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v. Rowell[27] involves the same technicality and the judgment of conviction was set aside. However, the judgment of reversal has been vacated and the case is remanded to the United States Court of Appeals for further consideration in light of *United States v. Buie, supra.* On the other hand, the majority seem to hold that the presentation of marijuana to governmental authorities for inspection when it is being imported into the United States does not violate one's privilege against self incrimination even without the required written order form and without payment of the transfer tax.

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ATTEMPTING TO PROCURE AN ABORTION

> Whoever, with intent to procure the miscarriage of any woman, unlawfully administers to her any poison, drug or substance, or unlawfully uses any instrument, or other means, with the like intent, is guilty of felony, and upon conviction thereof, shall be sentenced to pay a fine not exceeding three thousand dollars ($3,000), or undergo imprisonment by separate or solitary confinement at labor not exceeding five (5) years, or both.[1]

Commonwealth v. Sierakowski and *Commonwealth v. Williard*[2] particularly noted the aforementioned Pennsylvania statute's dissemination of the acts which constitute an attempt to procure an abortion; a factual stipulation contained within the language of this statute is that "the mere attempt per se is the veritable crime—the actual abortion is not the crime." The Pennsylvania Superior Court, in deciding both of these cases, adjudicated it unnecessary that an actual abortion occur or that the woman actually be pregnant. Simply stated, the area of the crime lies within the attempt to procure an abortion.

[27] 415 F.2d 300 (1969).

[1] Penn. Penal Code, P.L. 872, 18 P.S. § 4718 (June 1939). *See* 39 Temp. L.Q. 33 (1965).

[2] Com. v. Sierakowski, 154 Pa. Super. 321, 35 A.2d 790 (1943); Com. v. Williard, 179 Pa. Super. 368, 116 A.2d 751 (1955). Com. v. Adams (Pa. 1961), 11 Bucks Co. L. Rep. 233 (1962).

> Logically speaking, the crime of abortion is the wilful bringing about of the miscarriage of a woman without justification or excuse. Many of the modern statutes punish, as a substantive offense, an attempt to cause such an unlawful miscarriage. This offense is sometimes called very properly, an 'attempt to produce an abortion'; but in some statutes this attempt itself is called 'abortion.'[3]

CAUSING DEATH BY ABORTION

Section 719 of the Pennsylvania Penal Code of 1939, P.L. 872, provides:

> Whoever unlawfully administers to any woman, pregnant or quick with child, or supposed and believed to be pregnant or quick with child, any drug, poison or other substance, or unlawfully uses any instrument or other means, with the intent to procure the miscarriage of such woman, resulting in the death of such woman, or any child with which she may be quick, is guilty of felony, and upon conviction thereof, shall be sentenced to pay a fine not exceeding six thousand dollars ($6,000), or undergo imprisonment by separate or solitary confinement at labor not exceeding ten (10) years, or both.[4]

This section distinctly manifests that it is not a misdemeanor to cause death by an abortion but rather it is a felony, whether or not the woman upon whom the abortion was procured did or did not subsequently expire; death is not an essential component of the crime, it is merely considered for the purpose of determining the applicable sentence to be imposed.[5]

Although there appears to be no existing specific statute making the crime of abortion a felony, the crime is hermetically compressed between that of an attempt to procure an abortion,[6] which is a felony, and that of causing death in/by the performance of an abortion,[7] which is also a felony, and is, therefore, itself a felony.[8] In its decision in *Commonwealth v. Adams*,[9] the Pennsylvania Court emphatically adjudicated that "It is the attempt to produce an abortion which constitutes the crime and there

[3] PERKINS, Criminal Law, p. 140 (2d ed. 1969).
[4] 18 P.S. § 4719.
[5] Com. v. Trombetta, 131 Pa. Super. 489, 200 A. 107 (1938); Com. v. Sierakowski, *supra*. 18 P.S. §§ 4718, 4719.
[6] *See* note 4, *supra*.
[7] 18 P.S. § 4719.
[8] Com. v. Cohen, 31 Pa. D. & C. 249 (1937), 21 Westmoreland L.J. 198 (1936-1938).
[9] Com. v. Adams, *supra*.

