

In the third part of Coke's *Institutes* (a treatise upon the pleas of the Crown) we find the axiom in precisely the same words as we have it to-day. At p. 10, chapter 1, entitled "Of High Treason," there is the following passage commenting upon Sir John Oldcastle's insurrection in the reign of Henry VIII.:—"It was specially found that divers of the King's subjects did minister and yield victuals to Sir John Oldcastle, knight, and others, being in open war against the King, and that they were in company with them in open war; but all this was found to be pro timore mortis, et quod recesserunt, quam cito potuerunt, and it was adjudged to be no treason because it was for fear of death. Et actus non facit reum, nisi mens sit rea."

Again, in chapter 47, entitled "Of Larceny or Theft at Common Law," we read: "First, it must be felonious, id est, cum animo furandi, as hath been said. Actus non facit reum, nisi mens sit rea" (p. 107).

So it is established that the emergence of the maxim from the writings of the ecclesiastics and canonists into the modern jurisprudence of England was through the door of Coke's *Institutes*. Let us trace its development as a principle of the law of crimes.

In Hale's *Hist. Plac. Cor.* (q), published first in the year 1736, the doctrine of criminal intent is thus enunciated: "The consent of the will is that which renders human actions either commendable or culpable; as where there is no law, there is no transgression, so, regularly, where there is no will to commit an offence, there can be no transgression or just reason to incur the penalty or sanction of that law instituted for the punishment of crimes or offences" (r).

(q) Vol. 1, p. 15.

(r) There is an obvious confusion of terms in this passage. The author means by the phrases "consent of the will" and "will to commit" simply "mens rea" or "guilty intent." The distinction between "will" and "intention" as elements of crime is well made in Harris' *Criminal Law*, 10th ed., p. 10. Sir James Fitzjames Stephen argues the distinction at length in his *Hist. Crim. Law*, vol. II, chap. 18. The following passage from p. 100 is a succinct statement of his conception of the elements of a voluntary action: "A voluntary action is a motion or group of motions accompanied or preceded by volition and directed towards some object. Every such action comprises the following elements—knowledge, motive, choice, volition, intention; and thoughts, feelings, and motions, adapted to execute the intention. These elements occur in the order in which I have enumerated them." See also Terry's *Lead. Princ. Anglo-American Law*, § 79, where the confusion of "will" with "intention" in a modern English work is attributed to a German origin.