

A. Tuesday morning.

Mr. Hammond—If the Court please, the State rests.

10 Mr. Kafes—If the Court please, at this time the defendant desires to move for the direction of a verdict.

The Court—If counsel want to argue that question I will hear it in private.

(Court and counsel withdrew.)

Mr. Kafes—Mr. Devlin, who is associated with me in this case, will address the Court on this motion.

Mr. Devlin—I move to direct a verdict on the
20 ground that the indictment in no count expresses a crime.

On the second ground that there is no such crime as an attempted embracery, as expressed in the indictment.

On the third ground that there is no fact in this case to indicate an attempt at any kind of a crime, and particularly the crime expressed in the indictment.

Those are the reasons.

30 (Counsel proceeded with argument.)

(At twelve o'clock, noon, a recess was taken until two o'clock in the afternoon.)

Mr. Devlin—I want to put in about two more reasons.

The Court—All right, put them in.

Mr. Devlin—That is that each count of the indictment—The first count does not express a crime in that it fails to name the juror or jurors that were either directly or indirectly approached or seen or influenced.

That the second count fails to express a crime in that it fails to show the juror or jurors who were attempted to be influenced, approached or in any way persuaded in this case.

That the third count fails to express a crime in that it fails to show the juror on whom there was any attempt made to corrupt, influence or incline to favor in any way the plaintiff or any other person. 10

The Court—Those are additional reasons to those urged this morning?

Mr. Devlin—Now, another reason I want to put in is that there is no proof now as to who the juror was that was empanelled in that case.

The Court—After carefully considering the arguments of counsel on both sides of this motion I have concluded to overrule the motion for a directed verdict. I think under the statute a case has been made out of an attempt to influence a jury or a juror, and I think the duty of the Court is to permit the question to go to a traverse jury for final settlement. If I be wrong in my conclusions, of course, the appellate court can correct my errors. 20

Mr. Devlin—I ask an exception to the ruling.

The Court—Yes; exception allowed.

(Exception allowed and the same is sealed accordingly. 30

ERWIN E. MARSHALL, *Judge.*)

Mr. Kafes—Now I want to move the Court that the State elects under which count in this indictment they are now proceeding or expect to rely.

The Court—The first is the count for embracery and the others are for attempts?

Mr. Devlin—One is the attempt and the other is a charge of an attempt to corrupt, and we want the state to make an election upon which of those three counts they will proceed.

Mr. Hammond—I want some time to think that over.

Mr. Devlin—Take any reasonable time you wish, but I want you to make an election, and I ask the court to request you to make an election, because your case is in and you should know what you are going to do.

10 (After discussion.)

Mr. Hammond—I will elect to prosecute the man on the attempt count.

The Court—That is the second count?

Mr. Hammond—Yes.

Mr. Devlin—Then you abandon the first and the third count.

Mr. Hammond—If you want an election I will have to do it.

(Court and Counsel returned into Court.)

20 The Court—As announced to counsel in the private chambers, the motion for a direction of verdict is overruled.

Mr. Devlin—And an exception requested and granted.

The Court—And an exception granted.

(Exception allowed and the same is sealed accordingly.

ERWIN E. MARSHALL, *Judge.*)

The Court—A motion was made that the

30 Prosecutor be required to elect upon which count the state would go to the jury. I understand the Prosecutor is ready to make an election at this time.

Mr. Hammond—If the Court please, that being the ruling of the Court, the State elects to proceed under the attempt count, which, I understand, is the second count in the indictment, and, as a matter of law, the State would then be obliged to abandon the first and third counts.

Mr. Devlin—The State abandons the first and third counts in this indictment and rests this case on the second count.

The defendant rests his case.

Without taking the Court's time, we will move that a verdict be directed for the reasons in the indictment, set out in the motion to direct when the State rested.

10

The Court—They are already in the record.

Mr. Devlin—I do not want to repeat them, but the stenographer will please repeat all the reasons when he makes up the record.

(Reasons heretofore given on motion for direction of verdict, pursuant to request of counsel, are repeated, as follows:

"Mr. Devlin—I move to direct a verdict on the ground that the indictment in no count expresses a crime.

20

"On the second ground that there is no such crime as an attempted embracery, as expressed in the indictment.

"On the third ground that there is no fact in this case to indicate an attempt at any kind of a crime and particularly the crime expressed in the indictment.

"* * * that each count in the indictment —The first count does not express a crime in that it fails to name the juror or jurors that were either directly or indirectly approached or seen or influenced.

30

"That the second count fails to express a crime in that it fails to show the juror or jurors who were attempted to be influenced, approached or in any way persuaded in this case.

"That the third count fails to express a crime in that it fails to show the juror on whom there was any attempt made to corrupt, influence or

incline to favor in any way the plaintiff or any other person.

"* * * that there is no proof now as to who the juror was that was empanelled in that case.")

Mr. Devlin—And also for the reasons that I allege, that the facts adduced by the State do not constitute the crime charged in the indictment.

And for the reason that the facts adduced by the State constitute nothing but an intent to commit crime.

For the further reason that the facts adduced by the State constitute no attempt because they lack the overt act essential to an attempt to commit crime.

Because the facts adduced by the State in this case show that the intent only existed and that the failure to commit or attempt to commit a crime was due to the actions of the parties who intended the crime.

The next reason is because if those facts constitute any crime at all it is a crime other than that expressed under the common law and statute law of embracery.

The Court—That motion likewise will be overruled and denied and counsel will be granted an exception.

(Exception allowed and the same is sealed accordingly.

ERWIN E. MARSHALL, *Judge.*)

Mr. Devlin—Your Honor will, of course, direct the stenographer when he makes up the record to repeat all the reasons that were given in the motion when the State rested.

The Court—Yes, if the record is required for the purpose of review that will be the course. Are you going to argue it?

Mr. Kafes—Yes, sir. I understand through the Court's ruling that in effect I am now limited to this one particular argument, namely, assuming that the facts testified to by the witness Callahan be true, whether or not that constitues an attempt on the part of the defendant to commit the crime of embracery.

The Court—That is the situation; yes, assuming that the facts are true, whether or not they constitute the crime alleged in the second count of the indictment. 10

Mr. Kafes—Of attempted embracery?

The Court—Yes.

Mr. Hammond—All right.

(Mr. Kafes summed up for defendant.)

(Mr. Kafes offered testimony of James P. Callahan, taken in Mercer County Court of Common Pleas on January 11, 1921.) 20

Mr. Kafes—Do you object to it going in?

Mr. Hammond—Yes, I object to it going in. It has been read twice and the stenographer has the notes taken down as the questions were put to the witness.

Mr. Devlin—I think it ought to go to the jury. His story now and then differs. These are the transcription of the stenographic notes taken before Your Honor.

The Court—No; I do not think I will permit it to go in, Mr. Devlin. 30

Mr. Devlin—I ask an exception.

(Exception allowed and the same is sealed accordingly.

ERWIN E. MARSHALL, *Judge.*)

(Mr. Hammond summed up for the State.)

CHARGE.

The Court (Marshall, J.): Gentlemen of the Jury—The defendant, Charles Lavine, is charged in an indictment found by the Grand Jury at the present term with attempting to persuade one, James P. Callahan, to see and talk with the jurors of a certain jury which had been
10 empanelled to try a case then pending in the Court of Common Pleas of this county, to favor the defendant, Charles L. Lavine, in their verdict, and that he "did then and there say and utter to the said James P. Callahan divers words and discourse by way of commendation of the said Charles L. Lavine, the plaintiff, to wit: "Do you know any of the jurors? See them tonight and get them to do something for me."

The charge is that on the tenth day of January of the present year, after a jury had been impanelled in the
20 Court of Common Pleas to try an issue then pending in that court between Charles L. Lavine, plaintiff, and Nathan Aroniss and Hyman Gerofsky, defendants, the defendant went to Mr. Callahan, one of the court attendants who is connected with this court, and asked him if he knew any of the jurors who had been impanelled in the Lavine case, at the same time showing him a jury list with the names marked. Callahan says that he told Lavine that he did ~~not~~ know one man on the jury—I think he said that the man was Joseph Whitely, a hardware
30 merchant on Chestnut Avenue, this city—and that Lavine thereupon said to him, "Will you go see him tonight for me?"

It is charged by the State that this conduct on the part of the defendant was an attempt to have Callahan influence the jury to be more favorable to the plaintiff, Lavine, in that case, than he otherwise would have been. That is the essence of the charge in this case; that it was an attempt on his part to procure a juror to render a verdict in his favor.

Charge.

The defendant has not seen fit to take the stand in this case. No presumption is to be drawn against him on that account, however; but as matters now stand the testimony of Mr. Callahan stands uncontradicted.

It will be for you, gentlemen of the jury, to say whether, having regard to all of the evidence in the case and all the circumstances, whether the defendant did or did not attempt to influence a juror in the manner alleged in the second count of this indictment. If from all of the evidence in the case your conclusion is that the defendant did so attempt to influence a juror your verdict should be one of guilty.

If, on the other hand, you are not satisfied beyond a reasonable doubt of his guilt, your verdict should be one of acquittal.

(The Jury retired.)

Mr. Devlin—I except to the first paragraph, where Your Honor said he attempted to favor Lavine—The paragraph begins with that language—I did not get it all.

(Exception allowed and the same is sealed accordingly.

ERWIN E. MARSHALL, *Judge.*)

Mr. Devlin—And that the defendant has not seen fit to take the stand, but no presumption is against him for that reason.

(Exception allowed and the same is sealed accordingly.

ERWIN E. MARSHALL, *Judge.*)

Mr. Devlin—And where Your Honor says it is for the jury to say whether he did or did not attempt to influence a juror.

(Exception allowed and the same is sealed accordingly.

ERWIN E. MARSHALL, *Judge.*)

Mr. Devlin—I ask an exception to the whole charge.

(Exception allowed and the same is sealed accordingly.

ERWIN E. MARSHALL, *Judge.*)

CERTIFICATE OF JUDGE.

(Filed April 28, 1921.)

I, ERWIN E. MARSHALL, Judge of the Court of Quarter Sessions, of the County of Mercer, do certify and return the stenographic minutes taken at the trial of the above cause as a part of the return to the Writ of Error and as a part of the entire proceedings had in the above stated cause that the same may be made up and included in the entire state of the case on appeal.

ERWIN E. MARSHALL,
Judge.

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ASSIGNMENTS OF ERROR AND SPECIFICATIONS OF CAUSES FOR REVERSAL.

(Filed April 28, 1921.)

NEW JERSEY SUPREME COURT.

STATE OF NEW JERSEY, *Plaintiff and Defendant,* *vs.* CHARLES L. LAVINE, *Defendant and Plaintiff.*	In Error.

10

Afterwards, to wit, on the fifth day of May of the June Term before the judges of our Supreme Court at Trenton, comes the said Charles L. Lavine, by his counsel, John H. Kafes and Martin P. Devlin, and says that in the record and proceeding had at the trial of the said cause, and also in the giving of judgment aforesaid, there is manifest error in this, and the said plaintiff in error hereby specifies and assigns as the causes relied upon for the reversal of this judgment the same matters and things set forth in the assignments of errors and in addition thereto assigns the following specifications of causes for reversal:

20

1. Because the court below refused to direct a verdict for the reason that no count in the indictment charged a crime.

30

2. That there is no such crime as attempted embracery.

3. That the indictment does not name a juror or jurors who were either directly or indirectly approached or seen or influenced.

4. That the indictment fails to show the juror or jurors who were attempted to be approached or seen or influenced in the case.

5. That the second count of which the defendant was convicted does not charge the crime named in said indictment.

6. That the facts adduced by the State do not constitute the crime charged in the second count of the indictment or in any count of the indictment.

7. That the facts adduced by the State do not constitute the crime of attempted embracery.

8. That the facts adduced by the State constitute no
10 attempted embracery because they lack the overt act necessary to commit the crime of attempt.

9. Because the facts adduced by the State show that there is only an intent to commit a crime and that the failure to commit or attempt to commit a crime was due to the actions of the parties who intended to commit the alleged act.

10. Because if these facts constitute any crime at all it is a crime other than that charged in the indictment.

11. That the court should have directed a verdict of
20 acquittal because the evidence adduced by the State did not constitute the crime charged in the second count of the indictment or in the entire indictment.

12. That in the entire record and proceeding had upon the trial of the said Charles L. Lavine, he, the said plaintiff in error, suffered manifest wrong and injury in the admission of evidence and the charge of the court which prejudiced the defendant in maintaining his defense upon the merits and are causes for reversal.

JOHN H. KAFES and
30 MARTIN P. DEVLIN,
Attorneys and of Counsel with Defendant and Appellant.

ADDITIONAL ASSIGNMENTS OF ERROR AND SPECIFICATIONS OF CAUSES FOR REVERSAL.

(Filed May 27, 1921.)

NEW JERSEY SUPREME COURT 10

STATE OF NEW JERSEY, *Plaintiff in Error,* *vs.* CHARLES L. LAVINE, *Defendant in Error.*	On Error.

