

10-1-1975

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Recommended Citation

Michael Kelly, *Misprision of Felony Not a Crime in Florida*, 30 U. Miami L. Rev. 222 (1975)

Available at: <http://repository.law.miami.edu/umlr/vol30/iss1/8>

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vention may not be used as a basis for drawing a closing line from which to measure Florida's Gulf coast boundary. The acceptance of this contention, supported by the special master's interpretation of Florida's boundaries as declared in the 1868 constitution,⁴³ would limit Florida's claim under the Submerged Lands Act to a boundary 3 marine leagues from its coastline as it existed in 1868.⁴⁴ It would also deprive Florida of the closing line drawn by the special master as a portion of its coastline as it existed in 1868.⁴⁵

Thus, Florida, like all Atlantic coastal states,⁴⁶ owns the seabed and subsoil off its present coastline for a distance of 3 miles into the Atlantic Ocean and, like Texas,⁴⁷ out to its boundaries as approved by Congress, but not more than a distance of 3 marine leagues into the Gulf of Mexico. The coastline from which these distances are to be measured is ambulatory. Supplementary proceedings are available to the parties should further disputes arise which the parties cannot settle between themselves.

The ambulatory nature of the coastline will, nonetheless, continue to be a problem. Offshore mineral leases in the area of the federal—state boundary are necessarily undervalued because of uncertainty as to future changes in the coastline. Erosion could cause an area leased by the state to come under federal control; construction of permanent harbor works could cause an area leased by the federal government to come under state control. In either case the leasehold would be extinguished. Congressional action to avoid problems in this area seems the most likely and rational solution.

DOUGLAS A. SMITH

Misprision Of Felony Not A Crime In Florida

The defendant Holland, a city manager, visited the home of one of his employees where he noticed several plants which he suspected to be marijuana. He immediately contacted a city police captain who determined through analysis that the plants were indeed mari-

43. See note 35 *supra*.

44. See note 3 *supra*.

45. Closing lines are drawn from point to point along a coast to determine a base line from which the breadth of the territorial sea can be measured. The maximum closing line recognized under customary international law in 1868 was 6 miles.

46. See *United States v. Maine*, 420 U.S. 515 (1975).

47. *United States v. Louisiana*, 363 U.S. 1, 84 (1960).

juana. When confronted with this evidence, the employee admitted his guilt, after which Holland and the captain uprooted a sufficient number of plants to establish the felony of possession of marijuana. In discussing the matter with the city's police chief, Holland and the captain agreed that the matter should be handled administratively in order to avoid unfavorable publicity. Subsequently, the employee's resignation was secured. Seventeen other city officials and prominent members of the community were informed of this action and signed affidavits acknowledging their agreement. Holland's subsequent indictment for misprision of felony was dismissed in county court, but the circuit court reversed. Upon review by common law certiorari, the District Court of Appeal, Second District, *held*, reversed: The common law crime of misprision of felony is not part of the substantive criminal law of the state of Florida. *Holland v. State*, 302 So. 2d 806 (Fla. 2d Dist. 1974).

The legislature has not prescribed misprision of felony as a crime nor, prior to *Holland*, had the Florida courts ever dealt with the subject. The offense did exist, however, at common law as the "bare failure of a person with knowledge of the commission of a felony to bring the crime to the attention of the proper authorities,"¹ and absent statutes to the contrary, such common law crimes are in full force in Florida pursuant to Florida Statutes sections 775.01² and 2.01.³

Despite the relatively clear wording of sections 2.01 and 775.01, two divergent views have been adopted by the Florida courts in applying English common law principles. One view adheres to a literal reading of sections 2.01 and 775.01; the applicability of a common law rule is determined strictly on the basis of its consistency with constitutional principles or legislative intent. The second view examines the usefulness of the common law rule in light of modern society.

1. 302 So. 2d at 807, *citing* 1 BISHOP, *NEW CRIMINAL LAW* § 699 (8th ed. 1892); 1 CHITTY, *A PRACTICAL TREATISE ON THE CRIMINAL LAW* 3 (1819); 20 THE AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW 803-04 (2d ed. 1902). *See generally* Day, *Extent to Which the English Common Law and Statutes Are in Effect*, 3 U. FLA. L. REV. 303 (1950).

2. FLA. STAT. § 775.01 (1973) states:

The common law of England in relation to crimes, except so far as the same relates to the modes and degrees of punishment, shall be of full force in this state where there is no existing provision by statute on the subject.

