

had a special place and meaning in the criminal law; and, that being so, any unnecessary dislodgment of it therefrom for the purpose of making it do duty as a part of the technics of another and distinct branch of legal science is to be deprecated under any circumstances, but where the new setting for the old maxim is incongruous and subversive of its original meaning, such a use, or rather abuse, ought not to be allowed to become general.

It is submitted that the following examination of the psychology of negligence will demonstrate that Professor Salmond's view (*x*) that negligence is "a form of mens rea" (*y*) is not only inaccurate, but misleading—

(1) Because the phrase "mens rea" in legal technics (*z*) has become a synonym for *criminal intent*.

(2) Because even if the term might with propriety be extended to denote the psychical element of "intention" in civil wrongs involving fraud or malice, it is meaningless as applied to negligence.

The first branch of our proposition has, we hope, been adequately established; it remains for us to demonstrate the correctness of the second.

If we survey the province of civil wrongs in English law, as a whole, we find that they resolve themselves into three great classifications:

1st. *Personal wrongs*, marked by a deliberate intention to do harm, such as cases of assault, slander and libel, conspiracy, and malicious prosecution (*a*);

(*x*) Absolute originality in the impugned use of the phrase "mens rea" is not to be charged against Professor Salmond. For instance, more than a dozen years before the appearance of Salmond's "Jurisprudence," Cave, J., in *Chisholm v. Doulton* (1889) 22 Q.B.D. at p. 741, said:—"It is a general principle of our criminal law that there must be as an essential ingredient in a criminal offence some blameworthy condition of mind. Sometimes it is negligence, sometimes it is malice, sometimes guilty knowledge—but as a general rule there must be something of that kind which is designated by the expression "mens rea."

(*y*) It should be stated that Professor Salmond, when he expresses the view above quoted, refers to negligence as the foundation of liability in civil cases.

(*z*) "The law has its technical terms, and hence a dictionary of its own." Bigelow on Torts, 2nd ed., p. 15.

(*a*) Many wrongs of this class are also treated as criminal offences, and, indeed, there is no moral cleavage between this group of torts and crimes involving the same grounds of complaint. The only difference is in procedure. See Pollock on Torts, 7th ed., p. 9; Harris' Criminal Law, 10th ed., p. 2.