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

Dying Declarations in Cases of Abortion

With respect to "dying declarations" in abortion cases, section 1 of the Pennsylvania Penal Code of June 26, 1895, P.L. 387, provides the following:

> The *ante-mortem* statements of any woman, who shall hereafter die in consequence of any criminal acts producing or intended to produce a miscarriage of such woman, as to the causes of her injuries shall be competent evidence on the trial of any persons charged with the commission of such injuries, with like effect and under like limitations as apply to dying declarations in prosecutions for felonious homicide: Provided, however, that before such statement shall be submitted to the jury as evidence the commonwealth shall, by competent and satisfactory evidence, prove that such woman was of sound mind at the time such *ante-mortem* statements were made: And provided further, That no conviction shall be had upon the uncorroborated declaration of such woman.[10]

An abortion causing death was a homicide at common law. "It is now a rule of almost universal application that dying declarations are admissible only in cases of felonious homicide, where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declarations."[11] In *Commonwealth v. Bruce*, 1884[12] evidence of the dying declaration *in extremis* which was made by the deceased, whose death ensued from an abortion, was admissible because the court held that under the existing statute the death of the woman was an essential constituent of the crime itself. One year later, the court, overruling its previous holdings and in deciding *Railing v. Commonwealth*,[13] stated that the dying declarations of the victim of an abortion were not admissible in evidence even though the victim should subsequently die from such criminal operation; an addition to such a peculiar decision the court also decided that the final result of the statutory offense of causing death by abortion was not homicide. But on June 26, 1895, P.L. 387 was enacted,

[10] 19 P.S. § 583.
[11] 49 A.L.R. 1284.
[12] Com. v. Bruce, 16 Phila. 510 (Pa. 1884). *See also* 49 A.L.R. 1286.
[13] Railing v. Commonwealth, 110 Pa. 100, 1 A. 314, 6 Am. Crim. Rep. 7 (1885). *See also* 49 A.L.R. 1286.

making "dying declarations competent evidence in prosecutions for criminal abortions, when the subject shall die in consequence of such unlawful acts."[14] This statute was later enforced in *Commonwealth v. Keene*[15] and the constitutionality of the statute was later upheld by the decision reached in *Commonwealth v. Winkelman*[16] in which the court said:

> Dying declarations are only admissible when made by a person who is under the influence of an impression that her dissolution is impending. This is a preliminary fact to be proved by the party offering them in evidence, and the proof offered for this preliminary purpose is addressed in the first instance to the conscience of the court. It need not be proved that the declarant stated in so many words that her statement was made under a sense of impending death. It is enough if it appears satisfactorily in any legitimate mode that it was made under that sanction. The belief of a sudden dissolution is the test by which the competency of dying declarations is to be measured.

In *Commonwealth v. Heffelfinger*, 1923, and *Commonwealth v. Shearer*, 1923, the court[17] decidedly affirmed the validity and constitutionality of the 1895 statute by indicatively stating that the statute further provided that there could be no conviction unless the dying declaration was corroborated. In *Commonwealth v. Antonini*, 1949,[18] the court declared that dying declarations were only admissible when they were made by the victim of a homicide for which the defendant was on trial. In *Commonwealth v. Zimmerman*, 1969,[19] it was held that a person's guilt of performing an illegal abortion could not be established by evincing circumstantial evidence.

As attested to by Pennsylvania statutes,[20] abortion per se is not readily perceived as a criminal offense. The aggregate breach of law is (1) attempting to procure an abortion and (2) causing death by abortion; evidence of a mere "attempt" suffices the former requisite, yet "death" does not represent an essential constituent of the latter element. The crime

[14] *See* note 10, *supra*.

[15] Com. v. Keene, 7 Pa. Super. 293 (1898).

[16] Com. v. Winkelman, 12 Pa. Super. 497 (1900); Com. v. Kline, 66 Pa. Super. 285. *See generally* 33 Lanc. L. Rev. 299 (Pa. 1917).

[17] Com. v. Heffelfinger, 82 Pa. Super. 351 (1923); Com. v. Shearer, 82 Pa. Super. 355 (1923). *See* 69 Pa. D. & C. 531; 49 A.L.R. 1286; 167 A.L.R. 171; Com. v. Thomas, 94 Pa. Super. 353 (1928) (concurring opinion); 91 A.L.R. 561.

[18] Com. v. Antonini, 165 Pa. Super. 501, 69 A.2d 436 (1949). *See* 4 A.L.R.3d 683.

[19] Com. v. Zimmerman, 214 Pa. Super. 61, 251 A.2d 819 (1969).

[20] 18 P.S. §§ 4718, 4719.

of abortion, in the absence of a statute to the contrary, is constricted within the hermetic fusion of these two components.

In the Commonwealth of Pennsylvania, as an exception to the hearsay rule, dying declarations, made by the homicide victim of a criminal abortion for which the defending party is on trial, are admissible evidence. However, under a statutory mandate,[21] the courts are specifically directed not to otherwise grant a conviction if such dying declarations are uncorroborated. The test availed in determining the competency of dying declarations, provable by any legitimate mode—such as the declarant's lack of mental incompetency, is the declarant's "belief" of an impending dissolution.

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[21] 19 P.S. § 583.