3. FLA. STAT. § 2.01 (1973) states:

The common and statute laws of England which are of a general and not a local nature, with the exception hereinafter mentioned, down to the fourth day of July, 1776, are declared to be of force in this state; provided, the said statutes and common law be not inconsistent with the constitution and laws of the United States and the acts of the legislature of this state.

Following the first approach, statutory abrogation or modification of certain common law rules has been recognized by some courts in both criminal and non-criminal areas.⁴ In recognizing the statutory revision of common law crimes, Florida courts have added the qualification that such statutes should be strictly construed.⁵ But with respect to non-criminal common law rules, many Florida courts have been more liberal and have held that if the common law is simply inconsistent with a general area of statutory law, the common law rule is impliedly modified.⁶

These courts have not always abrogated or modified the common law rule in applying sections 2.01 and 775.01, however, and cases in which courts have adopted the applicable common law rule because of a lack of constitutional or statutory inconsistency have most frequently been in the area of criminal law.⁷ The leading case in this area is *State v. Egan*⁸ in which the Supreme Court of Florida held that the common law offense of nonfeasance had not been expressly abolished by statute and thus was enforceable.

The court in *Egan* was faced with questions similar to those found in *Holland*. The first question posed in *Egan* was one of statutory construction. The court observed that "no statute [should] be

4. Inconsistencies between a common law rule and provisions of either the United States or Florida constitutions have also been recognized by many courts. In dealing with conflicts between the common law and the Florida Declaration of Rights, however, courts have held that mere inconsistency is not enough to abrogate the common law. Courts which have abrogated the common law in such instances have thus tended to combine several reasons and methods for modifying the common law. See, e.g., *Gates v. Foley*, 247 So. 2d 40 (Fla. 1971) (denial of right of wife to seek damages for loss of consortium as a result of injuries to her husband proximately caused by negligence of another held to violate the equal protection clause of United States Constitution); *Gaston v. Pittman*, 224 So. 2d 326 (Fla. 1969) (common law rule that divorced woman could not maintain an action against her former husband for tort committed by him prior to their marriage was contrary to intendments, effects, purposes and objects of Florida Declaration of Rights).

5. See, e.g., *State v. Coleman*, 131 Fla. 892, 180 So. 357 (1938).

6. See, e.g., *Lewis v. City of Miami*, 127 Fla. 426, 173 So. 150 (1937) (statute impliedly modified doctrine of non-liability of municipality for negligence in government function in case where jailor did not separate prisoners with venereal disease); *Ballenger v. Mark*, 115 Fla. 95, 155 So. 106 (1934) (concurring opinion) (statute impliedly modified doctrine that woman not responsible for her torts during coverture); *Wax v. Wilson*, 101 So. 2d 54 (Fla. 3d Dist. 1958) (divorce statute impliedly modified common law rule that wife who leaves husband relinquishes her right to dower).

7. E.g., common law crimes or defenses to crimes were upheld in the following cases: *State v. Egan*, 287 So. 2d 1 (Fla. 1973) (crime of nonfeasance); *Duckworth v. Boyer*, 125 So. 2d 844 (Fla. 1960) (crime of prison break); *Croft v. Culbreath*, 150 Fla. 60, 6 So. 2d 638 (1942) (in the statutory offense of contempt, the common law defense of a sworn answer of the alleged condemnor fully denying the charge was upheld); *La Tour v. Stone*, 139 Fla. 681, 190 So. 704 (1939) (crime of extortion); *State ex rel. Farrior v. Faulk*, 102 Fla. 886, 136 So. 601 (1931) (crime of escape).

8. 287 So. 2d 1 (Fla. 1973).

construed as altering the common law further than its words and circumstances *impart*”;⁹ in response to the defendant’s argument that the offense of nonfeasance itself should be abrogated because there was no longer any necessity for its continued existence, the court reasoned that whenever a principle of the common law is clearly established, it must be judicially enforced until it is specifically repealed by the legislature. Clearly the courts would be functioning as a legislative body if they abrogated the common law. Exceptions to this general rule are permissible only when the common law is in doubt or when a factual situation is presented which is not within established precedents. Only in these exceptional circumstances may the court consider the changes in our social and economic customs and present conceptions of right and justice.

Alternatively, the defendants in *Egan* argued that since the entire scope of common law crimes has fallen into disuse, there is no need or reason to retain or revive them. In response, the supreme court reiterated that a legislative enactment may be repealed by further legislation and not by time or changed conditions as seen through the eyes of a panel of judges.

