AN INTERESTING LAW CASE.

We publish below the decision of Chief Justice Woodward and a majority of the Supreme Court of Pennsylvania on the case of Smith vs. The Commonwealth; also, the dissenting opinion of Justice Agnew. The Court held that a solicitation to commit a felony or misdemeanor was not indictable, while the dissenting Justice affirmed the contrary. "When doctors disagree," etc. The case is of importance and interest:—

SUPREME COURT.—The following interesting opinion, touching a very delicate question, was delivered by the Chief Justice at the recent sitting of the Supreme Court at Harrisburg.

Smith vs. The Commonwealth. Certiorari to the Quarter Sessions of Clinton County. Opinion by Woodward, C. J.

An attempt to commit a misdemeanor is a misdemeanor, whether the offense is created by statute, or was an offense at common law. These were the words of Parker in the case of Rex vs. Roderick, 7 Car. and Pay., 795, delivered in the year 1837. They have been adopted by the compilers on criminal law, 1 Rup. on Crimes, 46. 1 Arch. Crim. Pleading, and Ev. P, 19 Wharton's Crim. Law, pp. 79 and 873.

Long before 1837, to wit, in 1801, it was held in the King vs. Higgins (2d Ear. and p. 5), that to solicit a servant to steal his master's goods is a misdemeanor, though it be not charged in the indictment that the servant stole the goods, or that any other act was done except the soliciting and inciting. This was the case of an unsuccessful solicitation to commit a felony, and it is authority for nothing more than that such solicitation is indictable as a misdemeanor, though the language of the judges, and especially Judge J., went so far as to intimate that such solicitation to commit a misdemeanor is indictable. "All these cases prove," said the learned judge, "that inciting another to commit a misdemeanor is itself a misdemeanor. *A fortiori*, therefore, it must be such to incite another to commit a felony."

No fault can be found with his conclusion if his premises be true, but "all these cases" to which he referred himself were cases rather of *attempts* than of mere *solicitations* to commit misdemeanor. Thus, Rex vs. Scofield, Cald., 397, was an attempt by a man to set fire to his own house; at that time the burning of one's own house being only a misdemeanor in England, but since made a felony by statute. The act done in that case was setting a lighted candle under the stairway, and the question was whether the intent was to burn the house.

And in Rex vs. Vaughan, 2 Burr, 2494, the defendant attempted to bribe the Duke of Grafton, then a Cabinet minister, to give the defendant a place in Jamaica, and it was indicted as an *attempt*. The King vs. Plympton, 2 D. Reg., 1377, was another case of attempted bribery; the offer of money to a member of a corporation for his vote.

Rex vs. Johnson, 2 Shew, 1, another of the authorities relied upon by the Judge, as in Higgins' case, was nothing less than subornation of perjury, the actual putting of money into a desk to be paid to a witness upon the event of a verdict. And such indeed was the unreported case mentioned by the Judge as having occurred before Baron Adams, at Shrewsbury, where the indictment charged an attempt to suborn one to commit perjury.

These were the cases upon which Higgins' case was ruled, and no doubt they were ample authority for the point ruled there, but do they sustain or attempt to sustain the *obiter dictum*, that merely inciting another to commit a misdemeanor *is* indictable? That depends upon another question, whether there is any distinction in law and reason between an *attempt* to commit a crime, and the *inciting* or *soliciting* of another to commit a crime?

Long before any of the above mentioned cases were ruled, it had been decided in Peirson's case, 1 Salkeld, 382, that one may be indicted for keeping a bawdy house, but a bare solicitation of chastity is not indictable, and this had passed into the text of Hawkins, cap. 74, and perhaps of other writers on criminal law. Here the distinction between attempt and solicitation is sharply drawn. Keeping a bawdy house is an organized temptation to adultery, and a preparation of all facilities for the consummation of the crime. It is an attempt, a deliberate effort, to promote the crime of the most unqualified significance; but so many equivocal words, looks, and gestures might be constrained into solicitation, that it would be difficult to define the crime. What expressions of the face or *double entendres* of the tongue are to be adjudged solicitations? What freedoms of manners amount to this crime? Is every cyprian who nods and winks at the married men she meets on the sidewalks indictable for soliciting to adultery? And could the law safely undertake to decide what recognitions in the street were chaste and what were lewd? It would be a dangerous and difficult rule of criminal law to administer.

