to a sound result, for a shareholder who controls a corporation from behind the scenes through a dummy directorate should be subject to the same disabilities as one who exercises his control while on the board of directors.[14]

The court in the present case suggests that damages are to be measured by the injury resulting to the corporation from the shortcomings of the controlling stockholders. Since only a fraction of the controlling stockholders were actually before the court, a question arises as to whether full damages can be recovered from those defendants. Because recovery was based upon breach of fiduciary duty by the entire controlling group, it would appear that the individual defendant is to be treated as one of several joint tort-feasors who are jointly and severally liable.[15] It should be noted, however, that the court, while holding the defendants for negligent omissions, dismissed the charge of "knowingly participating in a fraudulent conspiracy" as "not established by the evidence."[16] It is possible that in the absence of a conspiracy, the several defendants could be treated as co-promoters who have divided a wrongful *profit*, in which situation it is sometimes held that each promoter is liable only for his share of the profit.[17] But this result appears unwarranted in the instant case, since the action was based upon the total injury to the corporation and was not limited to a recovery of the unjust profits—presumably measured by the excess of purchase price over the market price—received by the controlling shareholders.

Criminal Law—Accessory after the Fact—Misprision of Felony—[Michigan].—The defendant, knowing a felony had been committed, failed to notify the police or to do anything toward the apprehension and bringing to justice of the guilty person. An information, which resulted in a conviction, was filed charging him with the common law crime of misprision of felony. On an appeal from an order denying leave to withdraw a plea of guilty, *held*, that mere non-disclosure of knowledge of a felony committed by another is not a crime; the conduct of the accused must be such as to make him an accessory after the fact. Misprision of felony, short of accessory after the fact,

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Rev. 645, 659 (1932). And the imputation of a "representative's" knowledge to the interest group he represents does not seem to be too harsh.

[14] "Control" may be exercised by an officer of the corporation (Field v. Western Life Indemnity Co., 166 Fed. 607 (C.C. Ill. 1908); Westwood v. Continental Can Co., 80 F. (2d) 494 (C.C.A. 5th 1935)) as well as by the directors (McClure v. Law, 161 N.Y. 78, 55 N.E. 388 (1899); Keystone Guard v. Beaman, 264 Pa. 397, 107 Atl. 835 (1919); Robotham v. Prudential Ins. Co., 64 N.J. Eq. 673, 53 Atl. 842 (1903); see Jackson v. Smith, 254 U.S. 586 (1921)).

[15] It may be pointed out that the question of whether this "quasi-fiduciary" duty of the controlling group is based upon a trust, contract, or tort relationship is undecided, although the court, in the instant case, assumes that the defendants are joint tort-feasors. The problem of whether contribution over would be allowed, and if so, the problem of apportionment, may possibly be based upon the court's assumption of the underlying relationship between the shareholders of a corporation. See Harper, Torts § 303 (1933); 2 Williston, Contracts § 345 (1936); Rest., Trusts § 258 (1935).

[16] Insuranshares Corp. of Delaware v. Northern Fiscal Corp., 35 F. Supp. 22, 28 (Pa. 1940).

[17] Measure of Recovery against a Promoter Who Sells Property to a Corporation in Breach of Fiduciary Duty, 7 Univ. Chi. L. Rev. 534 (1940).

is not a substantive crime in Michigan. Conviction set aside and the defendant discharged, three judges dissenting. *State v. Lefkovitz.*[1]

Since the modern police organization has assumed major responsibility for the apprehension of criminals, prosecutions for misprision of felony are almost unknown. According to Blackstone, the crime at common law consists merely in the "concealment of a felony which a man knows, but never assented to; for if he assented this makes him either principal or accessory."[2] Thus a positive duty is placed on the citizen to reveal his knowledge of the commission of a crime to the proper authorities and otherwise to aid in bringing the felon to justice, and failure to do so constitutes the crime of misprision of felony. In *State v. Wilson*,[3] however, it was stated that mere neglect to inform the proper authorities of the commission of a crime and the identity of the felon is not in itself an offense, but such conduct becomes indictable only where the failure to report is coupled with an "evil motive" to obstruct justice.[4] On the other hand, an accessory after the fact is defined as one who, with knowledge of another's commission of a felony, renders some *affirmative* assistance to the felon[5] in order to obstruct the latter's apprehension, trial, or punishment.[6] His conduct is punishable as a felony, whereas misprision of felony is a misdemeanor.[7] Thus, while in both offenses the chargeable conduct of the accused is that his act or neglect to act has facilitated the felon in eluding punishment, the amount of assistance actually rendered differs markedly, and on that basis a distinction can be drawn between the two crimes. Where, however, as in the instant case, misprision of felony is held to require some act in aid of the offender such as would constitute a person an accessory after the fact, any distinction between the crimes, except as to punishment, disappears.

