

does not manifest itself in relation to the result of the breach of duty, but is confined wholly to the breach itself, which may or may not be followed by an injurious result; and it is only the result which makes the conduct of the wrong-doer a subject of juridical enquiry. Furthermore, it is obvious that in such a case the injury arises from carelessness, rather than from an intention to cause harm (*m*). On the other hand, a breach of duty committed with the intent to injure some one thereby, falls outside the sphere of negligence, as will be shewn hereafter.

But, if negligence may not be said to be "an unintentional breach of duty," is it, in the second place, "a form of mens rea?" This enquiry cannot be answered without first reviewing the place and meaning of the phrase *mens rea* in the language of the law.

The phrase in question is but a fragment of the maxim "Actus non facit reum nisi mens sit rea," which may be freely translated so: The act does not constitute a crime unless it is attended with a guilty mind, *i.e.*, *criminal intent*. This maxim has been described as "one of Coke's scraps of Latin" (*n*), but its first appearance in the common law is much older than Coke's time. In the *Leges Henrici Primi* (*o*) we have it in this form: *Reum non facit nisi mens rea*, and it undoubtedly filtered its way there through the canonists from its primary source in St. Augustine's "Sermones" (*p*). Dealing with the sin of false swearing, St. Augustine says: "The tongue is not guilty unless it speaks with a guilty mind" (*ream linguam non facit nisi mens rea*). However, in the *Leges Henrici* we cannot expect to find a very marked cleavage between the ecclesiastical and civil bearings of the maxim, and therefore we must turn to Coke to discover its place and significance in the common law.

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(*m*) Mr. Bigelow (*Torts*, 2nd ed., p. 13) very properly draws the distinction between intending an act and intending its consequences in this way: "To speak of an 'intended act' is a pleonasm. An 'act' is necessarily intended, though its consequences may or may not be intended." He refers on this point to Ziehen: *Philosophical Psychology*, 29. (Lond. 1892). On this point see also Markby's *Elem. Law*, sec. 219.

(*n*) See an able article on "Mens Rea" in 13 *Crim. Law Mag.*, p. 831.

(*o*) 5, s. 28. *Thorp's Auc. Law and Institutes of Eng.*, 1, 511.

(*p*) No. 180, c. 2.