When an act is done which unequivocally tends to crime, the law can lay hold of it, and punish it either as a consummated crime, or an attempt at crime. As, for instance, the renting of a house for purposes of prostitution, as in the Commonwealth vs. Harrington, 5 Pickering, 206; but until something has been done which may be called an overt act, it seems unreasonable that the law should be required to detect and punish the criminal intent. This Court said so with great emphasis in the case of Shannon and Nugent vs. Commonwealth, 2 H., 226, when it was held that a conspiracy between a man and woman to commit an adultery was not indictable. Conspiracy to commit adultery looks much more criminal than unsuccessful solicitation. In Regina vs. Martin, 9 Car. & Payne, 215, Justice Patterson hit the distinction when he said, "It is perfectly clear that every attempt, not every *intention*, to commit a misdemeanor is a misdemeanor." To the same effect are the cases collected in Wharton's Crim. Law, 873, which have been decided under the statutes that exist in several States for the punishment of attempts to commit crime.

The attempt can only be made by an actual, ineffectual deed done in pursuance of and furtherance of the design to commit the offense. I would have supposed that the case of Rex vs. Butler, 6 Car. & Payne, 368, would have fallen within this rule, and yet it was held there that a count was not good, although it was clearly proved that the defendant did solicit, by the most overt and almost forcible acts, the plaintiff to commit adultery.* This was soliciting and persuading with overt acts that clearly manifested the guilty intent, and if solicitation with such indubitable acts be not indictable, it is quite necessary to conclude that mere solicitation, without any overt acts, is not indictable. It is easy to say that solicitation is an attempt, but a study of the cases will show that every case of attempt has included something more than mere solicitation, and the slightest reflection will persuade any observant man that a rule of law which should make mere solicitation to fornication or adultery indictable, would be an impracticable rule—one that, in the present usages and manners of society would lead to great abuses and oppressions. The morality of the law cannot undertake to regulate the thoughts and intents of the heart. The best it can do is to punish open acts of lewdness, and repress indecent assaults. For the rest it must trust the people to the refining influences of Christian education.

It is time now to turn to the case upon record. It is an indictment in two counts, both of which charge that the defendant did "solicit, entice, and endeavor to persuade" a married woman to commit fornication and adultery." These are the efficient words, and contain the substance of the charge. There are plenty of adverbs added, but they implied only legal inferences from what is charged. In the second count the offense is laid as "feloniously" done; but as adultery, even when consummated, has never been treated as a felony in Pennsylvania, it is nonsense to rank solicitation to the crime higher than the crime itself. If the conviction was sustained, this word would have to be rejected as a surplusage. It is observable that no assault or overt act is charged, no writing or picture or indecent exposure of person is alleged; inviting, indeed, is suggested, but mere solicitation. And the manner of this is not hinted. It may have been by direct request, by innuendo, by argument, founded, as has sometimes happened, upon Scriptural texts and analogies, or it may have been by gay and frivolous anecdote or appeal. Possibly nothing was said, but only impure thoughts insinuated by looks or gestures. What evidence shall be sufficient to sustain such a charge? Nothing equivalent to an attempt is alleged. Of course, the evidence would fall short of an attempt, and what would it consist of? We have no precedent for such a case, and as precedents are evidence of the law, the lack of them implies that the law has never undertaken to redress such an indefinite offense as is charged here. The authorities to which I have adverted yield no support to the indictment, unless we confound legal distinctions and treat everything that may be considered a solicitation of chastity as an attempt upon chastity. In a high moral sense it may be true that solicitation is attempt, but in a legal sense it is not. And the law is as likely to be distorted by pressing it into extravagant reforms of the manners of men and women, as it is by too loose an administration.

The diligence of counsel has succeeded in finding but one case, that of State vs. Avery, 2 Conn. R., 267, that goes to support the indictment. That was an information in the nature of an indictment for writing and sending to a married woman a scandalous letter, inviting her to an assignation for adulterous purposes. The Court sustained the prosecution as for a libel, but added, *arguendo*, that if it were not a libel it was not indictable as a solicitation to commit a felony, and for this Higgins' case was cited and relied upon. By the Connecticut statutes adultery was a felony, and was in that case. That this in principle was Higgins' case over again, and is distinguishable from the solicitation charged here, which was not to commit a felony. On another ground it is distinguishable also, for the sending of the letter was an overt act, which might be considered sufficient to raise the offense to an attempt to debauch a married woman, which we agree is indictable.

Various forms of malicious mischief have been held indictable in Pennsylvania, and gross and obscene language, publicly uttered in the streets, has been indicted, but in all such cases the overt act, not the guilty intent, constituted the offense.

Nothing being alleged in this case which can be thought to amount to an attempt upon the chastity of the wife of the prosecutor, the judgment is reversed.

Smith vs. Commonwealth. Agnew, J.—To solicit a wife to commit adultery, and, consequently, to attempt to corrupt morals, contemn religion, wrong her husband, and endanger the peace of society, is said not to be an indictable offense. I am unwilling to assert this in the light of the present age to a people professing Christianity, and recognizing the Decalogue as the express command of God.

