Commonwealth *v.* J——.

Criminal law—Buggery—Acts of March 31, 1860, Sec. 33, and June 11, 1879—Constitutional law—Title of Act—Indictment—Attempt.

The offense specified in Sec. 33 of the Act of March 31, 1860, does not apply to an offense committed with an animal.

The Act of June 11, 1879, P. L. 148, is unconstitutional in so far as it extends Sec. 33 of the Act of March 31, 1860, to offenses committed with animals.

An indictment charging an attempt must set forth some particulars of the attempt.

Indictment for attempt to commit sodomy or buggery with a heifer. Q. S. Perry Co. Nov. T., 1898, No. 5.

Motion in arrest of judgment.

Wm. H. Kell, district attorney, for commonwealth.

J. L. Markel and *J. M. Barnett*, for defendant.

LYONS, P. J., Jan. 16, 1899.—Before the jury was sworn the defendant's counsel moved to quash the bill of indictment. This motion was overruled and the defendant directed to plead. The defendant was then, on Nov. 21, 1898, tried and convicted. A motion in arrest of judgment was then filed for the following reasons:

1. The indictment fails to charge any offense under the statute law of Pennsylvania, and the said bill concludes, "Contrary to the form of the Act of Assembly," etc.

2. The indictment charges an attempt but fails to make any allegation of facts, or to charge or disclose any details in support of the charge of an attempt whereby it may appear from the said bill prima facie whether such attempt was in fact made, as required in an indictment at common law.

The same reasons substantially were assigned in the motion to quash the indictment.

The indictment was framed under the thirty-third section of the Act of March 31, 1860, P. L. 392, Purdon, page 539, pl. 387, which reads: "If any person shall unlawfully and maliciously assault another with the intent to commit sodomy or buggery, or if any person shall wickedly and unlawfully solicit and incite, and endeavor to persuade another, to permit and suffer such person to commit sodomy or buggery with him, such person shall be guilty of a misdemeanor, and being convicted of an assault with the intent aforesaid, of

so inciting another to suffer the act of sodomy or buggery to be committed with him, shall be sentenced, etc."

It is clear that the language of this section does not cover or include the offense charged in this bill of indictment, but was intended to punish the act when committed between one man and another man or between a man and a woman.

The language, "if any person shall . . . assault another, or if any person shall . . . solicit and incite, and endeavor to persuade another to permit and suffer such person to commit sodomy or buggery with him," is not broad enough to include a "heifer" or other beast. Even a liberal construction would not include the offense when committed with an animal, and the statute is highly penal.

But it was argued that the section above referred to was enlarged and extended so as to include this offense, by the first clause of Sec. 1 of the Act of June 11, 1879, P. L. 148, Purdon, page 539, pl. 388, which declares that "the terms sodomy and buggery, as and where used in the laws of this commonwealth, shall be understood to be a carnal copulation by human beings with each other against nature res veneria in ano or with a beast." Such no doubt was the legislative intent. But the Constitution, Art. III, Sec. 6, declares, "No law shall be revived, amended or the provisions thereof extended or conferred by reference to its title only, but so much thereof as is revived, amended, extended or conferred shall be re-enacted and published at length." The Act of 1879, therefore, in so far as it enlarges the Act of 1860, would be in conflict with the above provision of the Constitution.

It is also a legislative interpretation of a statute, and is therefore an attempt to exercise judicial power and is a violation of Art. v, Sec. 1, of the Constitution of this commonwealth. This is decided in Titusville Iron Works *v.* Keystone Oil Co., 122 Pa. 627. See also East Grand Street, 121 Pa. 596. The indictment therefore cannot be sustained under the statute.

As to the second reason assigned: It was formerly held that "in cases of indictments for attempts it was not necessary to point out the specific means by which the attempt was to be consummated." See Wharton's Precedents of Indictments and Pleas, 2d ed., bottom page 719, note c. But in the 4th ed. of the same work, bottom page 598, the same author says: "The general principle was laid down that in cases of indictments for attempts it is not necessary to point out the specific means by which the attempt is to be consummated. But this

cannot be sustained. To charge a man with attempting to do a wrong is almost as loose as would be to charge him with 'designing' or 'meaning' to do the thing." While it is generally sufficient that the offense be charged substantially in the language of the statute there are many exceptions to the rule. In the 9th ed. of Wharton's Criminal Pleading and Practice, the learned author says: "It is not enough to say that the defendant 'attempted' an offense, though this is all the statute says: The particulars of the attempt must be given." See Sec. 221(3). No particulars of the attempt are set out in the indictment in this case. It is therefore too indefinite, vague and uncertain to be supported at common law: Randolph *v.* Com., 6 S. & R. 398; Mears *v.* Com., 2 Grant, 385.

The motion in arrest of judgment must therefore be sustained.

And now, Jan. 16, 1899, judgment is arrested and the defendant discharged without day.

From James W. Shull, Esq., New Bloomfield, Pa.

Wolf *v.* Crothers.

Water-course—Diversion—Injunction.

A stream of water flowing from a spring, down a natural depression in the ground, between its banks, is a water-course within the meaning of that term in law.

It is not necessary to a water-course that the water should flow constantly.

Bill in equity for an injunction for the diversion of a stream of water by the respondent from close of complainant. C. P. Washington Co., No. 983, Equity.

Parker & McIlvaine, for complainant.
Hughes & Hughes, for respondent.

TAYLOR, J., Jan. 29, 1898.—The respondent owns a tract of farming land in Blaine township, a portion of which adjoins the village of Taylorstown on the north. Running parallel with his line fence on the north is an alley at the rear of lots laid out and occupied in said village, on which lots are dwelling-houses, and stables on the rear end of same adjoining said alley. In the field of the respondent, just over the line fence from said alley, there is a spring of water on the hillside,