

constitute the crime": *Fowler v. Padget*, 7 T.R. 509, 514. This is expressed in the maxim familiar to English lawyers for nearly 800 years, "Actus non facit reum nisi mens sit rea." This maxim is one of "Coke's Scraps of Latin," and has been the subject occasionally of remarks by judges not complimentary in tone. For example, in the case of *The Queen v. Tolson*, 23 Q.B.D. 168, it is called by Cave, J., "the somewhat uncouth maxim" (p. 181), and Stephen, J., says, "Though this phrase is in common use, I think it most unfortunate and not only likely to mislead, but actually misleading" (p. 185). "It is indeed more like the title of a treatise than a practical rule" (p. 186). "I agree with my learned brother Stephen (said Manisty, J.), in thinking that the phrases 'mens rea' and 'non est reus nisi mens sit rea' are not of much practical value, and are not only 'likely to mislead,' but are 'absolutely misleading'" (p. 201).

In his *History of the Criminal Law*, Sir James Stephen says:

"The maxim 'actus, etc.," is sometimes said to be a fundamental principle of the whole criminal law, but I think that, like many other Latin sentences supposed to form part of the Roman law, the maxim not only looks more instructive than it really is, but suggests fallacies which it does not precisely state. It is frequently, though ignorantly, supposed to mean that there cannot be such a thing as *legal* guilt where there is no moral guilt, which is obviously untrue, as there is always a possibility of a conflict between law and morals. The truth is that the maxim about 'mens rea' means no more than that the definition of all or nearly all crimes contains not only an outward and visible element, but a mental element, varying according to the different nature of different crimes." (*Hist. Cr. Law.*, II, p. 95.)

Sir James Stephen said (p. 186) that he had tried to trace the origin of the maxim, but without success. Professor Kenney in his excellent "Outlines of Criminal Law" points out that Professor Maitland has traced the use of this aphorism in England back to the "*Leges Henrici Primi*," V. 28, and its origin to an echo of some words of St. Augustine, who says of perjury, "*ream linguam non facit nisi mens rea*." *Hist. Eng. Law*, II. 475. (Kenney, p. 37.)