this genus. The other reason was less convincing. A letter of advice from the executive obtained by Smith J. stated that in 1946 the Australian government recognized the Polish government as exercising *de facto* administrative control over Breslau but not as possessing *de jure* sovereignty. On this ground it was held that the Polish government had no power recognizable in our courts to change the marriage laws of the area. It is not clear how this reasoning can be reconciled with the case of *The Arantzazu Mendi*[24] where it was held on the highest authority that the laws of a government recognized *de facto* by the British government took precedence in British courts over the laws of the *de jure* sovereign authority. If the *de facto* recognition mentioned by Smith J. means the same thing as it did in the *Arantzazu Mendi* case (any other view appears to be difficult to support), it would appear that the two results are diametrically opposed to one another. In view of this, it is submitted that this reason for refusing to recognize the retrospective validation is not supported by authority and in fact is opposed to authority, though it is readily admitted that the refusal was correct on the other ground.

A halt has been called to the advance of the idea that the rule *locus regit actum* is a presumption. Smith J. has clearly marked the way for Victorian courts along the path of a stricter view of *Scrimshire v. Scrimshire,*[25] and the allowable exceptions to the rule it founded in English law, than is envisaged by *Kochanski v. Kochanska.*[26] If this decision is accorded the same consideration as *Savenis v. Savenis and Szmeck*[27] received, it might well recall English courts to the formulation of the rule expressed in *Berthiaume v. Dastous.*[28] It is only to be regretted that His Honour's view of the facts prevented him from considering *Savenis v. Savenis and Szmeck*[29] and the English interpretation of it. All extensions of existing rules need not, of necessity, work justice, and in at least refusing to extend the idea of *locus regit actum* as a presumption, and, it is suggested, setting it back one step, Smith J. in this case has struck a blow for the complete restoration in its pristine state of a rule which is an outstanding example of one which works substantial justice and provides complete certainty and consistency.

J. R. HANLON

R. v. CRIMMINS[1]

Criminal Law—Misprision of felony—Not obsolete—Elements of offence—Sufficient concealment

C, after treatment at a hospital for a gun-shot wound, stated to police officers that he had been deliberately shot, but he refused to disclose the name of the person who shot him or the whereabouts of the house where he had been shot. He admitted that he knew both these facts. C was convicted by a jury before O'Bryan J. of misprision of felony,

[24] [1939] A.C. 256. [25] [1752] 2 Hag. Con. 395. [26] [1957] 3 W.L.R. 619.
[27] [1950] S.A.S.R. 309. [28] [1930] A.C. 79. [29] [1950] S.A.S.R. 309.
[1] [1959] V.R. 270; [1959] Argus L.R. 674. Supreme Court of Victoria; Herring C.J., O'Bryan and Dean JJ.

the said felony being unlawful and malicious wounding with intent to do grievous bodily harm. The learned trial judge directed the jury that:

(i) misprision of felony was committed when a person concealed his knowledge of a felony, whether such concealment was for his own profit or not;

(ii) the concealment of the facts by C was a sufficient concealment to constitute the crime.

Under section 446 of the Crimes Act 1957,[2] O'Bryan J. reserved for the consideration and determination of the Full Court the question *inter alia,* whether his charge to the jury was proper and adequate in the circumstances of the case. The Full Court, in a joint written judgment, answered in the affirmative.

Before proceeding to consider the question reserved, Their Honours rejected the view, which seems to be widely held,[3] that the common law misdemeanour of misprision of felony is obsolete. In their opinion 'the citizen's duty to disclose to the appropriate authorities any treason or felony, of which he has knowledge, remains the same and is still binding upon him as it was in the early days of the common law'.[4]

Since the *dictum* of Lord Westbury in *Williams v. Bayley,*[5] in 1866, there has been doubt as to the constituent elements of misprision of felony.[6] His Lordship said that misprision of felony was committed 'when a man, instead of performing his public duty, and giving information to the public authorities of a crime that he was aware of, concealed his knowledge, *and, farther, converted it into a source of emolument to himself'.*[7] In the instant case, however, Their Honours stated that *Williams v. Bayley* was a case of compounding a felony, and that Lord Westbury apparently confused this offence with misprision of felony. Nor could they find any support for His Lordship's *dictum.* Accordingly, Their Honours held that it is not a necessary constituent of misprision of felony that the concealment should be for the purpose of profit.[8]

It is submitted, with great respect, that this decision is entirely correct. Except for the *dictum* of Lord Westbury, and a decision of Judge Stephen, based on that *dictum,* in the Court of Quarter Sessions in New South Wales,[9] misprision of felony seems always to have been defined as the concealment of a felony known to have been committed.[10] The offence

[2] Now s. 446, Crimes Act 1958.

