

Fall 9-1-1953

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Recommended Citation

E. Lee Morgan, Misprison of Felony, 6 S.C.L.R. 87. (1953).

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MISPRISION OF FELONY

Misprison¹ of felony has been defined in various ways, but perhaps its best definition is as follows: "Misprision of felony at common law is a criminal neglect either to prevent a felony from being committed or to bring the offender to justice after its commission, but without such previous concert with or subsequent assistance of him as will make the concealer an accessory before or after the fact."²

In the modern use of the term, misprision of felony has been said to be almost, if not identically, the same offense as that of an accessory after the fact.³ It has also been stated that misprision is nothing more than a word used to describe a misdemeanor which does not possess a specific name.⁴ It is that offense of concealing a felony committed by another, but without such previous concert with or subsequent assistance to the felon as would make the concealing party an accessory before or after the fact.⁵

Misprision is distinguished from compounding an offense on the basis of consideration or amends; misprision is a bare concealment of crime, while compounding is a concealment for a reward by one directly injured by the crime.⁶

History of Misprision

In order to better understand the development of the crime of misprision of felony, one should remember that at common law crimes were divided into misdemeanors, felonies, and treason.⁷ There was

1. A term derived from the old French, *mespris*, a neglect or contempt. 4 Bl. Comm. 119.

2. 16 C. J., § 13.

3. *State v. Graham*, 190 La. 669, 182 So. 711 (1938).

4. *United States v. Perlstein*, 126 F. 2d 789 (3rd Cir. 1941), *cert. denied*, 316 U. S. 678 (1942). The word misprision is sometimes employed to denote "all such high offences as are under the degree of capital, but nearly bordering thereon. The term 'high misdemeanor', however, better conveys this meaning, while the precision of our language is promoted by restricting 'misprision' to neglects; and such, it is believed, is the better modern usage." 1 BISHOP, CRIMINAL LAW, § 717 (7th ed. 1882).

5. Black's Law Dict. 1194 (3rd ed. 1933).

6. *Fountain v. Bigham*, 235 Pa. 35, 84 Atl. 131 (1912); 1 Hawkins P. C. c. 59, § 5; 4 Bl. Comm. 133. Compounding a felony is that offense committed by a person who, having been directly injured by a felony, agrees with the criminal that he will not prosecute him, on condition of the latter's making reparation, or on receipt of a reward or bribe not to prosecute. Black's Law Dict. 382 (3rd ed. 1933).

7. For discussion, see 1 BISHOP, CRIMINAL LAW, § 609 (7th ed. 1882). For discussion of the classification of crimes as felonies and misdemeanors, see 5 S. C. L. Q. 59 (1952).

no such crime as misprision of a misdemeanor, only of felony and of treason. Every act of treason constituted a felony, but treason, by its very nature, was considered to be of a higher degree of crime than other types of felonies, and it was thus classified apart.⁸ A discussion of misprision of treason is necessary to help one better understand misprision of felony, since the former is included in the latter, but generally punished more severely. Misprision of treason, which was a high misdemeanor and not a felony, was divided into two sorts: negative, which consisted in the concealment of something which ought to be revealed; and positive,⁹ which consisted of something which ought not to be done. Of the negative kind, bare knowledge and concealment of treason, without any degree of assent thereto, prior to the Statute 1 and 2 Phil. and Mary, c. 10, was a capital crime, but by the statute was made only a misprision. But if there were any probable circumstances of assent, as if one went to a treasonable meeting, knowing beforehand that a conspiracy was intended against the king; or, being in such company once by accident, and having heard such treasonable conspiracy, met the same company again and heard more of it, but concealed it; this was an implied assent in law, and made the concealer guilty of actual high treason.¹⁰