The Michigan constitution contains a blanket provision incorporating the common law of crimes.[8] The court in the instant case held that this does not include the common law crime of misprision of felony, although courts in states with similar constitutional provisions have held otherwise.[9] This same diversity has appeared in cases where courts have interpreted the crime of misprision of felony as set out in a statute.[10] The federal criminal code declares that whoever has knowledge of a crime cognizable by the courts of the United States and "conceals and does not as soon as may be disclose"

[1] 294 Mich. 263, 293 N.W. 642 (1940).

[2] 4 Bl. Comm. *121.

[3] 80 Vt. 249, 67 Atl. 533 (1907).

[4] Cf. State v. Biddle, 2 Harr. (Del.) 401, 124 Atl. 804 (1923), where it was held that, in addition to failure to report knowledge of a felony, the jury must also find that the defendant either "wilfully failed to make any effort to prevent the felony," or "wilfully failed and neglected to make any effort to prosecute and bring to justice."

[5] 1 Bishop, Criminal Law 497, 500 (9th ed. 1923).

[6] Examples of conduct indictable as accessory after the fact are: giving warning of the approach of arresting officers, Barnes v. State, 36 Tex. 639 (1872); acting as a "go-between," Nadel v. State, 27 Ohio App. 339, 161 N.E. 296 (1927); exchanging ransom notes for unidentifiable currency, Skelly v. United States, 76 F. (2d) 483 (C.C.A. 10th 1935); harboring the felon, Elmendorf v. Commonwealth, 171 Ky. 410, 188 S.W. 483 (1916).

[7] 1 Bishop, Criminal Law 503, 513 (9th ed. 1923).

[8] Mich. Const. Schedule, § 1.

[9] State v. Wilson, 80 Vt. 249, 67 Atl. 533 (1907); State v. Biddle, 2 Harr. 32 (Del.) 401, 124 Atl. 804 (1923).

[10] Compare State v. Hann, 40 N.J. L. 228 (1878), with State v. Graham, 190 La. 669, 182 So. 711 (1938).

to the proper authorities shall be subject to fine and imprisonment."[11] A similar statute in New Jersey[12] was interpreted in *State v. Hann*[13] as setting forth the common law crime of misprision of felony. As a result, in that case where the defendant, indicted under the statute, had witnessed a murder committed and simply remained "passive and silent," there was sufficient proof to sustain a conviction. The court stated that the crime was clearly distinguishable from accessory after the fact and it was therefore unnecessary to convict the principal before the defendant could be tried. The federal courts have taken a different view in interpreting the federal statute.[14] In *Bratton v. United States*,[15] the court stated that the crime as set forth in the statute consists of two elements: (1) some affirmative act of concealment such as suppression of evidence, harboring of the criminal, intimidation of witnesses, or "other positive act" designed to conceal from the authorities the fact that a crime had been committed, and (2) a failure to disclose. The court declared that both elements were required in order to give meaning to the complete language of the statute, for if "failure to disclose was itself concealment, the words 'conceals and' would be effectively excised from the statute." Like the definition of the crime in the instant case, this interpretation at once destroys the peculiar identity of misprision of felony. The federal court indicated that this interpretation was necessary to rescue the act from "an intolerable oppressiveness," for, while federal crimes were few when the statute was enacted in 1790, the great increase in number of felonies would make the statute unworkable and unenforceable today if any other interpretation were made.[16] This belief that the common law crime of misprision of felony is obsolete and wholly unsuited to modern conditions was also voiced by the court in the instant case and formed the basis for its conclusion that the common law crime did not exist in Michigan. As the dissenting opinion indicated, however, it would seem that this determination is more properly a legislative question of policy and not one for the courts. Nevertheless, reference to the historical background of misprision of felony reveals the purpose which the crime originally served and indicates that a question may be raised whether the crime is adaptable to the needs of modern society.