Afterwards on the twenty-seventh day of May, the defendant, Charles L. Lavine, by his counsel, John H. Kafes and Martin P. Devlin, assigns errors and specifications for causes of reversal in addition to the assignments made on the fifth day of May, which assignments are as follows: 20

1a. The court erred when, in its charge to the jury, it said, "It is charged by the State that this conduct on the part of the defendant was an attempt to have Callahan influence the jury to be more favorable to the plaintiff, Lavine, in that case, than he otherwise would have been. That is the essence of the charge in this case; that it was an attempt on his part to procure a juror to render a verdict in his favor." 30

2a. Because the court erred in its charge to the jury when it said: "It will be for you, gentlemen of the jury, to say whether, having regard to all of the evidence in the case and all the circumstances, whether the defendant did or did not attempt to influence a juror in the manner alleged in the second count of this indictment. If from all of the evidence in the case your conclusion is that the

defendant did so attempt to influence a juror your verdict should be one of guilty."

JOHN H. KAFES and
MARTIN P. DEVLIN,
Solicitors and of Counsel with Charles L. Lavine, Defendant in Error.

10

JOINDER IN ERROR.

(Filed April 28, 1921.)

NEW JERSEY SUPREME COURT.

STATE OF NEW JERSEY, *Plaintiff and Defendant,* *vs.* CHARLES L. LAVINE, *Defendant and Plaintiff.*	In Error. Joinder in Error.

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And hereupon, afterwards, to wit, on the fifth day of May, Nineteen Hundred and Twenty-one, the said State of New Jersey, by A. Dayton Oliphant, Prosecutor of the Pleas, comes into court and says that there is no error either in the record and proceedings aforesaid, or in giving the judgment aforesaid, and prays here, that the court here may proceed to examine as well the record and proceedings aforesaid, as the matters aforesaid assigned and specified for errors, and that the judgment aforesaid, in manner aforesaid, in all things be affirmed, etc.

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A. DAYTON OLIPHANT,
Prosecutor of the Pleas.

OPINION OF SUPREME COURT.

(Filed November 1, 1921.)

NEW JERSEY SUPREME COURT.
No. 6, JUNE TERM, 1921.

THE STATE,
Defendant in Error,
vs.
CHARLES L. LAVINE,
Plaintiff in Error.

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Argued June 7, 1921; decided November 1, 1921.

1. An indictment charging that defendant asked one C. to see certain jurors then sitting on the trial of a cause to which defendant was a party and endeavor to persuade them to return a verdict in his favor, sufficiently charges a violation of Section 16 of the Crimes Act, C. B. 1748, *Semble*, that it also sufficiently charged embracery at common law.

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2. A verdict entered on the record of "guilty on the second count of attempted embracery in the indictment," construed as a verdict of guilty on the second count, and the words "of attempted embracery" as merely a superfluous and perhaps erroneous description of the effect of that count.

3. A verdict of guilty under a good count of an indictment should not be considered vitiated by a misdescription of the legal effect of the count, when the count itself is otherwise positively identified, the misdescription is germane to the actual purport of the count, and the intent to convict thereunder is plain from the language of the verdict.

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Error to Mercer Quarter Sessions.

Before GUMMERE, Chief Justice, and Justices PARKER and KALISCH.

For the Plaintiff in Error, Martin P. Devlin (John H. Kafes, on the brief).

For the State, A. Dayton Oliphant, Prosecutor of the Pleas.

The opinion of the Court was delivered by

PARKER, *J.*:

The defendant was indicted for an attempt to influence a jury on the trial of a cause by solicitation of a court officer to see the jurors or some of them in his behalf. There were three counts in the indictment, but the first and third were abandoned. The defendant was convicted on the second, the relevant allegations of which are that an issue at law had been joined between defendant as plaintiff and two parties named as defendants and a jury was empanelled to try it in the Common Pleas, and that said Lavine, intending to hinder the lawful trial of that issue, did unlawfully, etc., on behalf of himself as plaintiff "solicit and attempt to persuade one James P. Callahan to see and talk with the jurors of the said jury in favor of the said Charles L. Lavine, and did then and there say and utter to the said James P. Callahan divers words and discourses by way of commendation of the said Charles L. Lavine, the plaintiff, to wit: "Do you know any of the jurors; see them to-night and get them to do something for me," and the said Charles L. Lavine then and there unlawfully and corruptly did desire and attempt to move the said James P. Callahan to solicit and persuade the jurors empanelled and returned to try the said issue to give a verdict for the said Charles L. Lavine, plaintiff in such issue, contrary to the form of the statute in such case made and provided, and against the peace," etc.

The verdict, as contained in the record, is as follows: "do say that they find the defendant guilty of the second count of attempted embracery in the indictment and so say they all, on him above charged in the form aforesaid and as by the said second count in the said indictment aforesaid is above supposed against him."

The case is before us under Section 136 of the Criminal Procedure Act, as well as on strict writ or error.

There was a motion to direct an acquittal when the State rested, which was denied. The defendant then rested, and motion for acquittal was again made and denied. After the verdict, there was a motion in arrest of judgment, and this likewise was denied and exception entered.

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The assignments of error and specifications of causes for reversal are identical and are fourteen in number. Numbers 2, 3 and 4, and 5 to 10 inclusive, need not be considered, as they do not challenge any judicial action or point out error on the record. No. 12 merely alleges general error. No. 5 is that the second count charged no crime, and No. 1 that the court refused to direct acquittal on that ground. No. 11, that the court should have directed acquittal because the evidence did not show the crime charged in the second count. The last two challenge instructions in the charge, and will be considered later.

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The argument of the plaintiff in error seems to proceed on these lines:

(1) That by the record it appears the verdict is one of guilty of "attempted embracery." (2) That there is no such crime as attempted embracery. (3) But conceding that there is such a crime, there is no evidence that it was committed by the defendant; (4) especially as it appeared without dispute that Callahan was in no way influenced by the alleged solicitation and refused to comply therewith.

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It is argued that as any attempt to influence a jury or juror is itself embracery, there can be no such thing as an attempt to attempt such influence, and that the verdict is consequently nugatory. It is quite true that an attempt to influence a juror, even if unsuccessful, constitutes the crime of embracery at common law. 4 Blk. 140; 1 Hawk. Chap. 86, Sec. 1; 2 Bishop New Cr. Law, Secs. 384, 389. But this does not vitiate the verdict, for

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it seems plain that the indictment clearly charged a crime both at common law and within section 16 of the Crimes Act (C. S. 1784), the evidence supported the indictment, and the verdict, as we view it, conformed to it; and the second is that the same act by Section 216, page 1812, recognizes that there may be an attempt to commit any of the offenses mentioned in the act, and embracery is one
10 of them; and that there was evidence to show such attempt as charged in the second count.

The language of Section 16 is comprehensive. It says embracery *and* all attempts to corrupt or influence a jury or any juror, or in any way to incline such jury or juror to be more favorable to the one side than to the other by promises, persuasions, entreaties, threats, letters, money, entertainments or other sinister means, *all indirect, unfair and fraudulent* practices, arts and contrivances to obtain a verdict, and all attempts to instruct a jury or juror be-
20 forehand, at any place or time, or in any manner or way, except only in open court at the trial of the cause by the strength of the evidence, the arguments of the parties or their counsel, or the opinion or charge of the court, shall be misdemeanors and punished as are misdemeanors under this act."

This seems to be somewhat more detailed than the usual descriptions of embracery at common law, but perhaps not more comprehensive than that contained in 1 Russ. Crimes 182. We need not dwell on the point,
30 for it is clear that when the count of the indictment now under examination charged defendant with trying to persuade Callahan to see the jury or some of them in his behalf, it charged an offense denounced by the statute. As for the evidence, a glance at the testimony of Callahan himself is enough to show that the charge was supported thereby. When we come to look at the verdict, it is true that the words "attempted embracery" are used; but the whole text of the verdict as contained in the record must be read, and when it is observed that it reads "guilty on the second count of attempted embracery in

the indictment, on him above charged in the form aforesaid and as by the solid second count in the above indictment is above supposed against him," the legitimate construction of the language used is that the phrase "of attempted embracery" is merely descriptive of the second count, and not a designation of the crime itself, in which case the appropriate language would have been "guilty of attempted embracery on the second count in the indictment." "*Ad proximum antecedens fiat relatic nisi impediatur sententia,*" is the old maxim, which is applicable by analogy if not directly. Broom's Legal Maxims, x529; 36 Cyc. 1123; Camden and Atlantic R. R. Co. v. Briggs, 22 N. J. L. 523; Summerman v. Knoles, 33 Id. 205; Johnson v. Grand Lodge, 81 Id. 517. A verdict of guilty under a good count should not be considered vitiated by a misdescription of the legal effect of the count, when the count itself is positively identified by number, the description is germane to the actual purport of the count, and the intent to convict thereunder is plain from the language of the verdict. Such cases as Com. v. Crowley (Mass.), 45 N. E. 766, 46 do. 625, and State v. Jankouski, 82 N. J. L. 229, affirmed 83 Id. 796, show that the courts are not disposed to reverse convictions plainly meritorious on unnecessarily technical grounds. We view the verdict as one of guilty on the second count of the indictment, and the phrase "of attempted embracery" as mere descriptive surplumage. We incline to think that the second count charged embracery at common law, but need not go further in this direction, as it plainly charged on offense under the statute.

This result makes it unnecessary to consider whether by the general language of Sec. 216 of the Crimes Act, which provides that "any person who shall attempt to commit *any of the offenses mentioned in this Act* (embracery is one, see Sec. 16, *supra*) or any offenses of an indictable nature at common law, *though such offense be not actually committed*, shall be guilty of a misdemeanor."

the legislature intended to penalize attempts to commit embracery at common law or to violate Section 16, or what, in such case, would constitute such an attempt.

For the reasons already stated, we find that none of the assignments of error or causes for reversal is well taken, and the judgment will accordingly be affirmed.

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RULE ON AFFIRMANCE OF JUDGMENT.

(Filed November 16, 1921.)

THE STATE OF NEW JERSEY, *Defendant in Error,* *vs.* CHARLES L. LAVINE, *Plaintiff in Error.*	In Error.

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This cause having been duly argued at the June Term, 1921, of this Court, by Martin P. Devlin, of counsel for the plaintiff in error, and A. Dayton Oliphant, of counsel for the defendant in error, and the Court having considered the same and finding no error in the record and proceedings in the Mercer County Quarter Sessions;

It is therefore ordered and adjudged that the judgment of the Mercer County Quarter Sessions, removed by writ of error in this cause, be affirmed with costs, and that the record be remitted to the Mercer County Quarter Sessions to be proceeded with in accordance with this judgment and the practice of said court.

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Entered November 16, 1921.

On motion of

A. DAYTON OLIPHANT,

Prosecutor of the Pleas.

CERTIFICATE OF CLERK OF SUPREME COURT.

(Filed December 23, 1921.)

I, Enoch L. Johnson, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of a rule entered in the minutes of the Court in the above stated cause. 10

In testimony whereof I have set my hand and the seal of said Court at Trenton, this twenty-third day of December, A. D. nineteen hundred and twenty-one.

[SEAL]

ENOCH L. JOHNSON,
Clerk.

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ASSIGNMENTS OF ERROR AND SPECIFICATIONS OF CAUSES FOR REVERSAL.

(Filed December 15, 1921.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

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STATE OF NEW JERSEY, *Plaintiff—Defendant in Error,* *vs.* CHARLES L. LAVINE, *Defendant—Plaintiff in Error.*	On Writ of Error.

Afterwards, to wit, on the 15th day of December, 1921, comes the said Charles L. Lavine, by John H. 20 Kafes and Harry H. Wittstein, his attorneys and counsel, and says that in the record and proceedings had at the trial of the said cause, and also in the conviction and the giving of judgment aforesaid, and in the affirmance thereof by the New Jersey Supreme Court of Judicature, there is manifest error, and the said plaintiff in error hereby repeats the same assignments of errors and specifications of causes for reversal as by him heretofore in the said Supreme Court assigned and specified, and in addition thereto says that said judgment and conviction should 30 be reversed because:

1. The said Supreme Court erred in giving judgment for the defendant in error, instead of for the plaintiff in error, upon the said assignments of errors and specifications of causes for reversal.

JOHN H. KAFES,
HENRY H. WITTSTEIN,
Attorneys for and of Counsel with Charles L. Lavine.

JOINDER IN ERROR.

(Filed January 14, 1922.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

STATE OF NEW JERSEY, *Plaintiff—Defendant in Error,* *vs.* CHARLES L. LAVINE, *Defendant—Plaintiff in Error.*	On Writ of Error.

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And thereupon, afterwards, to wit, on the 13th day of January, 1922, the said State of New Jersey, by A, Dayton Oliphant, Prosecutor of the Pleas, of the County of Mercer, comes into court and says that there is no error either in the record and proceedings aforesaid, or in giving the judgment aforesaid, and he prays that the court here may proceed to examine as well the record and proceedings aforesaid, as the matters aforesaid assigned for error, and that the judgment aforesaid, in manner aforesaid given, may in all things be affirmed, etc.

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A. DAYTON OLIPHANT,
Prosecutor of the Pleas.

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New Jersey Court of Errors and Appeals

STATE OF NEW JERSEY, *Plaintiff and Defendant in error,* *vs.* CHARLES L. LAVINE, *Defendant and Plaintiff in error.*	Sur. Indictment for Embracery. In Error.

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BRIEF FOR THE STATE OF NEW JERSEY, DEFENDANT IN ERROR.

