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IS AN ATTEMPT TO OBTAIN MONEY UNDER FALSE PRETENSES A COMMON-LOW CRIME?

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In the case of *People v. Dolph*[1], it was decided by the Supreme Court that a common law crime of England, unknown before the year 1607, is not a crime in Colorado. Dr. H. C. Dolph, Denver city councilman, was charged by information with the crime of attempting to obtain money by false pretenses and of other crimes not herein discussed. The people presented evidence to show that the defendant held himself out to Aziel Stein, complaining witness, as being in a position to either increase or diminish the possibility of a favorable reception by the Manager of Safety of a liquor license application submitted by the owners of the Continental Drug Store. Dolph approached Stein and offered his good offices in exchange for a small gift. The complaining witness, father of one of the owners of the drug store, contacted public authorities and arranged for representatives of the District Attorney's office to be present when he exchanged a gift of $500 for Dr. Dolph's promised good offices. After the money was handed to the defendant, he was immediately arrested by representatives of the District Attorney's office. Defendant was acquitted on a motion for a directed verdict.

The Supreme Court affirmed the judgment of dismissal. The principal issue was whether there existed in Colorado a common law crime of an attempt to obtain money under false pretences. It was contended by the defense that such a common law crime must have existed in England by 1607 in order for the defendant to be criminally liable, because the Colorado constitution[2] adopted only the English common law which existed in England as of 1607. It was urged by the People, first, that a general doctrine of criminal attempts existed in Colorado common law; second, that the crime of an attempt to obtain money by false pretences existed before 1607 in English common law; and third, that assuming that such a crime did not exist before the year 1607 the Colorado court was not bound to look only to decisions rendered prior to the year 1607. The people contended that the common law was not static and that it continued to change with passing years. Thus it was urged upon the court that it could look to subsequent English decisions for guidance.

In support of its contention that a general doctrine of criminal attempt exists in Colorado, the People cited the dictum in the majority opinion of *Compton v. People* which declared that: "An information necessarily charges an attempt to commit such a

[1] The decision in this case was handed down on December 17, 1951.
[2] '35 C.S.A., 159, Sec.1.

crime. It is admitted that under the common law, an attempt to commit a crime is equally indictable as a consumated crime."[3] This view was not accepted by the Colorado Supreme Court. The early case of *Chilcott v. Hart*[4] embodied the view that the common law was flexible, dynamic, and constantly changing. The court said in this case that:

> Since this court was first constituted, it has been enforcing the common law of England, so far as applicable and of a general nature, and in ascertaining what the common law is has repeatedly consulted, and referred with approval to, the decisions of the English courts rendered since, as well as prior to the year 1607, *without inquiring whether the doctrine of the cases subsequent to that date differed from the common law as found in the decisions prior thereto.*[5] (Italics added)

It should be noted, however, that the *Chilcott* case was concerned only with an estate matter. It remained for the court to determine whether this broad doctrine should be extended to encompass criminal law. Had the court elected to extend the effect of the *Chilcott* case to criminal law, it would have found that a general doctrine of criminal attempt existed in England in about the year 1784.

THE ORIGIN OF THE DOCTRINE

There is a considerable conflict of authority among text writers as to the date of birth of the doctrine of criminal attempt in England. Coke and Staunford cite a few cases to support their contention that such a doctrine was first evolved in the latter part of the fourteenth century.[6] The decisions in these cases were generally based on mere intent to do the deed. No heed was paid to the absence of any act designed by the actor to implement this intent. The intent was sufficient. Reeves and Pollock and Maitland concur in the view that this doctrine had fallen into disrepute by 1500.[7] The last two authors go further than Reeves and declare that "Ancient law has as a general rule no punishment for those who have tried to do harm but have not done it."[8]

Professor Sayre's monumental treatment of this doctrine rejects the date picked by Coke and Staunford. He places the birth of this doctrine in the year 1784, when Lord Mansfield announced in *Rex v. Scofield* the first clear formulation of a doctrine of criminal attempt.[9] In this case the court held that an attempt to burn a house, even though frustrated before damage is done, is

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[3] 84 Colorado 111 (1928).
[4] 23 Colorado 40 (1896).
[5] 23 Colorado 47.
[6] Staunford, *Pleas of the Crown* (1557), p. 27, and Coke, *Third Institute* 69 (1644) as cited by Francis Sayre, *"The Doctrine of Criminal Attempt,"* 41 Harvard Law Review 622-23 (1928).
[7] 3 Reeves *History of English Law,* (2nd Ed.) 413; 2 Pollock and Maitland, *History of English Law,* (2nd Ed. 1923) 508.
[8] Pollock and Maitland, *supra,* N. 7, footnote 4, pp. 508-09.
[9] Sayre, *supra,* N. 6, pp. 822-23.

criminally punishable. Lord Mansfield pointed out that bare intention is not sufficient to constitute a criminal offense, yet when this malicious and unlawful intent is coupled with an act designed to further this intent, the act becomes criminal and punishable. The doctrine of criminal attempt was firmly established by the year 1837 so that Baron Parke was able to declare in *Rex v. Roderick* that "an attempt to commit a misdemeanor is a misdemeanor, whether the offense is created by statute, or was an offense at common law."[10] The better authority seems to point to the conclusion that a doctrine of criminal attempt did not exist as a part of the English common law through the year 1607.

In concluding, it is clear that the Colorado court has not chosen to follow the lead of the English courts. No new common law crimes will be added to that body of English common law which was adopted as it existed in 1607. The court seems to be following the trend toward abolition of common law crimes completely, which has been accomplished by leglislative act in several states. The court indicates that only civil aspects of the common law will continue to be dynamic and constantly changing.

THE TAXPAYER'S MOTIVE

VICTORIA M. DOWNS *

Visintainer v. The Commissioner of Internal Revenue [1] is a tenth circuit case decided last March. That an equitable result was reached, is indisputable, but the successful outcome seems to have been reached despite, rather than because of, the application by the court of an anomalous philosophy presently rampant in the realm of taxation. Legal concepts when interpreted in tax contexts are sometimes metamorphosed to such an extent that although they may bear the same nomenclature as in other fields of the law, they are opposed in essence. By interpolating the phrase, "for tax purposes" the courts supplant time honored principles and precedents, and such concepts as "gifts", "trusts", "corporations", and "partnerships" may assume entirely new definitions. Nor are their tax-wise meanings necessarily consistent with each other, for the standard which guides the courts is not always an objective one, but is dependent on the taxpayer's subjective attitude, labeled by the court as his "motive". Such relativism in the application of justice is contrary to the tenets of a system, the essence of which is a government by laws not subject to change in each distinct context.

In the *Visintainer* case, the taxpayer, Louis Visintainer, brought petition against the Commissioner of Internal Revenue to have reviewed a decision of the Tax Court of the United States [2] approving an income tax deficiency for the period January 1 to

[10] 7 C&P 795, 173 Eng. Rep. 347 (1837).

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[1] 187 F. 2d 519 (1951).

[2] 13 T.C. 805 (1951).