The origin of the crime of misprision of felony is obscured by the many usages the word misprision had in early law. Thus, the term has been used to comprehend "every considerable misdemeanor which has not a certain name given it in the law."[17] However, viewed more narrowly, there is reason to believe that misprision of felony as defined by Blackstone is merely one phase of the system of communal responsibility for the apprehension of criminals which received its original impetus from William I, under

[11] 1 Stat. 113, § 6 (1790), 18 U.S.C.A. § 251 (1927).

[12] N.J. Rev. Stat. (1937) tit. 2, c. 118, § 2.

[13] 40 N.J. L. 228 (1878).

[14] Neal v. United States, 102 F. (2d) 643 (C.C.A. 8th 1939); United States v. Farrar, 38 F. (2d) 515 (D.C. Mass. 1930).

[15] 73 F. (2d) 795 (C.C.A. 10th 1934).

[16] Ibid., at 797.

[17] Russell, Crimes and Misdemeanors 45 (Davis and Metcalf's 6th Amer. ed. 1850); Coke classifies misprisions as positive and negative. Under the former are included misprision of felony, misprision of treason, and the concealing of treasure troves. Under the latter are included the forging of foreign coins, corruption of public office, refusal to render service in time of public need, defamation of the king or government, questioning the king's title, and disturbing the order of the palace or courts. 3 Inst. *139–42.

pressure of the need to protect the invading Normans in hostile country, and which endured up to the Seventeenth Century in England.[18] In order to secure vigilant prosecution of criminal conduct, the vill or hundred in which such conduct occurred was subject to fine, as was the tithing[19] to which the criminal belonged,[20] and every person who knew of the felony and failed to make report thereof was subject to punishment for misprision of felony.[21] Compulsory membership in the tithing group,[22] the obligation to pursue criminals when the hue and cry was raised,[23] broad powers of private arrest, and the periodic visitations of the General Eyre for the purpose of penalizing laxity in regard to crime,[24] are all suggestive of the administrative background against which misprision of felony developed. With the appearance of specialized and paid law enforcement officers, such as constables and justices of the peace in the Seventeenth Century,[25] there was a movement away from strict communal responsibility, and a growing tendency to rely on professional police.[26] Nevertheless, the continuance of the power of private arrest indicates that reliance is still placed to some extent on the individual members of the general public.

While private citizens are notably cooperative with the police forces in England,[27] in the United States the public frequently is apathetic, and in some places hostile, to the idea of volunteering aid to the police. The view of the federal courts and the court in the instant case on misprision of felony is indicative of a reluctance to place affirmative duties to act on the private citizen. There is, however, a growing animosity toward aloofness,[28] with a resultant broadening of the individual's civic responsibility. By compelling every citizen to report knowledge of a felony to the police authorities, facilitation of the administration of justice, particularly in combating organized crime,[29] should result, together with more efficient policing, and a possible lowering of the unit cost of crime detection.

[18] Morris, Frankpledge System 29, 30 (1910).

[19] A group of ten, twelve or more persons, mutually responsible for one another's misdeeds.

[20] 3 Holdsworth, History of English Law 598 (3d ed. 1923); The Policeman in Legal History, 170 L. Times 355, 356 (1930); Law and Order in Seventeenth Century England, 95 Justice of the Peace 363 (1931).

[21] 1 East, P.C. 377 (1803).

[22] 1 Holdsworth, History of English Law 5, 13 (4th ed. 1931).

[23] 3 Holdsworth, History of English Law 599 (3d ed. 1923).

[24] The General Eyre was composed of itinerant justices, one of whose principal functions was to address interrogatories to local juries covering the commission of crimes, invasions of royal rights, and neglect of police duties. 1 Pollock and Maitland, History of English Law 201 (2d ed. 1911).

[25] 3 Holdsworth, History of English Law 601 (3d ed. 1923).

[26] The Policeman in Legal History, 170 L. Times 355, 357 (1930).

[27] Howard, Criminal Justice in England 234, 235 (1931).

[28] There is a growing tendency to hold a person criminally responsible who fails to act "when there is a duty to act." This "duty" may be based on a vague "taking charge of the situation" or the assumption of care or control over another individual. See People v. Beardsley, 150 Mich. 206, 113 N.W. 1128 (1907); State v. Noakes, 70 Vt. 247, 40 Atl. 249 (1897); Regina v. Instan, 17 Cox Crim. Cas. 602 (1893).

[29] The analogous crime of misprision of treason may provide an effective weapon for combating so-called "subversive" activity.