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At the October term, 1920, of the Mercer County Court of Common Pleas, a certain issue in an action at law, having been found, wherein the plaintiff in error was plaintiff, and Nathan Aroniss and Hyman Gerfosky were defendants, said cause was then pending; the jurors empannelled for said term of said Court were present in Court; and the cause about to be tried. This was on January 10, 1921. The plaintiff therein, (the plaintiff in error), on the morning of the 10th day of January, 1921, the jurors for the trial of said cause not having yet been selected, called upon one James P. Callahan, an officer of the Court, connected with the Prosecutor's office, to whom he produced a Court calendar in which was printed a list of the jurors for the October term, and asked Mr. Callahan if he knew any of the jurors on the list; upon the reply of Mr. Callahan that he did, Lavine

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asked him (Callahan) to mark with a pencil the names of the men that he knew; with which request Mr. Callahan complied; as he says, having no knowledge of the purpose of such inquiry, or of its intended use. This interview was about 11:30 a. m. Again about 4:30 on the same day, a jury having, in the meantime, been empannelled to try the civil cause I have named, Mr. Lavine again called upon Mr. Callahan; and, meeting him in the corridor of the Court House, asked him to step down
10 to the lower end of the hall, where they were assured of and secured privacy. Mr. Lavine then again produced the list of jurors printed in the Court Calendar, upon which he, Lavine, had marked off certain names, which he said, were the names of the jurors who had been selected to try his case against Aroniss and Gerfosky, and again asked Callahan if any of the men he knew were among the jurors so drawn; to which Callahan replied that he knew one personally, naming him; whereupon, Lavine asked Callahan if he would go and see the juror
20 named and see if he, Callahan, could not get him to do something for him in his case. To this Callahan made no reply; and testified that he absolutely did not intend to, nor did see the named juror, or make any attempt to reach or influence any juror on that case. At the January, 1921, term of the Mercer County Oyer and Terminer, the Grand Jury returned an indictment against Lavine, (the plaintiff in error) for embracery. The indictment was based upon the facts which I have enumerated, consisting of three counts, namely: (1) attempt to com-
30 mit embracery; (2) *An attempt to induce and persuade James P. Callahan to commit the crime of embracery;* (3) Embracery. Case pp. 5-108.

There was no demurrer to the indictment, nor to any count thereof. There was no motion to quash.

The evidence adduced established the facts as I have detailed them.

At the conclusion of the case, on the part of the State, the State rested. No evidence was offered in behalf of the defendant. Case p. 27, l. 21.

Plaintff in error, when the State rested, moved for the direction of a verdict. Case p. 27, l. 22.

This motion was based upon the matters which appear in the assignments of error and which I will later discuss. Case pp. 27-28.

The Court, (p. 28, l. 29) overruled the motion for a directed verdict; to which ruling Counsel for plaintiff in error excepted. (Case p. 29, l. 1.)

Thereupon, (Case p. 29, l. 4) defendant's counsel moved that the State *elect* as to the count or counts in the indictment on which it would rely. The State elected to stand upon the *second count* in the indictment, (Case p. 29, l. 26-30) and abandoned the first and third counts.

> "The election of a count is virtually to withdraw the others from the consideration of the jury."
>
> 1 *Wharton Cr. L. sec.* 346.
>
> "Thereupon the charges abandoned cease to be parts of the indictment, as if the Court had quashed, or the State had nolle prossed them."
>
> *Mills* vs. *State*, 522 *Ind. p.* 187.

It is only necessary, therefore, that the Court consider the *second* count: and I shall confine myself to a discussion of so much of the assignments of error as are pertinent to the issue so joined.

The SECOND COUNT of the indictment, (to be found on p. 6, l. 20, to p. 7, l. 17), epitomized, is a charge that Charles L. Lavine, on January 10, 1921, a certain issue in an action at law having been joined between Charles L. Lavine, as plaintiff, and Nathan Aroniss and Hyman Gerofsky, as defendants, in the Mercer Common Pleas, before Judge Marshall, which was pending , and a jury empannelled and returned to try the same, well knowing the premises and devising, and wickedly, corruptly and unlawfully intending to hinder the due and lawful administration of justice, in the trial of said cause by said jurors, unlawfully, wickedly, corruptly and unjustly, on his own behalf, solicit and attempt, to en-

deavor, to persuade James P. Callahan, to see, and talk with, the said jurors in his (Lavine's) favor. That he said to said Callahan, "do you know any of the jurors, see them tonight and get them to do something for me in my case," thereby unlawfully and corruptly desiring and attempting to move the said Callahan to solicit and persuade the said jurors, returned to try said cause, to give a verdict favorable to him (Lavine), plaintiff in said cause.

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POINT I.

THE SECOND COUNT OF THE INDICTMENT CHARGES A SUBSTANTIVE, SPECIFIC AND RECOGNIZED CRIME; AND IS AN APPROPRIATE COUNT IN AN INDICTMENT FOR EMBRACERY.

The offense charged in this Count is that of the solicitation, by the plaintiff in error, of Mr. Callahan to commit the crime of embracery. "Such solicitation to commit any crime, constitutes, at common law, a substantive and completed offense."

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People vs. *Hammond*, 93 *N. W. R.* 1084.

The New Jersey Crime Act of 1898, sec. 215, makes all indictable affenses at common law not provided for by the act, etc., misdemeaonors.

> "Are soliciations to commit crimes, independently indictable? They certainly are, as has been seen, when they themselves involve a breach of the public peace, etc. They are also indictable, when there object is to interfere with public justice."
>
> *Com.* vs. *Flagg*, 135 *Mass. p.* 545.
>
> "The common law made it an indictable offense to solicit another to commit a misdemeanor."
>
> 1 *Russ. on Cr.* 46.
>
> "The solicitation to commit any crime, though nothing be done in pursuance of such solicitation is a misdemeanor at common law."
>
> *Arch Cr. Pl.* (*23d Ed.*) 1203.

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R. vs. *Higgins*, 2 *East* 5.
Reg. vs. *Gregory*, *L. R.* 1 *C. C. R.* 77.
3 *Chitty Cr. L.* 688.
Steph. Dig. Cr. L. (6 *Ed.*) 39.

"A common form of attempt is the solicitation of another to commit a crime; the act which is a necessary ingredient of every offense, consisting in the solicitation."

1 *Bish. Cr. L.* (7 *Ed.*) *sec.* 767.
Rex vs. *Higgins*, 2 *East* 5. 10
Rex vs. *Phillips*, 6 *East* 464.
Reg vs. *Turvy*, *Holt* 3645.
People vs. *Bush*, 4 *Hill* (*N. Y.*) 133.
State vs. *Avery*, 7 *Conn.* 266.
Com. vs. *Harrington*, 3 *Pick.* 26.

In *State* vs. *Sales*, 2 Nev. 268, the defendant was indicted for an "attempt to commit embracery." Defendant demurred to the indictment as charging no crime.

Ch. Justice Lewis, speaking for the Supreme Court. in the case, held: 20

"There is no such crime, specifically recognized either by the common law or by the statutes of this State, as that of an 'attempt to commit embracery.' In other words there can be no indictment for an attempt to commit a crime, which crime itself is but an attempt to do a criminal act. In our opinion from the very nature of the crime of embracery, there can be no attempt to commit it."

He then added: 30

"However, notwithstanding the demurrer to the indictment was well taken, we see no reason why the defendant might not be *indicted and punished for soliciting and inciting another to commit the crime of embracery*," *etc.*, (citing 1 *Russ. on Cr.*, *supra*), but the *indictment does not specifically charge such an offense.*"

In the case under consideration, such offense is specifically charged by the second count of the indictment,

which formed the issue elected and tried, and upon which the verdict was based.

In *Rex* vs. *Higgins*, 2 *East* 5, it was held that

> "to solicit a servant to steal his master's goods was a misdemeanor, though it was not shown that the servant stole the goods, nor that any other act was done, except the soliciting and inciting."

La Blanc, J. (in the same case), says:

> "A solicitation or inciting, of another, by whatever means it is attempted, is an act done; and that such act was done with a criminal intent, is punishable by indictment, has been clearly established."
>
> "An indictment, or information, charging embracery, may join a count charging an attempt to influence an officer in charge of the jury to permit the accused to approach the jurors."

1 *Wharton Cr. Pro.* (10 *Ed.*) *sec.* 602.

Mr. Wharton specifically states that it is proper to join in an indictment for any crime, a count for any cognate crime, either common law or by statute.

> "The ultimate purpose must be developed, and find expression in some act looking to an interference with the due course of judicial administration; and this as well when failing as when successful."

State vs. *Brown*, 95 *N. C.* 685.

> "Even when a crime is not, in fact, committed, those who have unsuccessfully solicited or incited another to commit it, are at common law guilty of an indictable misdemeanor, whether the crime to which the solicitation related is, either by common law or statute, a felony or a misdemeanor."

1 *Russ on Cr.* 7 *Eng. Ed. p.* 203-4.

I further submit, that there is in this State, by statute, such an offense as attempted embracery, created by the 16th section of the Crimes Act of 1898, upon which this indictment is founded.

Said section provides the following named offenses to be misdemeanors; namely:

1. "Embracery."

2. "*And all attempts* to, corrupt or influence a jury, or any of them, etc., by persuasions, entreaties, etc., or other sinister means."

3. "*And all indirect* unfair and fradulent practices, arts, and contrivances, etc., to obtain a verdict."

4. "And all attempts to, etc." 10

The crime of embracery consists of the direct approach by the *person charged* to the jury or juror, and his personal efforts to so influence the verdict.

The crime of attempted embracery, it has repeatedly been said, is not a specific crime; but such adjudications relate to conditions at common law and in states whose legislature has not specifically recognized such crime. *State* vs. *Sales*, 2 *Nev*. 268.

The New Jersey Act above cited and quoted, declares that not only embracery, but all attempts to influence a 20 jury, inter alia, by *indirect*, and fraudulent practices to obtain a verdict, shall be a misdemeanor.

Had the solicitation by the defendant, in this case, been assented to, *and* the approach made, and the same resulted in a verdict favorable to the desire of the defendant, and his emissary, there can be no question but that the person who so approached the jury would be guilty of embracery, and the defendant, who set in motion the exertion toward its accomplishment, there being no longer accessories, would too have been guilty of embra- 30 cery as a principal. The failure of the effort leaves the defendant guilty of an attempt to bring about the crime; and to meet and cover which condition the New Jersey Statute cited is directed.

II.

The Second Count of the Indictment is a Sufficient Indictment for the Crime of Solicitation to Commit Crime.

"Though commonly a solicitation is by words, their tenor need not be set out, but the substance will suffice; and when is added the proper statement of the particular offense meant, the intent of the defendant appears, and the indictment is complete."

3 Bish. New Cr. Pro. (*3d Ed.*) *sec.* 74 (2).

"It has been deemed sufficient to charge an endeavor to *suborn* generally, without stating the means." *Ibid.*

"The indictment for solicitation consists of two allegations: first, the solicitation, and secondly, the thing solicited to. The general term, without descending to particularly, is adequate for the first; and for the second, the indictment need not be formal and minute, as when the substantive offense is charged."

3 Bish. New Cr. Pro. (*3d Ed.*) *sec.* 76 (2).

In *Rex.* vs. *Higgins, supra,* at p. 22, the Court says:

"It is contended that the offense charged, etc., of which defendant has been convicted, is no misdemeanor because it amounts only to a bare wish or desire of the mind, to do an illegal act. If this were so, I agree, it would not be indictable; but this is a charge of an *act done,* an *actual solicitation* of a servant, to rob his master, and not merely a wish or a desire that he should do so."

It will be observed that the indictment considered, charged that the defendant "did desire and attempt to move, etc.:" first the criminal thought, or intent, followed by the overt act of solicitation.

POINT III.

The refusal by the trial Court to direct a verdict, when *first* made at the close of the State's case, was addressed to the discretion of the Court and is not reviewable as error. The whole record however being returned, as here, the plaintiff in error must have suffered manifest wrong and injury in the exercise of this discretion by the denial of the same motion, repeated after the State's election to proceed on the second count alone. 10

In *Burnett* vs. *State*, 62 *N. J. L. p.* 510, it was held

> "the denial of a motion to direct an acquittal at the close of the State's case, on the trial of an indictment, is not subject to review on error."

In *State* vs. *Brown*, 72 *N. J. L.* 354, *affirmed* 73 N. *J. L.* 679, the Court of Errors held:

> "the direction of a verdict, in a criminal case, is a matter resting in the discretion of the Court; and the refusal of the Court to so direct, is not reviewable on error. But, it being a matter resting in discretion, when the whole record is returned, as here, the Court is required to consider whether the defendant has suffered manifest wrong and injury in the exercise of this discretion by the trial Court." 20

Paraphrasing the language of Judge Fort, in *State* vs. *Brown, supra*: It would be difficult to read the wholly uncontradicted evidence in this cause and reach the conclusion that the circumstances do not impute to the plaintiff in error, a criminal intent to interfere with and obstruct the administration of justice: and that he put such intent into execution by his act of solicitation of Mr. Callahan, to see and influence the jury in his behalf. And it was for this reason, that Judge Marshall, in denying the request, was led to say: "I think a case has been made out, of an attempt to influence a jury or a juror, and I think it the duty of the Court to permit the question to go to a traverse jury," etc. 30

This being true, as the record discloses, there was no

manifest wrong or injury suffered by defendant from such denial. By the 9th assignment of error it is contended by the plaintiff in error that the facts adduced show only an *intent* to commit a crime; and that the failure to so commit, was due to the actions of the parties.