There was also one positive misprision of treason, created by the Statute 13 Eliz., c. 2 and Statute 14 Eliz., c. 3, which made the forging of coin, not current in England, a misprision of treason.¹¹ Other misprisings of treason, which were merely positive, were generally denominated contempts or high misdemeanors, consisting of such crimes as: (1) mal-administration, the punishment usually consisting of banishment, imprisonment, fines, or perpetual disability; (2) contempts against the king's prerogative, as by refusing to assist him for the good of the public, punishable by fine and imprisonment, at the court's discretion; (3) contempts against the king's person and government, as by speaking or writing against the king or the government, punishable by fine and imprisonment and also the pil-

8. Except treason, crime is either a felony or misdemeanor. *State v. O'Shields*, 163 S. C. 408, 161 S. E. 692 (1931).

9. In Coke's time the term had gotten an extended meaning; it was not merely a crime of omission, but a crime of commission. 3 Co. Inst. 139. A contempt or a high misdemeanor was a positive misprision, but in modern usage positive misprisings are limited to neglects. 2 COOLEY, BLACKSTONE 1300 (4th ed. 1899).

10. 1 Hawkins P. C. 56.

11. By subsequent statutes the offense was made a felony, or in case of copper coin, a misdemeanor. 2 COOLEY, BLACKSTONE 1299, n. 2 (4th ed. 1899).

lory¹² or other infamous corporal punishment; (4) contempts against the king's title, not amounting to treason, punishable by fine and imprisonment; (5) contempts against the king's palaces or courts of justice, punishable by death under the ancient law before the conquest, but later punished by imprisonment and fine; and if blood were drawn by any striking in the king's palace, wherein his royal person resided, punishment at the king's pleasure and also the loss of the offender's right hand; (6) threatening a judge, which is a high misprison and punished with large fines, imprisonment, and corporal punishment; (7) threatening or assaulting a party who is under the protection of a court, punishable by fine and imprisonment, and, (8) dissuading witnesses from giving evidence, or to advise a prisoner to stand mute, which are impediments of justice, and high misprisions, and punishable by fine and imprisonment.¹³

Misprison of felony¹⁴ was originally an offense or misdemeanor akin to felony, but involving a lesser degree of guilt, and those found guilty were not liable to the capital penalty. As various statutes¹⁵ stated that concealment of a person's knowledge of treasonable actions or designs should be regarded as misprison of treason, this term came to be used as the ordinary designation for such concealment. Hence it was often supposed that the word misprison itself expressed the sense of failure to denounce a crime.¹⁶

Misprison of felony cases, in England as well as in the United States, are rather rare cases,¹⁷ probably due to the reluctance of prosecutors to prosecute such type cases and to the difficulty of obtaining the necessary evidence needed to prove a misprison. Most of the English cases mentioning misprison deal with either compounding offenses or misprison of treason, and only mention mis-

12. Abolished by Statute I Vic., c. 23.

13. 2 COOLEY, BLACKSTONE 1299-1304 (4th ed. 1899).

14. See Proceedings Under a Special Commission for the County of York, 31 State Tr. (1813), the charge of Thompson, B., at p. 969.

15. Act 25 Hen. VIII, c. 22 § 9 (1533-34) provided: "If any person . . . being commaunded . . . to take the seid othe . . . obstynatly refuse that to doo . . . that every suche refusall shalbe . . . adjudged mespryson of high treason." Act 5 and 6 Edw. VI, c. 11 (1512) provided also ". . . that concealment or keping secrete of any Highe Treason be deemed and taken only mysprison of Treason." Act 14 Eliz. c. 3 (1572) provided: "That yf any person or persons hereafter . . . counterfayte any suche kind of coygne . . . as is not the proper Coigne of this Realme . . . That then everye suche Offence shalbee deemed and adjudged mysprison of Highe Treason."

16. The Oxford English Dict. 523 (1933).

17. There has been no prosecution for this offense for many years. The expression "misprison of felony" has "somewhat passed into desuetude." Williams v. Bayley, L. R. 1 H. L. 200, 220 (1866), per Lord Westbury.

prison of felony by way of dicta.¹⁸ In England there is no modern instance of any prosecution either for misprision of treason or for misprision of felony.¹⁹ The crime is practically obsolete everywhere.