A line of reasoning similar to that expressed in *Egan* can be found in early cases dealing with tort law.¹⁰ Most of these cases held that the common law should be changed only by the legislature¹¹ and that if the common law is clear it must be followed.¹² However, some of these cases have since been overturned in accordance with the theory that the common law of contracts and torts is judge-made and therefore can be altered by judges.¹³

9. *Id.* at 6.

10. For example, common law rules concerning torts were upheld in the following cases: *City of Miami v. Bethel*, 65 So. 2d 34 (Fla. 1953) (municipal corporation is not liable for all tortious acts of its police officers committed as incident to exercise of purely governmental function); *Ripley v. Ewell*, 61 So. 2d 420 (Fla. 1952) (a wife may not sue to recover for loss of consortium); *Owen v. Baggett*, 77 Fla. 582, 81 So. 888 (1919) (governmental officials are not liable for personal injury from negligent construction of a public edifice); *Wong v. City of Miami*, 229 So. 2d 659 (Fla. 3d Dist. 1969) (governmental unit has no responsibility for damage inflicted upon its citizens or property as result of riot or unlawful assembly); *Gordon v. City of Belle Glade*, 132 So. 2d 449 (Fla. 2d Dist. 1961) (municipal corporation is not liable for intentional tortious acts of its police officers committed incident to exercise of purely governmental function).

11. See *City of Miami v. Bethel*, 65 So. 2d 38 (Fla. 1953); *Kennedy v. City of Daytona Beach*, 132 Fla. 675, 182 So. 228 (1938); *Owen v. Baggett*, 77 Fla. 582, 81 So. 888 (1919).

12. *Ripley v. Ewell*, 61 So. 2d 420 (Fla. 1952).

13. See, e.g., *Gates v. Foley*, 247 So. 2d 40 (Fla. 1971), *overruling Ripley v. Ewell*, 61 So. 2d 420 (Fla. 1952); *City of Miami v. Simpson*, 172 So. 2d 435 (Fla. 1965), *overruling Gordon v. City of Belle Glade*, 132 So. 2d 449 (Fla. 2d Dist. 1961); *Hargrove v. Town of Cocoa Beach*, 96 So. 2d 130 (Fla. 1957), *overruling City of Miami v. Bethel*, 65 So. 2d 34 (Fla. 1953).

In following the second, less restrictive, view as to proper application of English common law in Florida, several courts have generally ignored the mandate of sections 2.01 and 775.01 and have altered or abridged the common law without a finding of constitutional or statutory inconsistency.¹⁴ The basis for the courts' action in such instances has been an application of the maxim: "Where the reason for a rule of the common law, which is the spirit and soul of that law, fails, the rule itself fails."¹⁵ Even in applying this maxim, some courts have modified the common law only if its meaning was not clear;¹⁶ others, however, have made changes regardless of the clarity of the common law.¹⁷ Nonetheless, prior to *Holland*, Florida courts had restricted the use of this approach to changes in the non-criminal areas of contract, tort, and real property law.

In *Holland*, the court noted that the case could be dealt with in a number of ways. One approach would be to construe the facts in a way that would require a finding of not guilty. While misprision of felony is applicable only to one who fails to bring knowledge of the commission of a crime to the proper authorities,¹⁸ *Holland* had actually reported the crime to the proper authorities. Arguably, therefore, *Holland* had no further duty under the common law. The court declined to follow this approach. A second possible approach would have been to follow the lead of other cases and modify the common law crime by adding as a necessary element, the existence of evil motive.¹⁹ The *Holland* court decided not to adopt this ap-

14. See note 4 *supra*.

15. *Banfield v. Addington*, 104 Fla. 661, 140 So. 893, 898 (1932); see, e.g., common law rules altered in the following cases: *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973) (the doctrine of contributory negligence replaced by the doctrine of comparative negligence); *City of Miami v. Simpson*, 172 So. 2d 435 (Fla. 1965) (a municipality is liable for intentional torts committed by employees acting within the scope of their employment); *Duval v. Thomas*, 114 So. 2d 791 (Fla. 1959) (owner of property with portions of its boundaries under water of a landlocked, non-navigable lake may use all of the lake for boating, fishing, and bathing, so long as he does not interfere with rights of others and such owner does not have exclusive dominion over water overlying his land); *Hargrove v. Town of Cocoa Beach*, 96 So. 2d 130 (Fla. 1957) (a municipality is liable for negligent torts committed by employees acting within the scope of their employment); *Morgenthaler v. First Atlantic Nat'l Bank*, 80 So. 2d 446 (Fla. 1955) (the guide at all times in construing wills is the intent of the testator); *Randolph v. Randolph*, 146 Fla. 491, 1 So. 2d 480 (1941) (father has no right of custody superior to that of mother).