The exact meaning of this assignment is not manifest. He concedes the proof of an intent on the part of the defendant to commit a crime (the crime charged). As the crime charged consists of a solicitation, to crime, to which the person solicited refused to and did not yield, it results that the failure to accomplish the criminal intent was due to the refusal of the person solicited to commit the embracery and that, for this reason defendant insists that the verdict should be reversed.

By the authorities which I have already cited it seems to be settled that the success or failure to accomplish the crime solicited is immaterial. This apparent criticism is covered and refuted by the following case:

People vs. *Hammond*, 93 *N. W. R. p.* 1084, *Sup. Ct. Michigan* 1903.

Montgomery, J., at p. 1085, says:

> "It is strenuously contended that the indictment charges no offense known to the laws of this State. It is contended by the State that the case falls within the statute providing for the punishment of offenses indictable at common law. In other words, it is claimed that the indictment sets out an offense at the common law. Respondent's counsel assert that solicitation to commit a crime is not indictable, where there is interposed, between a solicitation on the one hand, and the proposed illegal act on the other, the *resisting will of another person*, which other person refuses assent and co-operation." "But to say that a solicitation may not amount to an offense under the circumstances, is to deny that a solicitation to commit a felony is punishable, at the common law, as a substantive and completed offense. Can this be properly asserted?"

He then quotes *McClain's Cr. L. section* 220, as follows:

> "The form of intent which perhaps involves the least degree of criminality is that of the solicitation of another to do an act, which if done would constitute a crime; and such solicitation is generally held to be punishable as a misdemeanor, although the offense solicited is never committed."

POINT IV.

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A VERDICT OF GUILTY UNDER A GOOD COUNT SHOULD NOT BE CONSIDERED VITIATED BY A MISDESCRIPTION OF THE LEGAL EFFECT OF THE COUNT. WHEN THE COUNT ITSELF IS POSITIVELY IDENTIFIED BY NUMBER, THE DESCRIPTION IS GERMANE TO THE ACTUAL PURPORT OF THE COUNT, AND THE INTENT TO CONVICT THEREUNDER IS PLAIN FROM THE LANGUAGE OF THE VERDICT.

20

The verdict of record is, "guilty as charged in the second count, of attempted embracery."

The phrase "of attempted embracery" is merely descriptive of the second count, and not a designation of the crime itself.

My insistment is—

If, in the opinion of the Court, the New Jersey statute creates and recognizes as a specific misdemeanor all attempts, by indirect means, etc., as the offense of attempted embracery, then, in that event, the verdict is unassailable, and the judgment below must be affirmed.

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If, however, the Court shall conclude that there is no such actual and specified crime under our law, then, I submit, as I have already argued, that the second count appropriately charges a common law indictable misdemeanor, of which the defendant was convicted; that the words "of attempted embracery" were meaningless words, were redundant *and* should be rejected as surplusage, and do not vitiate the judgment.

The use of inconsistent, redundant or meaningless words in a verdict do not vitiate, providing the verdict be responsive.

In 16 *Corpus Juris*, page 1263, Sec. 2810, we find the following:

> "Judgment should not be arrested, where the part of the verdict that is not responsive to the indictment may be regarded as surplusage;" and the cases of *Jones* vs. *State*, 100 Ark. 195, and *State* vs. *Henry*, 98 Me. 563, are cited.

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In *State* vs. *Williams*, 8 Iowa 533, the Court held:

> "Where a jury returns a verdict of, 'guilty as charged in the indictment,' and then finds specifically the special facts constituting the crime, if the finding of the special facts is inconsistent with the verdict of guilty the court may regard it as surplusage and enter judgment on the verdict of guilty."

In *Waube* vs. *State*, 56 Miss. 153, the Court held:

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> "A verdict will be upheld though it contains a finding which is not embraced in the issue, or contains meaningless words, if there is a finding responsive to the issue, after striking out the irresponsive finding and meaningless words."

Wharton in his third volume of Criminal Procedure (10 Ed.), p. 3123-4, says: "But mere redundancy, or surplusage does not vitiate (a verdict) provided the verdict is responsive."

Courts are not disposed to reverse convictions plainly meritorious on unnecessarily technical grounds.

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Comm. vs. *Crowley*, 167 Mass. 434.
State vs. *Jankowski*, 82 N. J. Law 229.

THE ASSIGNMENTS OF ERROR.

The assignments, taken together, suggest the misapprehension of counsel for the plaintiff in error, that the case, instead of being considered only, under the second count of the indictment (as we insist), leaves, the re-

jected counts open to discussion, and a right to predicate upon them, assignments of error. Either this must be true or the misapprehension of counsel consists in his misunderstanding that the second count charges attempted embracery.

I think that I have sufficiently discussed the second count of the indictment, to support my contention, that it charges, properly and sufficiently, the common law crime of solicitation to commit crime, an indictable misdemeanor. 10

The second assignment, has, I believe, been fully covered in my argument under Point I.

The third assignment, that the indictment does not name a juror or jurors who were approached, while it may have been effective, as relating to the eliminated counts, no such pleading was, as to the charge of solicitation named in the second count, necessary, as I have already shown.

The fourth assignment is practically a repetition of the third assignment, my reply to which covers and embraces 20 this.

The fifth assignment is somewhat involved. It alleges that the second count of the indictment does not charge the *crime named in the indictment.* In view of the election, and the abandonment of the other counts, this assignment can only be given the construction that the crime of which the defendant was convicted, namely, solicitation to commit crime, was not charged in the second count. Obviously the assignment is refuted by the rceord.

The sixth assignment, that the evidence does not con- 30 stitute the crime charged in the second count.

The crime charged, solicitation to crime, is proven by the testimony of the person solicited, which stands uncontradicted, and absolutely and completely establishes the solicitation to commit embracery, charged in the second count.

The seventh assignment, "that the facts adduced by the State do not constitute the crime of attempted embracery," is admitted to be true. Not to reiterate my previous

argument, no such offense being charged in the second count, no such proof was requisite; or even possible, as no such crime exists.

The language of the seventh count (rejecting all surplusage) is sufficient to charge the solicitation to commit the crime of embracery.

I *Bish. Cr. L.* (7 *Ed.*) *sec.* 768, etc., says:

"The law, as adjudged, holds, and has from the beginning, in all this class of cases, an indictment sufficient, which simply charges that the defendant, at the time and place mentioned falsely, wickedly and unlawfully did solicit or incite a person named to commit a substantive offense without any further specification of overt acts."

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The eighth assignment is a practical repetition of the seventh; with the added charge, that some overt act is necessary to constitute the attempt (which does not exist as a crime).

Is this intended to admit, that an overt act is requisite to establish an attempt, and that an attempt may consist of solicitation or any endeavor to cause the crime to be committed I shall only point the Court to the authorities already cited, holding the solicitation itself to be an overt act.

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To the ninth assignment I have already made reply.

The tenth assignment has already been sufficiently answered to require no further discussion.

The eleventh assignment has already been fully answered in the earlier part of my argument.

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The supplemental assignments, 1a and 2a relate to the charge of the Court, quoted (read them).

The record, p. 34, l. 1-7 (read) shows the use by the Court of the language alleged, as error. The objected utterance in law was a statement by the Court to the jury, in an abbreviated form, of the attitude of the State. It was in all respects the correct statement, and one supported by a reading of the indictment and the evidence (read the second count). The language of the solicitation was, "See him and get him to do something for me

in my case." (Case p. 14, l. 32). What possible construction can be placed upon this language other than that he intended Callahan to use his personal acquaintance with the empanelled juror named, to induce him to a favorable consideration of his, Lavine's, case then to be tried.

I am unable to discover any error of fact in the statement made by the Court, and I am unconscious of any law which renders such a statement of fact to the jury, error. It was the duty of the Court, conscientiously discharged. 10

Assignment 2a (read). There is no question but that the Court understood, and correctly, that the second was the only count of the indictment under consideration; that the charge in said count was an intent to bring about a more favorable verdict in his, Lavine's behalf, and that such criminal intent he sought to effect by his solicitation of Mr. Callahan to intervene in his behalf. The Court correctly instructed the jury that it was for them to say, whether, having regard to the evidence and the circumstances the defendant did or did not attempt to influence 20 a juror, "in the manner alleged in the second count" (namely by solicitation), and their verdict should be in accordance with such finding. An examination of the authorities does not supply anything in support of this assignment.

The word "attempt" as used by the Court is synonymous with endeavor, to make an effort, to use exertion,—towards the accomplishment of some purpose. The use of the word attempt by the Court in his charge, perhaps inadvertently, is explained by his subsequent language in 30 the same sentence, namely, "in the manner charged in the second count," that is to say, solicitation.

The evidence clearly tended to support the second count, and, therefore, the Court properly refused the request for a direction of a verdict and fairly, lawfully and impartially instructed the jury, whose verdict is unimpeachable.

I submit that the defendant, plaintiff in error, has suffered no injury, but has been legally convicted, and that the judgment of the lower Court should be affirmed.

Respectfully submitted,

A. DAYTON OLIPHANT,

Prosecutor of the Pleas.

Trent Press, Printing, 14 North Warren St., Trenton, N. J.

New Jersey Court of Errors and Appeals

STATE OF NEW JERSEY, *Plaintiff—Defendant in Error,* *vs.* CHARLES L. LAVINE, *Defendant—Plaintiff in Error.*	On Writ of Error to Supreme Court.

The defendant, Charles L. Lavine, was indicted and tried in the January Term of Mercer County Court, Quarter Sessions. The indictment had three counts. At the end of the State's case the first and third counts of the indictment were abandoned by the State, and the State elected to proceed upon the second count, which was for "attempted embracery" (*State of Case, page* 31, *lines* 30-40,; *page* 32, *lines* 10-20 *and lines* 30-40; *page* 33, *lines* 20-23 *and lines* 32-35; *page* 34, *lines* 20-25; *page* 35, *lines* 1-17, *and especially lines* 13-17; *page* 36, *line* 38; *page* 37, *lines* 10-14). The case went to the jury on the second count, which charges the said Charles L. Lavine did "solicit and attempt to persuade one James P. Callahan to see and talk with the jurors of the said jury empannelled and returned for the trial of the said issue in favor of the said Charles L. Lavine, and did then and there say and utter to the said James P. Callahan divers words and discourses by way of commendation of the said Charles L. Lavine, the plaintiff, to wit, "Do you know any of the jurors; see them to-night and get them to do something for me." And the said Charles L. Lavine then

and there unlawfully and corruptly did desire and attempt to move the said James P .Callahan to solicit and persuade the jurors empannelled and returned to try the said issue to give a verdict for the said Charles L. Lavine, plaintiff in said issue, contrary to the form of the statute in such case made and provided, and against the peace of this State, the government and dignity of the same."

The facts of the case are that on the 10th day of January, 1921, while the said Charles L. Lavine had a civil suit pending against Hyman Gerofsky and others, he met James P. Callahan, a constable connected with the prosecutor's office, in the corridor of the Court House, and he said, "Do you know any of the jurors, see them to-night and get them to do something for me," to which Callahan made no reply, one way or the other. (*State of Case, page* 23, *line* 40). In Callahan's testimony he says he never intended to see any of the jurors, and in truth and in fact did not go near a juror and that at the time Lavine talked to him, he, Callahan, fully intended never to do so. (*State of case, page* 24, *lines* 1-40). Callahan further said that this communication was made to him by Lavine in the corridor of the Court House and no jurors nor any other person whatever heard the conversation. (*State of Case, page* 25, *line* 8).

On these facts the defendant was indicted for "attempted embracery" and trial was conducted along the charge of "attempted embracery." The court denied the motion to direct a verdict for the defendant and gave as his reason that the State proved "an attempt to influence a jury or juror." (*State of Case, page* 31, *line* 21). At this point the Court ordered the State to elect upon which count the State would proceed, and the State elected to proceed upon the second count for "attempted embracery." (*State of Case, page* 31, *lines* 30-40, *page* 32, *lines* 30-40; *page* 35, *lines* 1-17). The Court charged that it was for the jury to find whether the defendant did or did not "*attempt to influence a juror*" and that if the jury concluded that the defendant "*did attempt to in-*

fluence a juror" the verdict should be one of guilty. (*State of Case, page* 34, *lines* 10-20). The jury convicted the defendant and found him "*guilty on the second count of attempted embracery in the indictment.*" (*State of Case, page* 12, *lines* 28-30).

At the end of the State's case the defendant rested his case and moved to direct a verdict for the defendant for the reason that the indictment did not set out facts that constitute the crime of *attempted embracery*, and that the facts as proved by the State did not constitute the crime of *attempted embracery*. (*State of Case, page* 33, *lines* 20-23, *and lines* 32, 36; *page* 34, *lines* 10-30). The court denied the motion and the case went to the jury.