To me it proves nothing that adultery was not punishable in England. In 1650 we are informed by Sir William Blackstone (4 Com., p. 64) that this offense was made capital. "But at the Restoration, when men, from an abhorrence of the hypocrisy of the late times, fell into the contrary extreme of licentiousness, it was not thought proper to renew a law of such unfashionable rigor. And these offenses have been ever since left to the feeble coercion of the spiritual court, according to the rules of the common law—a law which has treated the offense of incontinency, nay, even adultery itself, with a good degree of tenderness and lenity, owing perhaps to the constrained celibacy of its first compilers. The temporal courts take no cognizance of the crime of adultery otherwise than as a private injury." But such a system has no application in a State whose founder was unwilling to imitate the vices of a Court from which he withdrew, and among a people whose moral sense, so early as the year 1705, declared that, for the preservation of virtue, chastity, and purity, and for the prevention of the heinous sin of adultery, any one thereof convicted should receive on his bare back twenty-one lashes, well laid on, at the common whipping-post, and suffer imprisonment for one whole year at hard labor. Lord Mansfield, speaking of offenses of incontinence, in Rex v. Deloval and Burrows, 1438, said: "They fall properly under the jurisdiction of the Ecclesiastical Court, and are *appropriated* to it. But if you except these appropriated cases, this Court is the *custos morum* of the people, and has the superintendency of offenses *contra bonos mores*." To exhibit an obscene picture is indictable because it is contrary to good morals; but is an actual proposition of lust to a married woman less injurious or less inciting to a prurient desire? The English law, and the licentious Court of the Second Charles, are not, therefore, the pure fountains from which we should draw the living principles of our laws as to this offense. To do justice to society and to ourselves as the custodians of public morals, as C. J. Tilghman also termed the judges of this Court, we must resort to our own legislation, and the general principles of the common law, instead of the exception introduced by a profligate monarch and a system of jurisprudence differing in this special case from our own.

To solicit a married woman's chastity is to counsel and to endeavor to procure the commission of an offense indictable at law, and forbidden by the Divine command. In the perpetration of a felony, the adviser would be an accessory before the fact, and in the commission of a misdemeanor he would be a principal. To steal a few trifling articles, to touch another rudely, and to ridicule him in writing, are public offenses because of their tendency. But what greater injury are these than the loathsome proposal of lust to the mind of a sensitive woman? If we protect a virtuous wife, faithful to her marriage vow, and perhaps the mother of children, from such indignity, it does not follow that we must become the Quixotic defenders of a strumpet, who hangs out the flag of surrender over the abandoned citadel of virtue.

Nor should human infirmity look upon the offense as venial. If such solicitation be left only to the lash of society as its punishment, what protection has a chaste woman against one who pursues her with his importunities? If his wanton proposal be no breach of the peace, she can have no bail to keep the peace. If, in her own vindication, she takes the law into her hands, and with it the life of her persecutor, who would pronounce her offense more than manslaughter? The provocation could be no greater, and passion corresponding, she must be acquitted of malice prepense. Thus a human life might be lost from a want of protection. But a thinking woman is more apt to fly to her husband for relief; and what husband would fail to defend her, and castigate her annoyer? A libel has, in its tendency to a breach of the peace, no comparison to an insult of this kind. The consequences are also *contra bonos mores*. To suffer such solicitations is to fan the flames of lust; furnishing it an opportunity gradually to undermine the citadel of virtue; and giving to vice a mien which is hideous at first, but, tolerated, at last attracts.

On the general principles of the common law it is a public offense. Whatever amounts to a public wrong (says McKean, C. J.) may be made the subject of an indictment. Respublica vs. Tenscher, 1 Dallas, 338. He then instances the poisoning of chickens, cheating with false dice, fraudulently tearing a promissary note, breaking windows by throwing stones, and decides that killing a horse wilfully and wantonly, an act in its nature but a trespass, is indictable as a public wrong. The Commonwealth vs. Taylor, 3 Bruny, 277, was an indictment for maliciously and *secretly* entering a house, and when in, making a great noise, which frighiened a married woman and caused her to miscarry. The act was held to be indictable by reason of its tendency. C. J. Tilghman says:—"There is another principle upon which it appeared to me that the indictment may be supported. It is not necessary there should be actual force or violence to constitute an indictable offense. Acts injurious to private persons, *which tend to excite violent resentment*, and thus produce fighting and disturbance of the peace of society, are themselves indictable." Hence, a libel of even a deceased person is an offense against the public, because it may stir up the passions of the living and produce acts of revenge. This language fits the case before us precisely; for what is more likely to produce resentment than an insulting proposition to a virtuous wife?