[3] *R. v. Aberg* [1948] 2 K.B. 173, 176 *per* Lord Goddard C.J. where His Lordship said that misprision of felony is an offence generally regarded as obsolete; *Halsbury's Laws of England* (3rd ed. 1954) x, 632, n. (r); Stephen, *History of the Criminal Law of England* (1883) ii, 238.

[4] [1959] V.R. 270, 272; [1959] Argus L.R. 674, 676.

[5] (1866) L.R. 1 H.L. 200.

[6] *R. v. Aberg* [1948] 2 K.B. 173, 176 *per* Lord Goddard C.J. His Lordship said that, in any future prosecution for misprision of felony, the constituents of the offence will require careful consideration. *Halsbury's Laws of England* (3rd ed. 1954) x, 315, 632, n. (r); *Archbold's Criminal Pleading* (33rd ed. 1954) 1512.

[7] *Williams v. Bayley* (1866) L.R. 1 H.L. 200, 220 (italics mine).

[8] [1959] V.R. 270, 273; [1959] Argus L.R. 674, 677.

[9] *R. v. Hosking,* noted by Professor Norval Morris in [1955] *Criminal Law Review* 291.

[10] *Hale's Pleas of the Crown* i, 374; *Hawkins' Pleas of the Crown* (3rd ed.) i, 125; 3 *Co. Inst.* 139, 140; *Blackstone's Commentaries* (10th ed.) iv, 121; *R. v. M'Daniel and*

differs from that of an accessory before the fact in that no privity to the commission of the felony need be proved, and from that of an accessory after the fact in that no actual assistance to the felon need be proved.[11] Moreover, it is a clearly separate offence from that of compounding a felony (in early law, theft-bote), which takes place when a person agrees for some reward not to prosecute a felon.[12] In *Williams v. Bayley*,[13] certain bankers agreed, upon the father of the forger giving to them an equitable mortgage of his property as security, to hand over to him certain forged promissory notes. It is respectfully submitted that this agreement was, in substance, an agreement for reward not to prosecute the forger,[14] that is a compounding of a felony, and that His Lordship's *dictum* was, therefore, not 'well-founded'.[15] Further, such an element as concealment for profit would be inconsistent with the duty to give information, which is the basis of misprision of felony,[16] for, if misprision of felony was not committed unless there was concealment for profit, there would be no enforceable duty to give information of felonies, but, in effect, only a duty not to conceal felonies for the purpose of profit. Thus, a man who merely did not disclose his knowledge of a murder or other serious felony would not be punishable. It is submitted, however, that a higher standard of civic responsibility than this should be demanded by the law, and that the duty confirmed by the Full Court is socially preferable.

In respect of the second question of law regarded as difficult by the learned trial judge, the Full Court held that the refusal by C to reveal the identity of the person who committed the felony and the place where it was committed was a sufficient concealment to constitute misprision of felony. Their Honours stated that there is sufficient concealment by a person 'if he fails to make known to the authorities facts that he knows of the felony that might lead to the apprehension of the felon'.[17] Although, in a sense, C had not concealed the felony, in that he had revealed the fact that he had been feloniously wounded, it is respectfully submitted that, as misprision of felony is founded on a duty to give information of a known felony,[18] the disclosure of the bare fact of a felony, without more, by a person knowing more, is not a disclosure constituting performance of that duty. As there are apparently no authorities as to what degree of concealment is sufficient, it is suggested

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others (1755) 19 State Trials 789, 805; *Proceedings under a Special Commission for the County of York* (1813) 31 State Trials 959, 969; *Hardie and Lane, Ltd v. Chilton* [1928] 2 K.B. 306, 317.

[11] Coke, *op. cit.*, 140; Hale, *loc. cit.*; Blackstone, *loc. cit.*; Archbold, *loc. cit.*

[12] Coke, *op. cit.*, 133-134; Hale, *op. cit.*, 619; Hawkins, *loc. cit.*; Archbold, *op. cit.*, 1268; *Russell on Crime* (11th ed. 1958) i, 381. [13] *Supra*, n. 5.