The defendant took a Writ of Error under the 136th Section of the Criminal Procedure Act and assigns and specifies as errors and causes for reversal the following (*State of Case, pages* 39 *and* 40 *and* 41 *and* 50):

1. Because the court below refused to direct a verdict for the reason that no count in the indictment charged a crime.

2. That there is no such crime as attempted embracery.

3. That the indictment does not name a juror or jurors who were either directly or indirectly approached or seen or influenced.

4. That the indictment fails to show the juror or jurors who were attempted to be approached or seen or influenced in the case.

5. That the second count of which the defendant was convicted does not charge the crime named in said indictment.

6. That the facts adduced by the State do not constitute the crime charged in the second count of the indictment or in any count of the indictment.

7. That the facts adduced by the State do not constitute the crime of attempted embracery.

8. That the facts adduced by the State constitute no attempted embracery because they lack the overt act necessary to commit the crime of attempt.

9. Because the facts adduced by the State show that there is only an intent to commit a crime and that the failure to commit or attempt to commit a crime was due to the actions of the parties who intended to commit the alleged act.

10. Because if these facts constitute any crime at all it is a crime other than that charged in the indictment.

11. That the court should have directed a veridct of acquittal because the evidence adduced by the State did not constitute the crime charged in the second count of the indictment or in the entire indictment.

12. That in the entire record and proceeding had upon the trial of the said Charles L. Lavine, he, the said plaintiff in error, suffered manifest wrong and injury in the admission of evidence and the charge of the court which prejudiced the defendant in maintaining his defense upon the merits and are causes for reversal.

1a. The court erred when in its charge to the jury it said, "It is charged by the State that this conduct on the part of the defendant was an attempt to have Callahan influence the jury to be more favorable to the plaintiff, Lavine, in that case, than he otherwise would have been. That is the essence of the charge in this case; that it was an attempt on his part to procure a juror to render a verdict in his favor."

2a. Because the court erred in its charge to the jury when it said: "It will be for you, gentlemen of the jury, to say whether, having regard to all of the evidence in the case and all the circumstances, whether the defendant did or did not attempt to influence a juror in the manner alleged in the second count of this indictment. If from all of the evidence in the case your conclusion is that the defendant did so attempt to influence a juror your verdict should be one of guilty."

POINT I.

The statute under which the defendant was indicted, tried and convicted is found in Compiled Statutes, Vol. 2, p. 1748, Sec. 16.

> *Embracery*—Embracery, and all attempts to corrupt or influence a jury or any juror, or in any way incline such jury or any juror to be more favorable to the one side than to the other by promises, persuasion, entreaties, threats, letters, money, entertainments or other sinister means; *all indirect, unfair, and fraudulent practices, arts and contrivances to obtain a verdict*, and all attempts to instruct a jury or juror beforehand, at any place or time, or in any manner or way; except only in open court at the trial of the cause, by the strength of the evidence, the arguments of the parties or their counsel, or the opinion or charge of the court, shall be misdemeanors and punished as are misdemeanors under this act. (*P. L.* 1898, *p.* 798).

This statute, with the exception of the words italicized, "all indirect, unfair, and fraudulent practices, arts and contrivances to obtain a verdict," is a literal declaration of the common law crime of embracery as found in *Bishop 3d Ed., Vol. 2, Sec.* 371, where it is said:

> "The crime of embracery is mentioned in the old books. It is a species of maintenance, consisting in an attempt corruptly to influence a jury. Blackstone defines it as "an attempt to influence a jury corruptly to one side by promises, persuasions, entreaties, money, entertainments, and the like." And Hawkins says: "It seems clear, that any attempt whatsoever to corrupt or influence or instruct a jury, or any way to incline them to be more favorable to the one side than to the other, by money, promises, letters, threats or persuasions, except only by the strength of the evidence and the arguments of the counsel in open court, at the

trial of the cause, is a proper act of embracery; whether the jurors on whom such attempt is made give any verdict or not, or whether the verdict given be true or false."

The third count in the indictment contained a charge of indirect, unfair and fraudulent practices, arts and contrivances and as that count was abandoned the portion of the statute that is not a literal declaration of the common law is out of the case. Hence the count on which the defendant was tried and convicted was under the statute declaratory of the common law.

The language of the statute, being such as is used to describe the crime at common law, must receive the same construction as that given to the common law.

Lewis Sutherland Statute Interpretation, p. 863, 2*d Ed., Vol.* 2, *says:*

"A statute in affirmance of the rule of the common law will be construed, as to its consequences, in accordance with such law. So provisions which are intended to remedy defects in the common law must be read and construed in the light of that law. When words of definite signification therein are used in such provisions, and there is no intention manifest that they are to be taken in a different sense, they are to be deemed employed in their known and defined common law meaning. *Central Railway of Georgia* vs. *Lippman*, 110 *Ga.* 665; *Baker* vs. *Baker*, 13 *Call* 87; *Holt* vs. *Agnew*, 67 *Ala.* 360; *Brochett* vs. *Rockwood Co.*, 14 *Pa. St.* 241; *United States* vs. *McGill*, 1 *Wash.* 463; *Texa Cases No.* 15706 *and other cases cited.*"

Endlich on Interpretation of Statute, p. 172, *Sec.* 127, says:

"That technical legal terms are to be taken, as a general rule, and in the absence of the countervailing intent, in their established common law significance; and that statutes in affirmance of the

common law should be construed, as to their consequences, in accordance with the common law. In all these cases and many others, the principle is recognized that the intent to alter the common law beyond the evident purpose of the act is not to be presumed. It has, indeed, been expressly laid down, that "statutes are not presumed to make any alteration in the common law further, or otherwise, than the act does expressly declare; therefore, in all general matters, the law presumes the act did not intend to make any alteration; for, if the Parliament had that design, they would have expressed it in the act; that "the rules of the common law are not to be changed by doubtful implication." And it is probably true, that, taking one case with another, "an intention on the part of the Legislature to alter the statute law is sometimes presumed upon much slighter grounds than would support any such inference in the case of the common law." But, in this country, the rule has assumed the form of a dogma, that all statutes in derogation of the common law, or out of the course of the common law, are to be strictly construed. Undoubtedly, wherever the construction of an act falls under and is affected by the operation of the presumption against a change of the existing law beyond its immediate ojbects and purposes, the result is a certain strictness of construction. But the "strict construction" referred to in the formula stated goes beyond this, and requires, in the interpretation of penal laws, that the case, in order to be within the meaning of the statute in derogation of the common law, must be as well within its letter as within its spirit. And see cases there cited."

POINT II.

THERE IS NO SUCH CRIME AS ATTEMPTED EMBRACERY.

We insist that the facts proved show that there was no attempted bracery or embracery for the reason no juror had been seen directly or indirectly, and further that no juror knew directly or indirectly or heard anything about the facts of the conversation between the defendant and Callahan as alleged and proved in the case. And under the common law and under the statute whatever efforts were made by the defendant or whatever is done by the defendant or by any person or agency set in motion by the defendant must come directly or indirectly in contact with a juror or a jury. The crime of embracery is of such a nature that the crime is complete when a juror is reached regardless of whether the contact with the jury has a good or bad effect or no effect whatever, and the effect of such action is only a matter of aggravation or mitigation. We submit that the indictment and the case by allegation and by proofs fail to show that the juror or jury, directly or indirectly, were reached by the efforts of the defendant.

The mere intention to influence a juror although expressed in words is not sufficient. There must be an attempt to carry that intention into effect by some direct or indirect approach to or communication with the juror. But such an attempt is the only overt act necessary. It is immaterial whether a juror is approached directly or indirectly. The words need not be spoken directly to a juror where they are intended to be overheard by him to influence his decision. The means of influencing a juror are also immaterial. An unlawful attempt, irrespective of the result, constitutes the crime of embracery, if it reaches a juror. (*Corpus Juris* 20, *page* 496, *Sec.* 7) and cases cited. *State* vs. *Brown*, 95 *N. C.* p. 685, is as follows:

"1. An indictable attempt to commit a crime is such an intentional preliminary guilty act as will apparently result in a deliberate crime.

"2. The acts constituting the alleged attempt should be set forth in the indictment.

"3. Embracery consists in such practices as tend to unduly influence the administation of justice *by improperly working upon the minds of the jurors.* To constitute the offense, there must be an attempt to carry into effect the corrupt purpose —to form the purpose and give it expression merely in words, is not sufficient.

"The defendant was tried and convicted of the crime of embracery. The defendant was charged with wilfully and corruptly *attempting to influence* the deliberations of a jury that was trying two men on a charge of larceny. Indictment containing three counts.

"*First Count*—after imputing corrupt purpose, alleges that the defendant approached an officer in charge of the jury, who had retired to their room to make up their verdict, and inquired as to the opinion of the jurors, saying that he 'had come to give them instructions,' and asked the officer if any such were needed to let him know and he would give them.

"*Second Count*—imputes the same criminal attempt, through 'promises, persuasions, entreaties and the like,' setting out the same general act as in the preceding.

"*Third Count*—contains similar averments as to what transpired near the jury room, and alleges that the persons on trial were clients for whom the defendant had appeared in the prosecution, and reiterates the conversation had with the officer.

"The offense imputed is thus described by Sargant Halkins in his *Pleas of the Crown, Volume* 1, *Chapter* 85: 'Any attempt to corrupt or in-

fluence or instruct a jury, or in any way to incline them to be more favorable to the one side than to the other, by money, promises, letters, threats or persuasions, except only by the strength of the evidence and the arguments of counsel in open court, at the trial of the case, is a proper act of embracery, whether the jurors on whom such attempt is made give any verdict or not, or whether the verdict given be true or false.'

10 "It is manifest that more is required to constitute the crime than the formation of a corrupt purpose in the mind and giving it utterance in words. The attempt must be made to carry it into effect, *by some direct or indirect approach to and communication with the jury*, or, as in the case supposed, a delivery of money or something of value to someone, to be used in operating upon the minds of the jurors. The attempt is as truly a criminal act as its full consummation would be. Assuming the alleged charges to be fully sustained by the proofs, does the indictment impute a punishable offense? We think it does not. No communication with the jurors is alleged, nor any attempt to have it; what the defendant said and did was to the officer, and an expression of his readiness then and there to give instructions (in its unfavorable sense for defendant's advice) to the jury, or thereafter, if the jury should need instructions or advice in regard to the case"

30 "It is true that the indictment alleges an approach to the jury, and to the officer, with the criminal intent, but the acts done, are, as they should be, set out, and in them is the imputed offense made to consist."

"It is not averred that what was said reached the ears of the jury, or was intended to be heard by them, since the words were addressed to the officer, and at the most were a suggestion of a

readiness then or thereafter, if the jury should want further advice, to give it himself."

"It was not to corrupt the officer in his discharge of duty—*itself a highly criminal act*—or through him to act upon the minds of the jury, but at most a communication to him of what he, the defendant, was at present prepared to do, or what he would thereafter do, if the wishes of the jurors were conveyed to him."

"Highly improper as was the conduct of the defendant, more so from his relation to the cause as counsel to the parties on trial, and foolish and absurd as was the suggestion of his giving instructions, which, being authoritative, could proceed only from the presiding Judge, we think the conduct of the defendant stops short of what is required to constitute the corrupt and unlawful *attempt*, which makes the crime. 'An indictable attempt to commit a crime is such an intentional preliminary guilty act,' in the defining words of Mr. Wharton, 'as will apparently result, in the usual course of natural events, if not hindered by causes outside of the active will, in a deliberate crime.' 2 *Wharton C. L., Sec.* 2686.

"But embracery, like a solicitation to commit crime, is independently criminal, and the subject of a public prosecution. Yet the ultimate purpose must be developed and find expression in some act looking to an interference with the due course of judicial administration, and this as well when failing as when successful. The conversation with the officer, censurable and unprofessional as it was, does not in our view contain the necessary elements of an indictable offense in itself, nor was it a solicitation to induce his interference with the jury consultations nor was any tampering with that body alleged; but the misconduct is in an inquiry as to how the jurors stood, with an offer

to the officer not requested to be conveyed to the jury, then or thereafter, to advise them as to their duty in the premises."

" 'Attempt' (we quote from section 2703 of the same work) 'is a term peculiarly indefinite' and consequently the facts which develop the attempt, should be set out so as to show that the *attempt* is itself criminal. This has not been done in the present case, and we think they fail to show the crime charged."

State vs. *Salles*, 2 *Nevada* 268, is as follows:

"Defendant was indicted, charged with the crime of an attempt to commit the crime of embracery. Defendant while acting as a juror in the civil action, approached one of the attorneys in the case and offered to secure and return a verdict for the defendant for the sum of $100.00. There is no charge that he was corruptly influenced or that he attempted in any way corruptly to influence his fellows. The substance of the indictment is the offer to secure a verdict for the defendant in the action for the sum of money. To this indictment defendant put in a general demurrer, which was sustained, and the case was resubmitted to the grand jury. The only question presented to this court for determination is whether the facts detailed in the indictment constitute an indictable offense. Whilst we are inclined to believe that the defendant might be held under a proper indictment, we do not think the bill presented to us in this record charges defendant with any crime known to the law. Embracery is defined to be an attempt by either party, or a stranger, to corrupt or influence a jury, or to incline them to favor one side by gifts or promises, threats or persuasions, or by instructing them in the cause, or any other way, except by opening and enforcing the evidence by counsel at the trial,

whether the jurors give a verdict or not, and whether the verdict be true or false. Embracery Statutes of Nevada, 1861, Sec. 112, p. 79." "There is no such crime specifically recognized, either at common law or by the statutes of this State, as that of attempt to commit embracery. As the crime itself consists of a mere attempt to do an act or to accomplish a result, it is difficult to comprehend how there can be an attempt to commit such a crime. Any attempt to corruptly influence a juror, whether it be successful or not, is itself embracery. The crime may be committed though the object of the embracer be not accomplished, and his only act consists of an attempt to carry out a corrupt purpose. If, therefore, there be any act done to carry out such corrupt purpose, whether it be successful or not, such act would be sufficient to constitute the crime of embracery. Hence it would seem there can be no such specific crime as an attempt to commit embracery."