16. See, e.g., *Duval v. Thomas*, 114 So. 2d 791 (Fla. 1959); *Morgenthaler v. First Atlantic Nat'l Bank*, 80 So. 2d 446 (Fla. 1955).

17. See *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973).

18. See note 2 *supra*.

19. 302 So. 2d at 810, citing *Commonwealth v. Lopes*, 318 Mass. 453, 61 N.E.2d 849 (1945). The court in *Lopes* suggested that if faced with the question, they would interpret the crime of misprision to include the element of evil motive. See also *State v. Wilson*, 80 Vt. 249, 67 A. 533 (1907).

proach either, fearing that the crime of misprision of felony in the modified form would be a mere facsimile of the crime of accessory after the fact.²⁰ A third approach, and the one embraced by the *Holland* court, was simply to abrogate the common law crime without regard to any possible expression of legislative intent. *Holland* is therefore novel in that it is the first Florida case to follow this approach in the area of criminal law.

The court observed that the statutes adopting the common law were almost universally interpreted to adopt the common law of England only to the extent that such laws were consistent with the existing physical and social conditions in the state.²¹ It was reasoned that inconsistency resulted if the basis for the rule at common law had ceased to exist.²² In interpreting section 775.01, the court summarily concluded that the Florida State Legislature had "recognized this judicial precept . . ." ²³ In support of its statutory interpretation and the application of this maxim, the court cited several tort cases in which it had been used to modify the common law²⁴ while noting that the application of this precept had the effect of granting to the courts "[t]he discretion necessary to prevent blind adherence to those portions of the common law which are not suited to our present conditions, [or] our public policy . . ." ²⁵

The court examined the history of the crime of misprision in order to determine if it was inconsistent with either the conditions existing when Florida adopted the common law or present physical and social conditions. The law was viewed as a product of communal responsibility in the tithing group existing in medieval England.²⁶ The court pointed out that in both 18th century and present day society, professional police work, not communal responsibility, was relied upon to keep the peace. Due to this shift in responsibility, the court concluded that the reason for the rule existed neither when the common law was adopted by the state nor at the present time. Therefore, the rule was never adopted by the state and thus did not presently exist. To support this finding, the court cited a Michigan

20. FLA. STAT. § 776.03 (1973).

21. 302 So. 2d at 808, citing 15A C.J.S. *Common Law* § 11 (1967).

22. See note 15 *supra* and accompanying text.

23. 302 So. 2d at 808.

24. *Id.*, citing *Margrove v. Town of Cocoa Beach*, 96 So. 2d 130 (Fla. 1957); *Morgenthaler v. First Atlantic Nat'l Bank*, 80 So. 2d 446 (Fla. 1955); *Waller v. First Sav. & Trust Co.*, 103 Fla. 1025, 138 So. 780 (1931); *Wax v. Wilson*, 101 So. 2d 54 (Fla. 3d Dist. 1958).

25. 302 So. 2d at 808.

26. *Id.* at 809, citing 1 WHARTON CRIMINAL LAW § 289 (12th ed. 1932); 9 HALSBURY, THE LAWS OF ENGLAND § 580, n.1 (Hailsham ed. 1933); STEPHEN'S DIGESTS OF CRIMINAL LAW, articles 156, 157, see 8 U. CHI. L. REV. 338 (1940).

case which abrogated misprision on the same grounds.²⁷

A further inconsistency in the law of misprision was noted in *Holland*. The court opined that the law should not be blindly adhered to if not suited to our traditions or our sense of right and justice.²⁸ Several other Florida cases have also modified the common law on this ground.²⁹ Implicitly following the reasoning of these prior cases, the *Holland* court found that the fear of the consequences of a violation of the duty to get involved "is a fear from which our traditional concepts of peace and quietude guarantee freedom."³⁰ In summary, the court stated: "We cherish the right to mind our own business when our own best interests dictate."³¹

The court found additional support for its finding of inconsistency in an examination of the harshness of the law. It observed that enforcement of the crime was "summary, harsh, and oppressive"³² On this point the court cited Chief Justice Marshall, who had said, "It may be the duty of a citizen to accuse every offender, and to proclaim every offense which comes to his knowledge; but the law which would punish him in every case for not performing this duty, is too harsh for man."³³ As an example of the potential harshness of the application of misprision of felony, it was pointed out that the seventeen individuals who had signed affidavits in agreement with defendant's position could also have been indicted in the principal case.