Misprision of felony remains a common-law crime in some of the States²⁰ of the United States. In other states it is supplemented by statute²¹ or does not exist at all.²²

Congress has made misprision of felony a crime.²³ Under the Federal statute,²⁴ one having and concealing knowledge of the actual commission of a felony and not reporting it as soon as possible to some judge or other person in civil or military authority under the United States, is guilty of misprision.²⁵ The felony must be one which is cognizable by a court of the United States. Misdemeanors are not included in this Act,²⁶ but by a reclassification of offenses from misdemeanors to felonies, crimes were brought within the operation of the Act.²⁷ However, if the crime were not an offense at common law, no charge of misprision could be sustained.²⁸

There have been very few cases in the United States involving

18. *Scrope's Case*, 3 Co. Inst. 36 (1415); *Williams v. Bayley*, L. R. 1 H. L. 200 (1866); *Rex v. Cowper*, 5 Mod. Rep. 206, 87 E. R. 611 (1696); *Regicides' Case*, 5 State Tr. 947, Kel 7, 10; 84 E. R. 1056 (1660); *Rex v. Tonge*, 6 State Tr. 225, Kel. 17; 84 E. R. 1061 (1662); *Rex v. Thwing & Pressicks*, 7 State Tr. 1161 (1680); *Rex v. Walcot*, 9 State Tr. 519 (1683).

19. 9 HALSBURY, LAWS OF ENGLAND 48 n. 1 (2d ed. 1933).

20. *Carpenter v. State*, 62 Ark. 286, 36 S. W. 900 (1896); *State v. Wilson*, 67 Atl. 533 (Vt. 1907).

21. DELAWARE REV. CODE 1915, § 4720, where misprision of felony is declared to be a misdemeanor. See *State v. Biddle*, 124 Atl. 804 (Del. 1923), where it is said that the common-law definition of "misprision of felony" (the criminal neglect to either prevent a felony or to bring the offender to justice after its commission, but without such previous concert with or subsequent assistance as would make the concealer an accessory) applies in Delaware.

22. *People v. Lefkowitz*, 293 N. W. 642 (Mich. 1940), states that the common-law offense of misprision of a felony does not exist in Michigan.

23. 62 STAT. 684, c. 645, § 1, of June 25, 1948 based on § 251 of former Title 18 (Act Mar. 4, 1909, c. 321, § 146, 35 STAT. 1114).

24. The statutes of the United States make punishable both misprision of felony, (REV. STAT., § 5390) and misprision of treason (*Id.* § 5333), against the general government.

25. The punishment is a fine of not more than Five Hundred Dollars or imprisonment not more than three years, or both.

26. *Presont v. United States*, 281 Fed. 131 (6th Cir. 1922); *Neal v. United States*, 102 F. 2d 643 (8th Cir. 1939).

27. *United States v. Kent*, 36 F. 2d 401 (S. D. Ill. 1929), where under § 1 (27 USCA, § 91) of the Jones Act (27 USCA, §§ 91, 92) are classified as felonies many of the liquor law violations formerly classified as misdemeanors.

28. See *United States v. Brandenburg*, 144 F. 2d 656, 154 A.L.R. 1160 (3rd Cir. 1944), where it was held that the defendant, who concealed knowledge of another's flight from North Carolina to escape prosecution from burglary with explosives, which flight was not an offense within the purview of the Fugitive Felon Act because the prosecution was for an offense unknown to the common law, was not guilty of misprision of felony.

misprison of felony. Michigan²⁹ has rejected the crime entirely. Louisiana,³⁰ while not rejecting the crime, has quashed a bill of information charging an accused with the offense of misprison committed in another state, holding the offense not cognizable by the courts of Louisiana. Other states which have had misprison cases before them or occasion to mention the offense are Arkansas,³¹ Vermont,³² Alabama,³³ and Delaware.³⁴ McClain in his treatise on Criminal Law stated:

