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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

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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).

October 31, 1942, and for the fiscal years ending October 31, 1944 and 1945.

Visintainer owned a large ranch, and in October, 1942, gave five hundred ewes with lambs to each of his four children. With the children's assistance he branded their initials on the sheep in oil paint, and he then executed bills of sale and listed the sheep in the names of the children in the records of the tax assessor. Visintainer also made gift-tax returns to the United States and to the state of Colorado, and subsequently paid the taxes. The children's sheep were left to run with Visintainer's herd. After shearing, the wool of the children's sheep was not separated from that of Visintainer's own sheep. Although the children frequently discussed their sheep, their profits and their losses, Visintainer did all the work in connection with them, including the sale of the sheep, and of the wool, and the purchase of the supplies. Except in the case of the oldest child, no separate bank accounts were kept for the children, but some of the children's money was invested in government bonds in their names. As they were in school, the children never worked in on the ranch, except for the son who assumed some managerial duties when he had vacation from his schooling.

The issue: Was the income from the children's sheep taxable to Visintainer despite his attempt to transfer them to the children.

MOTIVES OF TAXPAYER QUESTIONED

The court found that all the elements ordinarily sufficient to constitute a gift in the eyes of the law were present. It did not, however, bring its decision to a close at that point, but deemed it incumbent upon itself to find that the taxpayer's frame of mind was the proper one, that is, *that his motive was not solely the avoidance of taxes.* The court looked further than to the external ingredients normally ample as prerequisites of a gift, and added a strictly subjective element, the proper motive of the taxpayer, or at least the lack of an improper one. It succeeded in finding this nebulous factor extant to the appropriate degree:

> The case should be decided upon the importance and reasonable construction of the arrangement rather than upon the failure to move the sheep from the ranch and supervision of the taxpayer and the failure to deposit in separate bank accounts of the children the revenues derived from the operation of the sheep. Considered in the light of all the facts and circumstances, *we fail to find in the transaction the conventional badges of a device to evade income taxes.* The facts and circumstances negate the view that the gifts were merely a colorable subterfuge to reduce income taxes. To say that the gifts were ineffective for income tax purposes would be the equivalent of holding that a father is disenabled to make a gift to

his minor child which is effective in point of tax consequences if he retains or subsequently exercises any control or management of the property or fruits therefrom solely for the benefit of the child. Neither the letter nor the spirit of revenue legislation extends its reach that far.

A fifth circuit case, *Alexander et al. v. Commissioner of Internal Revenue,*[3] decided subsequent to the *Visintainer* case, presented very nearly identical facts. The court reached the same result, though by a different analysis and without reference to the motives of the taxpayer. The decision was a reversal of the Tax Court's ruling, the substance of which was that in reaching its decision the Tax Court too narrowly interpreted the rule stated in *Lucas v. Earl*[4] that income is taxable to him who earns, losing sight of the principle that income may be "earned" not only by individual personal effort, but also by the employment of invested capital, which may be managed by another person for the benefit of the owner; and that when the parties are acting in good faith, there is no objection inherent in the fact that the owner and manager are members of the same family.

TAX THE TREE AND NOT THE FRUIT

In *Lucas v. Earl,* the focal point of the discussion in the *Alexander* case, the taxpayer and his wife made a contract under which each took half of all the earnings the other would receive. Although the contract was declared to be a perfectly legal one for tax purposes, as for any other, the decision said that the revenue act places the tax upon the tree that really bears the fruit, and what happens subsequently to the fruit is of no consequence in determining who is taxable, so the husband was taxed on his entire earnings.

The *Alexander* case, then, was decided on the narrow point of whether the child or the father was the true earner. The court decided that the child's capital which was given him by his father in order to buy the livestock, "earned" the taxable income.

The doctrine that the court must find a sufficiently lofty motive in every transaction where tax questions are concerned, and that the transaction is not *bona fide* if it is for the sole purpose of avoiding taxes, has many facets and has wended its way into various linguistic forms. One of the favorite exercises of the courts when thinking in terms of taxes is to "look through the form to the substance." Such perspicacity is thoroughly warranted when the court is regarding the substance of the transaction as distinguished from the nomenclature given it by the parties. However, the distinction between form and substance seems invalid when it is said that the substance is incompatible with the form because the motive is not the usual one but is for the purpose of lower taxes.

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[3] 190 F. 2d 153 (1951).
[4] 281 C.S. 111 (1930).

In *Commissioner v. Court Holding Co.*[5] the court found that the motive to achieve lower taxes rendered the transaction in question one merely formal without *bona fide* substance. The case embodies the fallacy of the *Visintainer* case. The *Court Holding Co.* case deals with an attempt to dissolve a corporation before sale of its assets to avoid the tax to the corporation.

In essence, the court said that although the sale of assets would be valid for other purposes, it is not valid when tainted with "the conventional badges of a device to evade income taxes" described in the *Visintainer* case. An answer to this specious argument concerning motives is contained in *United States v. Cumberland Public Service Co.*,[6] a case whose facts resemble those of the *Court Holding Company case.* The court said:

> Whatever the motive and however relevant it may be in determining if the action was real or a sham, shares of physical properties by shareholders following a genuine liquidation distribution cannot be attributed to the corporation for taxation purposes.

By the same taken, it may be asked why the court in the *Visintainer* case considered whether the gifts which were gifts in fact, were or were not "a subterfuge to reduce income taxes."

INDEPENDENT PURPOSE DOCTRINE

Another sophistic ramification of the same basic theory, that transactions are invalid if the motives behind them are the reduction of taxes, is known as the Independent Purpose Doctrine. Its scope may best be illustrated by the case of *Gregory v. Helvering.*[7] There, the court said that the taxpayer's purpose was to pay herself a stock dividend to avoid taxes, and that since she had no "independent purpose" other than the avoidance of taxes, such would not be countenanced. The court came to this decision in spite of the fact that the taxpayer had followed the Revenue Act, Section 112g to the letter. As owner of all the stock of the United Mortgage Corporation, which in turn held a thousand shares of the Monitor Securities Corporation, she organized a third corporation, the Averill Corporation, which took the shares of the Monitor Corporation, and was subsequently dissolved. All its assets went to the taxpayer who sold them, believing she would diminish her income taxes. The court declared the transactions ineffective for tax purposes.

CONCLUSION

How far the courts will go in such subjective examinations to determine the taxpayer's state of mind, it is hard to say. At any rate, in its changed role as psychologist from that of judge, the court necessarily has departed from what was once stated as a truism, "For law we have a measure, know what to trust to." To a taxpayer, like Visintainer, no measure exists.

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[5] 324 U.S. 331 (1945).
[6] 338 U.S. 451 (1950).
[7] 203 U.S. 465 (1935).