While much can be said in favor of the *Holland* decision,³⁴ the rationale of the court does not appear to justify its holding. Three basic reasons exist for this conclusion: (1) the court found the basis for its decision in tort law despite a prior supreme court decision refusing to apply these principles in the area of criminal law; (2) the court contradicted itself; and (3) strong policy considerations suggest that the law and its purpose are not necessarily obsolete or overly harsh.

The *Holland* court found justification for its statutory interpretation and its determination in several tort cases which had rejected "anachronistic" common law concepts³⁵ by applying a test of "in-

27. *People v. Lefkowitz*, 294 Mich. 263, 293 N.W. 642 (1940).

28. 302 So. 2d at 808.

29. See cases cited note 7 *supra*.

30. 302 So. 2d at 810.

31. *Id.*

32. 302 So. 2d at 809.

33. *Id.*, citing *Marbury v. Brooks*, 20 U.S. (7 Wheat.) 556, 575-576 (1822).

34. For example, concern about the harshness of the law might be sufficient justification for the court's decision.

35. See note 26 *supra*.

consistency." Yet less than one year prior to *Holland* the Supreme Court of Florida, in *State v. Egan*,³⁶ refused to construe section 775.01 to apply this test of "inconsistency" in determining the applicability of a common law crime. The *Egan* court thus refused to extend this modern standard to areas of criminal law and held:

Whenever a principle of the common law has been once *clearly* established, the courts of this country *must* enforce it until repealed by the legislature, as long as there is a subject matter for the principle to operate on, and *although* the reason, in the opinion of the court, which induced its original establishment may have ceased to exist.³⁷

Although both *Holland* and *Egan* dealt with common law crimes, the *Holland* court completely disregarded this holding, thus apparently practicing selective suppression to enable it to reach the desired result.

This approach, however, did not completely suppress the reasoning exhibited by the supreme court in *Egan*. Ironically, to support its use of the inconsistency test the court cited with apparent approval the following language from *Duval v. Thomas*:³⁸ "It is . . . only when the common law is clear that we must observe it."³⁹ This policy of changing the common law only when it is unclear is completely in line with the holding in *Egan*. The common law of misprision appears to be extremely clear.⁴⁰ The *Holland* court itself appeared to find no difficulty in defining and documenting a history of the offense.⁴¹ Thus, the court did not meet the burden which it imposed upon itself to demonstrate the non-crystallization of the offense of misprision and its holding is therefore a contradiction of its own reasoning.

There are strong policy considerations favoring the maintenance of this common law offense. Assuming arguendo that the *Holland* court was correct in stating that the police have assumed primary responsibility for the keeping of the peace, it does not necessarily follow that the crime of misprision of felony has become obsolete.⁴² Today, the pressures generated by our crowded urban society have resulted in increased crime and violence and the police

36. 287 So. 2d 1 (Fla. 1971); see note 9 *supra*.

37. *Id.* at 7 (emphasis added).

38. 114 So. 2d 791 (Fla. 1959).

39. *Id.* at 795.

40. See note 1 *supra*.

41. 302 So. 2d at 809, citing 8 U. CHI. L. REV. 338 (1940).

42. In agreement with the finding on non-obsolescence: *R. v. Crimmins* [1959] Vict. 270 (Aust. Vic. Sup. Ct. F.C.).

alone are unable to protect the peace. An illustration given national publicity occurred a number of years ago in New York City. Kitty Genovese was brutally murdered after several futile attempts to escape from her assailant while at least a dozen onlookers made no attempt to call police or render assistance.⁴³ No doubt this tragedy is not peculiar to New York and has occurred elsewhere with less notoriety. In situations such as these, it is arguable that if a known duty existed to inform the police, the victims might have been saved. It is submitted that communal responsibility is needed to help the police in their effort to protect society. One should not be able to hide behind his "own best interests," as the *Holland* court would allow him to do,⁴⁴ when doing so would jeopardize the welfare of others. The possible harshness that the retention of the offense might cause is not sufficient justification for its abrogation. The harshness of the rule is more than alleviated by the benefits society would likely derive from its retention.

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43. N.Y. Times, Mar. 27, 1964, at 1, col. 4; *Editorial*, N.Y. Times, Mar. 28, 1964, at 18, col. 2. Twenty minutes passed between the time witnesses saw Kitty first attacked and when she was finally murdered. Had the police been called immediately, they could have arrived in a maximum of ten minutes.

44. 302 So. 2d at 810.