... and perhaps not a single case can be cited in which punishment for such connection with a felony has been inflicted in the United States. If such criminal liability is recognized in any form it is by statute making particular acts of that character substantive offenses rather than by the preservation of the common-law doctrine of misprison of felony.³⁵

General Considerations

A question which arises in the consideration of the topic "misprison of felony" is to what extent is one bound to act to prevent himself from committing a misprison. At common law, and it is still true today, one was under a duty to prevent the commission of a felony about to be committed in his presence,³⁶ or to arrest the felon after the commission of a felony within his presence. If he failed to do so, he was guilty of a misprison.³⁷ And one was bound at common law to either report the commission of a felony to the proper authorities³⁸ or to prosecute the felon. If he failed to do

29. "The old-time common-law offense of misprison of felony, short of an accessory after the fact (if there ever was such a crime, which is extremely doubtful because wholly unsupported by adjudications in England), is not now a substantive offense and not adopted by the Constitution, because wholly unsuited to American criminal law and procedure as used in this State." People v. Lefkovitz, 293 N. W. 642 (Mich. 1940).

30. State v. Graham, 190 La. 669, 182 So. 711 (1938).

31. Carpenter v. State, 62 Ark. 286, 36 S. W. 900 (1896).

32. State v. Wilson, 67 Atl. 533 (Vt. 1907).

33. Suell v. Derricott, 49 So. 895 (Ala. 1909).

34. State v. Biddle, 124 Atl. 804 (Del. 1923).

35. 2 McCLAIN, CRIMINAL LAW § 938.

36. "The law will not be astute in searching for a line of demarcation between the lawful . . . , and . . . illegal acts of individuals in the . . . prevention of crime, . . . as will take an innocent citizen . . . from the protection of the law . . .". *Ruloff v. People*, 45 N. Y. 213 (1871).

37. See *State v. Biddle*, 124 Atl. 804 (Del. 1923), where the Delaware court said that all that was required for a conviction of misprison of felony was that the defendant, a woman, need only stand by while a man attacked another man and robbed him, and wilfully fail and neglect to prevent such robbery, or wilfully fail and neglect to make any effort to prosecute the robber.

38. "A man is bound to discover the crime to a magistrate with all possible expedition." 1 RUSSELL, CRIMES 45 (3rd Eng. ed. 1857).

either, he was guilty of a misprision.³⁹ Such concealment of the commission of the felony under the Federal misprision statute must be more than just a failure to report or prosecute. Mere silence after knowledge of the commission of the crime is not sufficient to amount to "misprision of felony", but there must be some affirmative act toward its concealment.⁴⁰ Just what that act must consist of cannot be clearly ascertained from the cases, but it seems to be some act which falls between mere silence or failure to disclose the felony, and an act in aid of an offender of such nature as to constitute one an accessory after the fact. In *United States v. Perlstein*,⁴¹ the court said that a misprision of felony is the concealment of a felony without giving any degree of maintenance to the felon. And in *Bratton v. United States*,⁴² the court said that the indictment for misprision must allege more than mere failure to disclose, such as suppression of evidence, harboring of the criminal, intimidation of witnesses, or other positive act designed to conceal from authorities the commission of a felony. It seems that such acts would also be sufficient to make one an accessory to the offense. The case of *Neal v. United States*⁴³ held that the elements of statutory misprision of felony, both of which must be proved to support conviction, are concealment of something, such as suppression of the evidence or other positive act, and failure to disclose. For example, in the case of *United States v. Farrar*,⁴⁴ it was said that knowledge and failure to report whiskey sales of the seller by the buyer was not a sufficient affirmative act of concealment to charge the buyer with the crime of misprision. And in the case of *Donovan v. United States*,⁴⁵ it was said that the defendant by remaining silent while sentence was imposed on him and another person whom he knew was sub-

39. When one had suffered from a felony, he could not maintain against the felon a civil action for the injury, until he had discharged his duty to the public by carrying on, or at least by setting on foot, a criminal prosecution for the public wrong. 1 BISHOP, CRIMINAL LAW, § 267 (7th ed. 1882), wherein it is stated that this is the English rule, followed by some American jurisdictions. See *Martin v. Martin*, 25 Ala. 201; *Pettingill v. Rideout*, 6 N. H. 454. However, South Carolina does not follow the English rule. See *Cannon v. Burris*, 1 Hill (S. C.) 372 (1833); *Robinson v. Culp*, 1 Tread 231, 3 Brev. (S. C.) 302 (1812).