Eavesdroppers who listen under walls, windows, and eaves of houses to catch and detail conversations to the prejudice of others, are indictable at common law. So is a common scold, as this Court has recently determined; and yet these cases bear no proportion to the one before us. Exhibiting an obscene picture is indictable as *contra bonos mores*, though not charged to be done publicly as a common nuisance: Commonwealth vs. Sharpless, 2 S. & R., 91. Joseph Barker was charged with collecting crowds in the streets of Pittsburg, to whom he spoke scandalous and infamous words representing men and women in indecent postures. This Court held that count to be good, though it did not charge a public nuisance, Lewis, C. J., remarking that it would be a reproach on the common law if such acts were permitted, expressions very applicable to the case now before us: 7 Haines, 412. In the Commonwealth vs. Trundell, 2 Grant, 510, Thompson, J., held that running the street cars on Sunday, to the disturbance of the "peace of the Sabbath," as he well expresses it, is a breach of the peace. In principle it is a step downward from this case to that. Now if in Pennsylvania all these have been held to be indictable offenses, it is certainly a public wrong of greater magnitude and worse tendency to solicit the prostitution of a virtuous married woman, to incite her to commit adultery, an offense which has been indictable in this State for more than one hundred and sixty years. To be solicitous on account of the debauch of public morals, is to be overnice. The modesty which does not shrink from the disgusting details of a case of *crim con.* or of fornication and bastardy, cannot be greatly shocked at the proposal only.

It is said there will be difficulty of proof, and Courts will be called upon to punish for a wink or a nod, or some other obscene invitation to criminal intercourse. The argument furnishes a dispensation to all crimes of a secret or uncertain character. In punishing for a libel, no difficulty is set up because the allusions are purposely veiled. Who and what is meant are often questions for a jury. Nor do I think such an argument just to those who are the custodians of public morals, which invites them deliberately to close their eyes to plain and palpable proposals to lust, because in some instances their visions cannot detect an invitation in disguise. Besides, there is a full protection against silly and pretended prosecutions, in the power to visit the unwise and the malicious with penalty of all the costs.

The English case, which is so zealously attacked in the opinion of the majority, and seems to bear against all the fine powers of the intellect which prepared the opinion to overturn its force, was a surprise upon me, for I had not expected such aid from a country which ignores the offense of adultery itself in her civil Courts. It only discovers the fact that even their judges are compelled by the inherent indignity of the proposal to advance towards its punishment. But the Connecticut case, of the State vs. Avery, 7 Conn., is an American authority and precedent which, it seems to me, should be adopted.

It is asserted that mere words are not indictable, and nothing short of an attempt is indictable. This I conceive is a mistake. To approach a married woman and to propose adultery, is an act quite as much as to exhibit an obscene picture, or to listen under the eaves of a house, or to spout out vulgar and indecent language to a gaping crowd. Indeed, it is as gross an act as can be well imagined. To say that it requires the touch of the would-be seducer to require legal visitation, is to stick in the mud of pollution, and to expose a virtuous woman to their abuse is as abhorrent and wounding to her pure spirit as the mere touch of her pursuer.

I would affirm the judgment.

*We have taken the liberty of altering the reading of the opinion of the learned Justice, in the case cited, as the original language, although suited for legal hearing, is not qualified for ears polite.

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LEGAL NOTICES.

IN THE ORPHANS' COURT FOR THE CITY AND COUNTY OF PHILADELPHIA.

Estate of WILLIAM DUNCAN, Deceased.

The Auditor appointed by the Court to audit, settle, and adjust the account of GEORGE W. DUNCAN, WILLIAM D. MOULDER, ANNA C. DUNCAN, JAMES J. DUNCAN, and JOHN G. FORD, Executors of the last will and testament of WILLIAM DUNCAN, deceased, and to report distribution of the balance in the hands of the accountants, will meet the parties interested for the purposes of his appointment, on WEDNESDAY, May 29, 1867, at 3 o'clock P. M., at his office, first floor, first room back, No. 22 S. THIRD St., in the City of Philadelphia. [5 17 fmw5t

IN THE ORPHANS' COURT FOR THE CITY AND COUNTY OF PHILADELPHIA.

Estate of SAMUEL McILREE, deceased.

The Auditor appointed by the Court to audit, settle, and adjust the account of HORACE FRITZ, Administrator of the estate of SAMUEL McILREE, deceased, and to report distribution of the balance in the hands of the accountant, will meet the parties interested for the purpose of his appointment on MONDAY, June 3, 1867, at 4 o'clock P. M., at his Office, No. 423 WALNUT Street, in the city of Philadelphia. THOMAS J. WORRELL,

5 22 wfm5t Auditor.

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