"In other words, there can be no indictment for an attempt to commit a crime, which crime itself is but an attempt to do a criminal act. It is a general rule of the common law that an attempt to commit a crime is itself a crime, but in our opinion, from the very nature of the crime of embracery, there can be no attempt to commit it. However, notwithstanding the demurrer to the indictment was well taken, we see no reason why the defendant might not be indicted and punished for soliciting and inciting another to commit the crime of embracery, if it can be shown that he did so."

State vs. *Davis*, 112 *Mo. App.* 346, is as follows:

"The defendant was indicted on the charge of embracery. The proof consisted of the fact that during the trial of one Jones, for murder, Davis approached one Ward, a juryman, and said 'He

(meaning Jones on trial for murder) is a good fellow.' Ward further testified against Davis and said, 'from the way he approached me, I thought he was on the side of Jones.' Ques. 'You just inferred that he was in favor of Samuel Jones and wanted to talk to you on his behalf?' Ans. 'Yes.' There is no further evidence on the part of the State. Defendant requested the court to instruct the jury for his acquittal, which the court declined. The case was sumbitted to the jury and the jury returned a verdict of guilty. Defendant appeals, and insists that the evidence was insufficient to sustain a conviction. After quoting a statute on embracery which closely follows a common law definition the court went on to say:

"The evidence wholly fails to show that appellant attempted to improperly influence a juror to the side of Jones by promises, persuasions, entreaties, money, entertainment and the like, in fact, the evidence wholly fails to show that appellant did or said anything other than that Jones was a good fellow. The appellant being the defendant in the trial before a jury, where the only charge against him was what he said and the manner in which it was said, had the right to have the words he used or their substance at least, detailed to the jury so that the jury might judge as to whether or not he attempted to improperly influenc the juror. The mere statement of Ward that appellant talked to him about the case and that he presumed and inferred from the way he approached him that he was on the side of Jones, is not enough to support the find of guilty. The charge is a serious one. The law presumes appellant to be innocent thereof and he stands innocent until the State overcomes this presumption by proof showing such facts from which the jury might reasonably infer beyond a reasonable doubt that he sought to improperly influence the juror."

In the argument before the Supreme Court and in the brief for plaintiff in error submitted to the Supreme Court, it was argued, as hereinabove, that *there is no such crime as attempted embracery*. Technically, perhaps, this contention is correct, but for practical purposes this argument is probably too broad and the Supreme Court may have been misled into error by this argument. For it seems that section 16 of the Crimes Act provides (1) for the crime of embracery, which is a successful consummation on the part of the accused of reaching and influencing the jury in his favor, and it provides also (2) for the unsuccessful effort on the part of the accused who has either directly or indirectly reached the jury but has failed in the consummation of his purpose; and section 16, though it takes cognizance of these two crimes, in effect treats them alike and provides punishment for both alike in general terms. The result is, that both are, and even at common law, were, treated and understood as *embracery* because the unsuccessful attempt contemplated by the statute was treated as the same offense as successful embracery, and, therefore, in strict legal technology, it is perhaps, correct to say that *there is no such crime as attempted embracery*. But it is probable that the Supreme Court, after considering the argument and reading section 16, concluded that the argument was erroneous because section 16 itself takes cognizance of the unsuccessful attempt to embrace the jury. However, the *attempt* contemplated by section 16, means an attempt in the usual legal and technical signification in the law and necessarily means an overt act and actual contact with the jury either directly or indirectly. Therefore, the more accurate but perhaps verbose argument is that *there is no such crime as an attempt to attempt embracery;* but, as an *attempt to embrace* is and always has been treated as *embracery*, the more correct and verbose argument resolves itself into the simpler statement that *there is no such crime as attempt to embrace* or that *there is no such crime as attempted embracery*, and this is

exactly the argument that was intended to be made by counsel for the plaintiff in error in the Court below, and this is the argument that is now contended for upon the authorities above set forth.

POINT III.

IF THERE IS SUCH A CRIME AS ATTEMPT TO COMMIT EMBRACERY THEN THERE IS NO EVIDENSE TO CONSTITUTE SUCH A CRIME.

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The facts merely show evidence of intention on the part of the plaintiff in error. There is no act of preparation nor is there any overt act. The fact is that Callahan, who was to commit the crime, says that at the time Lavine asked him to commit it he, Callahan, was determined not to commit it and never intended to commit it, and the cause which frustrated the commission of the crime came from Callahan himself who was asked to commit the crime. Neither mere intention to commit crime nor mere preparation to commit crime is a crime. This is the law of the cases in this State, in other States, and throughout England.

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12 *Cyc.* 178:

> "The preparation consists in devising or arranging the means or measures necessary for the commission of the offense; the attempt is the direct movement toward the commission after preparations are made. Something more must be shown than mere intention, and preparation for the attempt indicates the intention, but between this and the attempt itself there is a wide difference. The attempt contemplated by the statute, must be manifested by acts which would end in the consummation of the particular offense, but for the intervention of circumstances independent of the will of the party charged with the attempt." *People* vs. *Murray*, 14 *Cal.* 159.

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12 *Cyc.* 177:

"And there can be no attempt to commit a crime which is itself a mere attempt to do an act or to accomplish a result. And embracery unsuccessful is only an attempt.

2. WHAT CONSTITUTES AN ATTEMPT.

a. *Definition.*

"An attempt to commit a crime is an act done with intent to commit it, beyond mere preparation, but falling short of its actual commission."

b. *Necessity and sufficiency of overt act.* 10

"To constitute an attempt to commit a crime both at common law, and under the various statutes, something more than mere preparation or planning is essential. The accused must take at least one step beyond preparation by doing something directly moving toward and bringing him nearer the crime he intends to commit. Mere intent to commit a crime, without any overt act or conspiracy, is not an indictable offense. The overt act which is relied upon as an attempt need 20 not be an act which is ordinarily a part of the criminal transaction itself, but may be one which, although somewhat remote, leads up to it."

12 *Cyc.* 177 (*note* 96):

"Thus there can be no attempt to commit embracery (*State* vs. *Salles*, 2 *Nev.* 268), or an assault, which is itself an attempt." (*Wilson* vs. *State*, 53 *Ga.* 205; *White* vs. *State*, 22 *Tex.* 608.)

People vs. *Webb*, 127 *Mich.* 29, 86 *N. W.* 30 406; *People* vs. *Youngs*, 122 *Mich.* 292, 81 *N. W.* 114; 47 *L. R. A.* 108; holding that one could not be convicted of an attempt to enter and break a dwelling merely because be agreed with another to do so, met him at a saloon at the appointed time with a revolver and slippers to be used in the house, and went into a drug store and purchased some chloroform to use, being arrested

when he came out; he was not guilty of an attempt to commit burglary, as his acts did not go beyond mere preparation.

Decisions of the New Jersey Courts on Attempts:

Sipple vs. *State*, 46 *N. J. L.* 197, *Ct. of E. and A.*:

1. "An attempt to steal, accompanied by an overt act or acts towards its commission constitutes an attempt to commit larceny."

2. "The overt act or acts must be such as will apparently result, in the usual and natural course of events, if not hindered by extraneous causes, in the commission of the crime itself."

3. "Mere preliminary preparations are not the overt acts required."

Marley vs. *State*, 58 *N. J. L.* 207, *Sup. Ct.*:

2. "Where a charge is made in the indictment of a certain crime, but the facts stated show that the charge is nugatory, a defendant cannot be convicted of such charge."

3. "When the thing done is nullity, and therefore is not adapted to do the thing intended, there can be no conviction of an attempt to do the thing intended."

State vs. *Schwarzback*, 84 *N. J. L.* 268, *Ct. of E. and A.*:

2. "The attempt to commit a crime is an act done, beyond mere preparation, with intent to commit it, but falling short of its actual commission. Furthermore, to constitute an attempt to commit a crime there must be an overt act directly moving toward its commission, and the overt act must be such as will apparently result, in the usual and natural course of events, if not hindered by extraneous causes, in the commission of the crime itself."

3. "Preparation for adultery necessarily consists of such preliminary arrangements as appointing the time and place of meeting, and repairing

to the rendezvous; but, after the parties are met and are disrobed or disrobing, and nothing but an extraneous cause, namely, one not moving from themselves, prevents the accomplishment of the intended criminal purpose, then the offenders have progressed beyond the stage of preparation and are actually engaged in the attempted commission of crime."

In the above case, the court held the defendant guilty of attempted adultery. For the purpose of discussion, let us assume a state of facts where the husband of the woman was concealed in the room, and both defendants entered with the intention of committing adultery and that both parties went through the preparations described in the above case, but that one of the said parties then repented and refused to commit the crime. That both parties then dressed and left the room. We submit that this Court would be compelled to hold that neither of the parties could be convicted of the charge of attempt to commit adultery.

The real test as to whether intentions or preparations to commit crime have been carried far enough to be punishable as an *attempt* to commit crime, lies in the question whether the commission of the crime has actually been initiated or started by such an overt act as will apparently result in the commission of the crime but for the intervention of some extraneous circumstance independent of the will of the accused, and the ineffectual overt act must be of such a character as to advance the conduct of the actor beyond the sphere of mere intent or preparation; and that act must reach far enough towards the accomplishment of the desired result to amount to the commencement of the consummation.

State vs. *Hurley*, 79 *Vermont* 28:

1. To constitute an attempt to commit a crime, the act must be of such a character as to advance the conduct of the actor beyond the sphere of mere intent. It must reach far enough towards accom-

plishment of the desired result to amount to the commencement of the consummation.

2. The mere facts that a prisoner, lawfully in jail, arranged to procure saws adapted to jail breaking, and thereby got them into his possession, with intent therewith to break open the jail for the purpose of escaping, did not constitute an attempt to break jail.

The Court said: "The act in question here is the procuring by the prisoner of tools adapted to jail breaking. That act stands entirely unconnected with any further act looking to their use. It is true that the defendant procured them with the design of breaking jail. But he had not put that design into execution, and might never do so. He had procured the means of making the attempt, but the attempt itself was still in abeyance. Its inauguration depended upon the choice of an occasion and a further resolve. That stage was never reached, and the procuring of the tools remained an isolated act. To constitute an *attempt*, a preparatory act of this nature must be connected with the accomplishment of the intended crime by something more than a general design."

A series of cases on indictments for attempt to commit arson illustrate the nice distinctions required. The defendant bought matches to set the fire; he cannot yet be punished. *R.* vs. *Taylor*, 1 *Fost. and F.* 511.

He solicited another to burn and furnished him with materials; there is no punishable attempt. *McDage* vs. *P.*, 29 *Mich.* 50; *S.* vs. *Bowers*, 35 *S. C.* 262; 14 *S. E. Rep.* 488.

He procures tools and meets a confederate at a distance from the house; he is not guilty. *P.* vs. *Youngs*, 122 *Mich.* 292; 81 *N. W. Rep.* 114.

He hires a hack to go to the house; he is not guilty. *Groves* vs. *S.*, 42 *S. E. Rep.* 755 (*Ga.*).

It seems to be clear that the common law misdemeanor of "attempt" to commit crime cannot be acccomplished by the solicitation of another to do the act. Attempt is the act of one who is himself to commit the intended crime, and if the crime is committed and is a misdemeanor he will become principal; and if the crime is committed and is a felony he will become accessory before the fact. Therefore, one who solicits another to commit a crime, in the actual committing of which he does not intend to join, and which is never committed, is not guilty of an "attempt." *R.* vs. *Williams*, 1 *C. and K.* 589; 1 *Den. Brit. C. C.* 39. *P.* vs. *Youngs*, 122 *Mich.* 292, 81 *N. W. Rep.* 114. *Stabler* vs. *C.*, 95 *Pa. St.* 318, 40 *Am. Rep.* 653. *Hicks* vs. *C.*, 86 *Va.* 223; 9 *S. E. Rep.* 1024. *S.* vs. *Butler*, 8 *Wash.* 194; 35 *Pac. Rep.* 1093.

Thus in *Regina* vs. *Williams*, *supra*, an indictment for attempt to administer poison by giving the poison to X, who knew its nature, with directions to administer it, it was held that the defendant must be discharged. To the same effect is *Hicks* vs. *C.*, *supra*, where the evidence showed that Hicks procured the poison and ineffectually solicited Mrs. Long to put it in the drink of the intended victim, and by appointment met Mrs. Long and delivered the poison to Mrs. Long, and Mrs. Long then testified that she never agreed to administer the poison and never intended to do so and would not have done it for anything, and that she thereupon delivered the poison to the State authorities and informed them of the facts, and it was *held* that the acts of the solicitor, Hicks, did not reach far enough towards the accomplishment of the desired result to amount to the commencement of the consummation, and that the acts did not constitute an "attempt," but only a preparation, and that an "attempt" to commit a crime must consist of (1) the intent and (2) an ineffectual act which must reach as far as indicated in the case of *State* vs. *Hurley*, *supra*.