40. *United States v. Farrar*, 38 F. 2d 515 (1st Cir. 1930), *aff'd*, 281 U. S. 624 (1930); *Donovan v. United States*, 54 F. 2d 193 (3rd Cir. 1931). An intention to conceal the commission of a felony from the government, if not carried out, is not statutory misprision of felony. *Neal v. United States*, 102 F. 2d 643 (8th Cir. 1939).

41. 126 F. 2d 789 (3rd Cir. 1941).

42. 73 F. 2d 795 (10th Cir. 1934).

43. 102 F. 2d 643 (8th Cir. 1939).

44. 38 F. 2d 515 (1st Cir. 1930).

45. 54 F. 2d 193 (3rd Cir. 1931).

stituting for the real co-defendant was not guilty under the Misprison of Felony Act. It seems, therefore, that even though one is under a duty to report or prosecute a felony committed within his presence, he is not liable for misprison if he fails to carry out his duty.⁴⁶ There must be some affirmative neglect, if it can be called such, on his part, or, as Chitty says, "he will be guilty of misprison of the crime which he has been *instrumental* in concealing."⁴⁷

How much a man, to avoid the guilt of misprison, must do to prevent a crime, or bring the offender to punishment, it is difficult to state; and doubtless the rule will vary with the nature and magnitude of the offense, and the kind and degree of public provision made for searching out and prosecuting offenders.⁴⁸

At common law only those are disqualified from becoming prosecutors who either from religious scruples or infidelity, which render them incapable of taking an oath, or from infamy, which presumes them unworthy of credit, are incompetent to become witnesses. Of this description are:

. . . Quakers, infidels who have no ideas of God or a future state of retribution, and persons attained of felony, treason, or false verdict, or convicted of any species of *crimen falsi* which renders them infamous. All these parties, however, are perfectly at liberty to disclose the circumstances of the crime, and thereby enable others to bring an offender to justice, against whom they cannot themselves give evidence.⁴⁹

Persons legally entitled to prefer an accusation against a party are in general

. . . bound by the strongest obligations, both of reason and law, to exert the power with which they are invested. Revenge ought not to become the motive of their actions. But in cases of greater offenses, which affect the public, they have no power

46. "It is true that under the English common law it was made the duty of every citizen to disclose any treason or felony of which he had knowledge and a person who did not fulfill this duty was guilty of 'misprison of treason or felony' though no affirmative effort or attempt was made to conceal the crime. But the early federal statute and the law of the present day expressly require concealment in addition to knowledge and failure to report, to constitute the crime of 'misprison of felony.'" *MERE FAILURE TO REPORT FELONY NOT A CRIME*. 63 U. S. L. Rev. 621, 622 (1929).

47. 1 CHITTY, CRIMINAL LAW, 2, 3 (1819).

48. 1 BISHOP, CRIMINAL LAW, § 721 (7th ed. 1882).

49. 1 CHITTY, CRIMINAL LAW 2 (1819).

(right) to forgive the injury which society in general has sustained, or to deprive mankind of that security which can alone result from the prompt detection and punishment of those by whom it is broken.⁵⁰

Conclusion

If the crime of misprision were strictly enforced today, there might arise many interesting problems. For example, following the duty to prevent felony to its logical conclusion, would one be under a duty to kill a man in order to prevent his committing suicide? There is a duty to prevent a commission of a felony, even to the extent of killing if necessary,⁵¹ and if one failed to carry out his duty, he would be chargeable with a misprision. In answer to this problem, first, it might be questioned whether committing suicide is a felony. Generally, felonies are defined by the punishment meted out, and no punishment may be inflicted upon one who successfully accomplishes suicide. And, secondly, in view of the fact that one must commit an affirmative act of concealment to be guilty of misprision, more than a mere witnessing of the suicide might be required before the witness would be legally compelled to act.