If an attempt succeeds, it cannot be punished as an attempt, for in the nature of things a mere attempt must be unsuccessful. If, therefore, at the trial of an indictment for attempt the evidence proves that the crime intended has been committed, there must be an acquittal. *R.* vs. *Nichols*, 2 *Cox. C. C.* 182; *Graham* vs. *P.*, 181 *Ill.* 477, 55 *N. E. Rep.* 179.

POINT IV.

10 **THE DEFENDANT COULD NOT BE CONVICTED FOR AN ATTEMPT WHEN THE PERSON WHO WAS ACTUALLY TO COMMIT THE CRIME WOULD NOT AND DID NOT COMMIT IT.**

Embracery is a crime that can be committed by one or more persons. The evidence shows that Lavine, the defendant, requested Callahan to commit the crime of embracery. If Callahan had committed the crime as requested by Lavine, either by "attempting" its commission or by consummating his attempt, both he and the 20 defendant, Lavine, would have been guilty as principals. In New Jersey the distinction between felonies and misdemeanors is disregarded and under our statutes all who aid and abet in the commission of the criminal act are principals and are punishable as such.

> "The distinction between felonies and misdemeanors being disregarded in our statutes relating to crimes, the rule that in misdemeanors all who aid and abet in the commission of the criminal act, although not personally present, may be 30 indicted, tried and punished as principals, which obtains at common law, obtains also in misdemeanors made so by statute." *State* vs. *Spence*, 81 *N. J. L.* 265.

Accessories before the fact are abolished by our statute and they are made principals. The reasoning is just the same as at common law, and as Callahan did not intend to and would not commit the crime of embracery,

the defendant, Lavine, who aided and abetted, counselled and procured Callahan to do so, could not be guilty of an attempt to commit it.

"To constitute one an accessory before the fact, it is of course essential that the felony shall have been in fact committed by the person whom the accused is alleged to have incited or counselled, etc., and under such circumstances as to render him guilty. In other words, although the offense of the accessory is distinct from that of the principal, yet it is in judgment of law connected with it and cannot subsist without someone being guilty as principal. This principle appears at every point in the common law rules regulating the indictment and trial of accessories.

Of course, a person cannot be an accessory before the fact to an impossible crime, as, for example, an accessory to the crime of burglary by inciting one to break and enter a place not the subject of burglary." (16 *C. J.*, *p.* 134, *sec.* 127.)

Ark.—*Jones* vs. *State*, 108 *Ark.* 447, 158 *S. W.* 132. *Ray* vs. *State*, 102 *Ark.* 594, 145 *S. W.* 881.

Cal.—*Peo* vs. *Burke*, 18 *Cal. A* 72, 122 *P.* 435.

Ga.—*Brooks* vs. *State*, 103 *Ga.* 50, 29 *S. E.* 485.

Ill.—*Usselton* vs. *Peo*, 149 *Ill.* 612, 36 *N. E.* 952 (*foll. Baxter* vs. *Peo*, 8 *Ill.* 368).

Ky.—*Reed* vs. *Com.*, 125 *Ky.* 126, 100 *S. W.* 856; 30 *Kyl* 1212. *Begley* vs. *Com.*, 60 *S. W.* 847, 22 *Kyl* 1546.

Mass.—*Com.* vs. *Asherowski*, 196 *Mass.* 342, 82 *N. E.* 13.

Miss.—*Harper* vs. *State*, 83 *Miss*, 402, 35 *S.* 572.

N. Y.—*Peo* vs. *Mills*, 41 *Misc.* 195, 83 *N. Y. S.* 947, 17; *N. Y. Cr.* 466.

N. C.—*State* vs. *Jordan*, 75 *N. C.* 27.

Or.—*State* vs. *Steeves*, 29 *Or.* 85, 43, *p.* 947.

Pa.—*Stoops* vs. *Com.*, 7 *Serg.* & *R.* 91, 10 *Am D.* 482.

Tenn.—*State* vs. *Ayers*, 8 *Baxt.* 96.

Tex.—*Warren* vs. *State*, 67 *Tex. Cr.* 273, 149 *S. W.* 130; *Hall* vs. *State*, 52 *Tex. Cr.* 250, 106 *S. W.* 379; *Moore* vs. *State*, 37 *Tex. Cr.* 552, 40 *S. W.* 287.

W. Va.—*State* vs. *T. Ellison*, 49 *W. Va.* 70, 38 *S. E.* 574; *State* vs. *Bailey*, 63 *W. Va.* 668, 60 *S. E.* 785; *State* vs. *Lilly*, 47 *W. Va.* 496, 35 *S. E.* 837.

Wis.—*Ogden* vs. *State*, 12 *Wis.* 532, 78 *Am D* 754.

10 Eng.—*Reg* vs. *Gregory L. R. K. C. C.* 77.

The leading case on this question is the English case of *Regina* vs. *Ann Williams and John Rees*, 1 *C.* & *K.* 589, 1 *Den. Brit. C. C.* 39, under a statute, the terms of which are similar in the use of the word attempt to the phraseology in the section under which the plaintiff in error was indicted under our statute. While this case differs from the case at bar the facts nevertheless are stronger. It is there held:

"The delivery of poison to an agent, with di-
20 rections to him to cause it to be administered to another under such circumstances that if administered the agent would be the sole principal felon is not 'an attempt to administer poison' within the statute. 1 *Vict. C.* 85 *S.* 3."

"A delivered poison to B, and desired him to put it in V's beer, for that he A wanted to kill V. B delivered the poison to V, and told him what had passed between A and himself. Held: That A could not be convicted on the statute 1
30 *Vict. C.* 85 *S.* 3 of having attempted to administer poison to V. Indictment on the *Stat.* 1 *Vict. C.* 85 *S.* 3. The first count of the indictment charged the prisoners with feloniously attempting to adminsiter to one Thomas Vaughan a large quantity of a certain deadly poison, called white arsenic, with intent to kill and murder him. There was also a second count, charging the prisoners in like manner with attempting to administer poison

to Mary Vaughan, with intent to kill and murder her; and a third count, charging them with attempting to administer poison to Thomas and Mary Vaughan, with intent to kill and murder both."

"It appeared that the two prisoners cohabited together, the female prisoner being a daughter of Mary Vaughan; and that, in the month of May, 1844, the prisoners procured some arsenic, and gave it, in a paper, to a man named Richard Edwards, and informed him that it was poison, and that they wanted to kill Vaughan and his wife; and they gave directions to Edwards to keep the arsenic in the palm of his hand, and go to Vaughan's house, which was two or three miles distant, and there call for a pint of beer which he, Edwards, and the Vaughan's were to drink together, and after having done so, he (Edwards) was to call for another pint of beer, and take the opportunity of slipping the arsenic into it, undiscovered by the Vaughans, to whom he was to hand it, that they might drink it and be poisoned. The prisoners gave Edwards $5.00 for his services and told him, that if he succeeded he should never want, for all in the Vaughan's house belonged to the prisoner, Ann Williams. It further appeared that Edwards immediately proceeded to the house of the Vaughans, and gave up the poison to them, and told them all that had passed. Edwards was a man of apparently rather weak intellect, but gave his evidence in a very clear and collected manner, and was certainly perfectly aware that, if he had done as he was directed, he must have destroyed the Vaughans." Verdict-Guilty.

"Rolfe, B., respited the judgment, in order to consult the judges on the point, whether the foregoing facts warranted the conviction of the pris-

oners for the attempt to administer poison; for if Edwards had administered the poison, he would have been sole principal felon, and the prisoners would have been accessories before the fact. The question, therefore, was, whether the delivery of poison to an agent, with directions to him to cause it to be administered to another, under such circumstances that, if administered, the agent would be sole principal felon, was an "*attempt to administer*" within the third section of the statute. 1 *Vict.* C 85.

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"In the ensuing term the case was tried by the fifteen judges, who held the conviction wrong."

Below is a copy of the act under which the defendants in the above case were indicted and tried:

Statutes 1 and 2 *Vict.*, *p.* 634.

No. 3. "And be it enacted that whosoever shall attempt to administer to any person any poison or other destructive thing or shall shoot at any person or shall be drawing a trigger or in any other manner attempt to discharge any kind of loaded arms at any person or shall attempt to drown, suffocate, or strangle any person with intent indicated in the case aforesaid to commit the crime of murder shall be guilty of a felony."

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When this cause came before the Supreme Court on writ of error to Mercer Quarter Sessions, the County Prosecutor submitted a brief and argued orally, admitting that there is no such crime as "attempt to commit embracery," and cited as authorities for this admission on the part of the State the two cases of *State* vs. *Salles*, 2 *Nev.* 268, *and State* vs. *Brown*, 95 *N. C.* 685. But, admitting that there is no such crime as "attempt to commit embracery," the State submitted a brief and argued that the second count of the indictment sufficiently and specifically charged the crime of "solicitation to commit embracey,"

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that the proof supported the charge of soliciation, and that, therefore, the learned trial Judge committed no error in refusing to direct a verdict for the plaintiff in error. But we contend and respectfully submit that the second count did not charge *solicitation to commit embracery* and that the second count differed from the first only in that it used the words "attempt to" as modifying the word "persuade" and also as modifying "move," the charge in the first count being:

> "did solicit and *persuade* Callahan to see and talk with the jurors—and did *move* and desire the said Callahan to solicit and persuade the jurors" etc.,

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and the second count being:

> "did solicit and *attempt to persuade* Callahan to see and talk with the jurors—and did desire and *attempt to move* the said Callahan to solicit and persuade the jurors" etc.

The first count charged a consummation of the effort to reach and influence the jury, that is, *embracery*, and the second count charged that the same effort was ineffectual or frustrated, that is, *attempt to embrace*. This analysis seems strongly to indicate that the second count did not charge and was not intended to charge *solicitation to commit embracery*. However, it is immaterial what the second count charged, for from the record it is clear that the trial Court understood that count to charge "attempted embracery," that the trial Court refused to direct a verdict for the defendant because the State proved "an attempt to influence a jury or juror" (*State of Case, page* 31, *line* 21), the State elected to proceed upon the second count and in so electing stated it was and described it as "attempted embracery" (*State of Case, page* 31, *lines* 30-40, *page* 32, *lines* 30-40, *page* 35, *lines* 1-17), the Court charged that it was for the jury to find whether the defendant did or did not "attempt to influence a juror" (*State of Case, page* 34, *lines* 10-25), which charge was clearly a charge for "attempted embracery," the jury

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convicted the defendant and found him "guilty on the second count of attempted embracery" (*State of Case, page* 12, *lines* 28-30), counsel for the State and the defendant, and also the Court proceeded with the case as for "attempted embracery" (*State of Case, page* 33, *lines* 20-23 *and lines* 32-36, *page* 34, *lines* 10-30), and the whole case was conducted, tried, conviction had, and sentence imposed, for "attempted embracery" (*State of Case, page* 32, *lines* 10-20, *page* 36, *line* 38, *page* 37, *lines* 10-14).

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POINT V.

ASSUMING, BUT NOT ADMITTING, FOR THE PURPOSE OF ARGUMENT, THAT THE SECOND COUNT OF THE INDICTMENT CHARGES THE OFFENCE OF SOLICITATION TO COMMIT A CRIME, YET THE APPELLANT INSISTS THAT THE CONVICTION CANNOT STAND, FOR THE FOLLOWING REASONS:

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1. **THAT THE DEFENDANT WAS PLACED ON TRIAL, THE JURY WAS CHARGED, THE VERDICT WAS FOUND, AND JUDGMENT ENTERED FOR A CRIME DIFFERENT THAN THAT ALLEGED TO BE CHARGED IN THE SECOND COUNT OF THE INDICTMENT.**

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In the case of the *State* vs. *Rudner*, 92 *N. J. L.* 20, (*at p.* 25) the Court said:

> "The jury, although the question was submitted to it, failed to pass upon his guilt or innocence of the crime charged in the third and fourth counts of the indictment. In this situation the trial court was without legal power to pass sentence upon the plaintiff in error, and, consequently, the judgment under review must be reversed."

The only difference between the Rudner case and the case at bar is that in the Rudner case all of the charges in the indictment were submitted to and considered by the jury, and the verdict returned by the jury was clearly inapplicable to the third and fourth counts, and therefore it could not be upheld as a conviction on the third and fourth counts; whereas, in the case at bar the charge for soliciation to commit crime was never entertained by the Court, or prosecuted by the State, and was never submitted to or considered by the jury, and the verdict returned was clearly inapplicable to a charge for *solicitation to commit crime*, and it was plainly *in haec verbis* "*guilty on the second count of attempted embracery.*" If a charge for *solicitation to commit crime* was in the indictment, it was not noticed by the Court or the State, the Court did not instruct the jury thereon, it was not submitted to or considered by the jury, and the jury returned no verdict thereon. But the jury did pass on what was orally placed before them by the State and the Court, and that was only the issue and trial for "attempted embracery" and not "solicitation."

In the case of *State* vs. *Levin*, 92 *N. J. L.* 553 (*at p.* 554), the Court of E. & A. said:

> "The only counts on which the judgment could be pronounced were the counts for a high misdemeanor, and on these counts there is no verdict and hence no basis for a judgment."

This pronouncement of the court is in direct line with the case at bar in that there is no verdict on which to base a judgment for solicitation.

2. A JUDGMENT AND VERDICT CANNOT BE AMENDED ON A VITAL OR SUBSTANTIAL MATTER IN EITHER A CRIMINAL OR CIVIL CASE.

It is true that there is power to correct an error in a sentence under Compiled Statutes, page 1867, section 144.

This seems to be as far as the Court can go in amending a criminal record.

In *Cruiser* vs. *The State*, 18 *N. J. L.* 206, the Court said:

> "After a writ of error, this court cannot amend or order an amendment below, in a criminal case."

In *Roop* vs. *State*, 58 *N. J. L.* 487, the Court said:

> 2. "Upon a verdict of guilty, on an indictment charging the offence of keeping a disorderly house, a sentence that the offender pay a fine or be confined in the State Prison is error. No power having been conferred to correct this error by a new sentence in this court, or by remanding the record for correction, the judgment must be reversed."

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In *State* vs. *Gray*, 37 *N. J. L.* 368, the Court said:

> 1. "The defendant was convicted of adultery and sentenced to imprisonment at hard labor for six months in the State Prison. Being brought before this court by habeas corpus, it was held, that he could not be imprisoned at hard labor for this offence."

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> 2. "This court having no power to pass a proper sentence, or to remand the prisoner to the court below for re-sentence, he was discharged."

This was the state of the law before the court received the statutory power of correcting a sentence under Compiled Statutes, page 1867, section 144.

In civil cases this rule is followed in the case of *Gerhab* vs. *White*, 40 *N. J. L.* 242, where the Court said:

> 1. "Where the jury, by their verdict, say 'we find the full amount of the plaintiff's claim,' and it appears that there was one amount claimed in the bill of particulars, and another on the trial before the jury, the verdict is not informally expressed, but is ambiguous and uncertain, and cannot be amended by the court."

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In the case of *Kilgus* vs. *Wayne Company*, 85 *N. J. L.* 351, the Court of E & A. said:

2. "In moulding a verdict to correspond with the real finding of the jury the court is not at liberty to add an item, such as interest, which the jury did not agree to find, and this in spite of the fact that in omitting to find such item the jury disregarded the proper instruction of the court."

In this case the question is learnedly discussed on pages 354-355 and at the conclusion of the discussion the court says:

"We think the learned trial judge was right in so moulding the verdict as to correct a pure inadvertent mistake on the part of the jury by reducing the sum found to the sum which the jury thought they were finding, but that he was in error in adding to this an item (interest) which admitedly the jury did not intend to include in their verdict."

And in *State* vs. *Levin*, *supra*, on writ of error from the Court of Errors and Appeals to the Supreme Court, it was urged in the Court of Errors and Appeals that the verdict shown on the record of the case was not the verdict rendered by the jury and that it was only as the Clerk of the Quarter Sessions had made it up in the record, and the Court of Errors and Appeals said that it was beyond its power to consider and correct such error, if there was any, or to amend the record in that respect.

3. A VERDICT MUST RESPOND TO THE CRIME CHARGED IN THE INDICTMENT.

If the indictment charged solicitation to commit crime, as contended by the State in the Court below, the verdict rendered was for "attempted embracery", and the verdict therefore was not responsive to the crime charged in the indictment.

It is settled that the verdict must be responsive to the crime charged in the indictment. 16 *Corpus Juris* 1103, *Sec.* 2587, and cases there quoted.

In the following cases verdicts were reversed because not being responsive:

Guilty of murder with intent to kill under the indictment for murder. *State* vs. *Guillory*, 42 *La. Ann.* 581; 7 *S.* 690.

Guilty of breaking under an indictment charging burglary. *State* vs. *Evans*, 49 *La. Ann.* 329, 330; 21 *S.* 546.

"Guilty of carrying a pistol in a suitcase" under an indictment for carrying a concealed weapon. *State* vs. *Parker*, 152 *N. C.* 790, 791; 67 *S. E.* 35.

People vs. *Harrison*, 261 *Ill.* 517.

State vs. *Grossman*, 214 *Mo.* 233.

Hendrey vs. *U. S.*, 233 *Fed.* 5, 147 *C. C. A.* 75.

4. THE VERDICT CANNOT STAND BECAUSE IT VIOLATES ARTICLE 1, SECTION 3, OF THE CONSTITUTION, WHICH PROVIDES THAT THE ACCUSED SHALL HAVE A RIGHT TO BE INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATION.

In the case at bar if the indictment was for solicitation, it was successfully disguised from the day it was found up until the time the Prosecutor presented his brief to the Supreme Court, as the following facts will show:

The indictment was endorsed by the foreman of the grand jury as embracery. By the record of the case the entire trial was conducted for attempted embracery. The Judge charged the jury on attempted embracery. Verdict found and judgment entered for the attempted embracery. Furthermore, the Court, in denying the motion to direct a verdict for the defendant, said "I think *under the statute* a case has been made out of an *attempt to influence a juror*", and the crime of *solicitation* is not anywhere mentioned in the statute and the crime of *attempt to influence a juror* is provided for in section 16 of the Crimes Act, and, therefore, it is clear that the defendant was tried not for *solicitation* but for *attempted embracery*.

It must be admitted that, if the second count charged "solicitation to commit crime", the accused was not informed of the nature and cause of the accusation, and the Court and the Prosecutor successfully concealed such charge until the complete conviction of the defendant. This state of affairs cannot be said to square with a fair trial of the defendant.

In the case of *Howland* vs. *State*, 58 *N. J. L.* 18, the Court said:

> "The provision in section 56 of the Criminal Procedure Act, that, upon the trial of an indictment for larceny, the jury may return a verdict of guilty of embezzlement, contravenes article 1, section 3, of the state constitution providing that in all criminal prosecutions the accused shall have the right to be informed of the nature and cause of the accusation."

In this State the legislature made an effort to permit a conviction for embezzlement where the defendant was indicted for larceny. The act was held unconstitutional in the foregoing case.

If it be unconstitutional to indict a man for larceny and convict him for embezzlement, it certainly is unconstitutional to indict a man for *solicitation* and try him for *attempted embracery* and convict him for *attempted embracery*.

We respectfully insist that while we assume, for the purpose of discussion, that the second count of this indictment charged *solicitation*, yet the court could not try the defendant and convict him for the crime of *attempted embracery*, or any other crime than that alleged in the indictment, as such procedure is against legal and constitutional reason.

(over)

5. IF THE SECOND COUNT CHARGED SOLICITATION TO COMMIT CRIME, THE COURT AND THE PROSECUTOR INFORMED THE DEFENDANT THAT SAID COUNT CHARGED HIM WITH ATTEMPTED EMBRACERY, AND THE TRIAL WAS CONDUCTED AS FOR ATTEMPTED EMBRACERY, AND THE DEFENDANT WAS ACTUALLY PREJUDICED THEREBY.

10 It is true that no presumption as to the defendant's guilt or innocense is to be drawn from the fact that the defendant did not take the witness stand in this case, but this rule of law has no bearing upon the fact that no defense whatsoever was interposed in this case, and from this latter fact certain presumptions may be drawn. It is also true that the presumption of innocence envelops the defendant and goes with him throughout the whole case.

Solicitation to commit crime is complete when one person requests another to commit a crime. *Attempt* to commit crime requires an overt act going beyond the sphere 20 of mere intent or preparation and reaching as far as the commencement of the consummation.

The case having been tried for *attempted embracery*, and the State having failed to adduce any proof of an *attempt*, and the presumption of innocence being with the defendant, and the defendant being represented by eminent counsel at the trial, exercising their knowledge of the law and the technical principles relating to *attempts*, and advising the defendant accordingly, the defendant was entirely justified in not interposing any defense to the 30 charge of *attempted embracery* because he and his counsel knew that the State had failed to adduce proof of any such overt act as would amount to *attempt*. This conclusion as to the law of the case and this determination not to interpose any defense, would not have been made by the defendant and his counsel if the case had been tried for *solicitation*, because the State's proof was perfect to support the charge of solicitation and nothing more was required to constitute such crime and the defendant and

his counsel would then have felt compelled to interpose a defense by way of denial, if in truth they could do so. And as the presumption of innocence resides always with the defendant, the presumption must attach to the charge of *solicitation*, upon which he was never tried, and therefore it may be presumed that because of his innocence he would have interposed a denial of the State's proof if he and his counsel had been apprised that he was being tried for *solicitation*. It follows, therefore, that the defendant was actually and seriously prejudiced in being 10
tried for *attempted embracery*, if the second count charged solicitation.

POINT VI.

THE OPINION OF THE SUPREME COURT IS INCONSISTENT WITH AND IRRECONCILABLE WITH THE PROOFS AND THE LAW OF THE CASE.

The opinion holds (State of Case, page 46, lines 1-3) that an indictment charging merely that the defendant 20
asked C. to see certain jurors sitting on the trial of the cause to which defendant was a party and endeavor to persuade them to return a verdict in his favor, without setting out more, sufficiently charges a violation of section 16 of the Crimes Act and also sufficiently charged embracery at common law. Certainly, at common law, embracery was not commited until the embracer had actually approached and come in contact with one of the jurors, or until he as a solicitor to crime had through an agent reached one of the jury either by that agent or by 30
some means or instrumentality by the solicitor set in motion through that agent. *Citations, supra.* And likewise, under section 16, because that section is but declaratory of the common law and must therefore be given the same techinal and legal interpretation and construction as the common law. *Citations, supra.* The opinion also holds (State of Case, page 46, lines 7-11) that the Crimes Act by section 216 recognizes that there may be an

attempt to commit any of the offenses mentioned in the act, and embracery is one of them, and that there was evidence to show such attempt as charged in the second count. But section 216 uses the word "attempt" in its established common law significance without any countervailing intent that it shall be accepted or understood to have any other significance, and therefore the word "attempt" as used in section 216, and also in section 16, must be deemed employed in its known and defined common law meaning. *Citations, supra.* Therefore, the "attempt," as at common law, is not completed until an overt act, such as above outlined, has been proved. Certainly, a mere request by A. to B. that the latter shall murder or assault C., or a solicitation by A. that B. shall commit arson, or that B. shall commit burglary, without more, would not be construed to amount to an "attempt" to commit any of such crimes under section 216, merely because section 216 "recognizes that there may be an attempt to commit any of the offenses mentioned in the act, and embracery (murder, assault, arson, burglary) is one of them," as expressed in the opinion of the Supreme Court.

The opinion employs the old maxim "*ad proximum antecedens fiat relatic nisi impediatur sententia,*" but this maxim is wholly inapplicable to the case at bar because in this case we are not called upon to employ this rule of grammatical construction for the purpose of harmonizing the verdict with the indictment; but on the contrary, we must make incisive inquiry into the history and record of the entire case to determine upon what criminal charge the defendant was prosecuted and tried; and because the defendant was prosecuted and tried for *attempted embracery*, it is clear that the phrase "of attempted embracery" is not "merely descriptive" and is not a "mere descriptive surplummage" or "erroneous description" of the legal effect of the second count, but the phrase is in fact a correct designation of the second count as it was prosecuted and tried and as the Court charged the jury thereon and as the jury understood the count, as for "at-

tempted embracery." Therefore, the Supreme Court was without justification in substituting "*guilty of attempted embracery on the second count in the indictment*" for the phrase "*guilty on the second count of attempted embracery in the indictment,*" or vice versa; for no matter what the precise language was, it is, nevertheless, true that the defendant was charged, tried, convicted and sentenced for "attempted embracery."

The opinion also holds (State of Case, page 47, lines 17-22) "*A verdict of guilty under a good count should not be considered vitiated by a misdescription of the legal effect of the count, when the count itself is positively identified by number, the description is germain to the actual purport of the count, and the intent to convict thereunder is plain from the language of the verdict.*" This is good law, but inapplicable to the case at bar. If the defendant had been tried for *embracery* and the verdict had been returned in the language as in the case at bar, then this rule of law would be properly applicable, because then it could be properly said that the crime charged and prosecuted was misdescribed as to its legal effect in the language of the verdict. But in the case at bar, the case was prosecuted and tried, and the jury was charged, for *attempted embracery*, and the jury rendered its verdict in language correctly designating the crime itself, as the jury had been made to understand the crime by the trial and by the Court's charge to the jury.

The opinion holds (State of Case, page 46, lines 7-11) that the indictment and proof supported a conviction under section 216 of the Crimes Act, and subsequently the same opinion holds (State of Case, page 47, lines 32-40, and page 48, lines 1-10), that it is unnecessary to consider such proposition.

It may be that the plaintiff in error might properly be indicted and tried for *solicitation to commit the crime of embracery*, but that is no part of the case at bar.

For the reasons above mentioned it is respectfully submitted that the verdict of the Court below should be reversed, and the acquital of the defendant ordered.

Respectfully submitted,

HENRY H. WITTSTEIN,

Counsel of Plaintiff in Error.

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