Another problem might arise in those states which require one, when feloniously attacked, to retreat to the wall before killing an attacker, if that be the only way to prevent such attack.⁵² If a man murderously attacked by another flies instead of resisting, he commits, substantially, misprision of felony, even though in strict law he will be excused, because acting from the commendable motive of saving life.⁵³ So, if he flees, that is, retreats to the wall, he commits a misprision of felony for not apprehending the attacker. If he stays to apprehend the attacker, he violates his duty of retreating to the wall. In answer to this problem, it can be said that as a prac-

50. *Ibid.*

51. "It is held to be the duty of every one who sees a felony attempted by violence, to prevent it if possible; and in the performance of this duty, which is an active one, there is a legal right to use all necessary means to make the resistance effectual." *Pond v. People*, 8 Mich. 150 (1860). See also *State v. Harris*, 1 Jones (N. C.) 190; *State v. Moore*, 31 Conn. 479 (1863); *State v. Turlington*, 102 Mo. 642, 15 S. W. 141 (1891).

52. At common law one need not retreat to the wall if the attack be felonious. CLARK'S, CRIMINAL LAW, 139, 140 (1894). However, in some states, the law requires, under all circumstances, that a man retreat before taking the life of his assailant, unless in some cases where he is attacked in his dwelling house, or unless by retreating he has no probable means of escape, *State v. Foster*, 66 S. C. 469, 45 S. E. 1 (1903); or, unless by so doing he would probably endanger his safety. *State v. Jones*, 90 S. C. 290, 73 S. E. 177 (1911).

53. 1 BISHOP, CRIMINAL LAW, §§ 851, 849 (7th ed. 1882).

tical matter, one would not be prosecuted for misprison under such circumstances. And certainly one would not be held responsible for doing the very thing which it is a crime to fail to do.⁵⁴

Whether the common-law crime of misprison should be retained today, as it is in some of our states, or whether it should be left up to the legislative branch of government to decide whether it should exist, is difficult to say. Certainly we do not need any laws such as those old laws of Egypt, whereby "whoever had it in his power to save the life of a citizen and neglected that duty, was punished as a murderer."⁵⁵ Such a law in our society would be regarded as more than severe. Neither would it seem that our society would permit enforcement of or punishment for every dereliction of one's duty. The appropriate observation on this point was made by Chief Justice Marshall in *Marbury v. Brooks*,⁵⁶ where he stated: "It may be the duty of a citizen to accuse every offender, and 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."

Common-law misprison has largely outlived any usefulness it may have had in times where conditions were more anarchical and law enforcement by government agents was less sophisticated and clearly more difficult of accomplishment. Certainly with the growth of our modern-day police systems and methods of crime detection, there is little need today for making misprison a crime, except in particular, specified types of crimes in which the public would have a great interest. The citizen's duty set out in misprison is certainly of a high political and moral character, but any punishment for failure to carry out this duty would seem to be best determined by the legislative branch of government, rather than under common-law rules which arose in answer to problems of a society very different from our own.

E. LEE MORGAN.

54. *Korematsu v. United States*, 323 U. S. 214, 220 (1944), a case concerning alleged conflicting orders given by the military, which forbade defendant both to leave an area and to remain there, in which it was said by Mr. Justice Black, in delivering the majority opinion of the court, that "... a person cannot be convicted for doing the very thing which it is a crime to fail to do."

55. 1 TYTLER, HISTORY 37 (Boston ed. 1844).

56. 7 Wheat. 556, 20 U. S. 556, 575, 5 L.Ed. 522 (1820).