[14] In *Fisher & Co. v. Apollinaris Co.* (1875) L.R. 10 Ch. App. 297, 300 n., Sir R. Malins V.-C. stated that *Williams v. Bayley* was a case of compounding a felony.

[15] [1959] V.R. 270, 273; [1959] Argus L.R. 674, 677.

[16] [1959] V.R. 270, 273; [1959] Argus L.R. 674, 677 where Their Honours state that it 'is the breach of the duty to give information that is the gist of the crime'. In Archbold, *op. cit.*, 1512 it is stated that 'the offence appears to be founded on a duty to inform the Queen's officers of the commission of a felony'.

[17] [1959] V.R. 270, 274; [1959] Argus L.R. 674, 678. [18] *Supra*, n. 16.

that this judgment by the Full Court clarifies a previously ill-defined element of the crime. It is now clear that the common law misdemeanour of misprision of felony is committed by an omission to act.[19] It is interesting to note that in the United States where Congress has made misprision of felony a statutory offence, the courts have decided that an omission to act is not enough, and that to commit statutory misprision of felony a person must do some affirmative act to conceal the known felony.[20] It seems, therefore, that liability for statutory misprision of felony in the United States is akin to common law liability as an accessory after the fact.[21]

Misprision of felony was said, as long ago as 1866, to have 'somewhat passed into desuetude',[22] but, in view of the instant case, and other recent cases,[23] it seems that prosecutions for this offence will, from time to time, be brought by the Crown. It is submitted, however, that the common law definition of the crime is too wide. If 'to know of a felony and not to inform the King's officers, is misprision of felony',[24] then 'it would make it an offence for a mother to fail to inform the police that her eight-year-old son has taken a cake from the pantry, knowing that it is wrong to do so'.[25] The law may be even more demanding, as it seems that the crime may be committed by failure to reveal an *intended* felony.[26] In fact, prosecutions for misprision of felony are rare, and it is not suggested that the Crown would, in fact, prefer charges against persons who did conceal such minor felonies. It is submitted, however, that the law does require all felonies, regardless of degree, to be reported to the authorities. Such an extensive duty, although perhaps not out of place in earlier centuries, is not required in a modern community in which the detection and suppression of crime is undertaken by an organized police force.[27] Even in the middle of the last century, the Criminal Law Commissioners recognized that the law should not compel everyone with knowledge of a felony to disclose it. They were in favour of limiting the offence to the concealment of serious crimes only.[28] As misprision of felony has assumed a new importance in recent years, it is submitted that the legislature should confine it within such limits.

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[19] In *Journal of Criminal Law* (1949) xiii, 8, a case is noted in which misprision of felony was considered before a Magistrate's Court in England. It was stated, on behalf of the Director of Public Prosecutions, that it was thought that the concealment must be active and not mere passive connivance, but that no authorities could be found.

[20] E. Lee Morgan, 'Misprision of Felony' (1953) 6 *South Carolina Law Quarterly* 87, 92.

[21] See *R. v. Tevendale* [1955] V.L.R. 95 as to the act of assistance required to constitute an accessory after the fact.

[22] *Williams v. Bayley* (1866) L.R. 1 H.L. 200, 220 *per* Lord Westbury.

[23] *R. v. Hosking, supra,* n. 9; Archbold, *op. cit.,* 1512 where it is stated that there have been recent prosecutions for misprision of felony at the Central Criminal Court, London.

[24] *Hardie and Lane, Ltd v. Chilton, supra,* n. 10 *per* Scrutton L.J.

[25] Glanville Williams, *Criminal Law: The General Part* (1953) 236. It is doubtful whether an infant can be guilty of misprision of felony: Hale, *op. cit.,* 20; *Bacon's Abridgement* iv, 352.

[26] Hawkins, *op. cit.,* ii, 317, s. 23.

[27] In 1829, however, in the early years of police, Sir Edwin Chadwicke did advocate the revival of misprision of felony; he considered that every unreported crime was a stimulus to fresh crime: L. Radzinowicz, *A History of English Criminal Law* (1956) iii, 465-466.

[28] Glanville Williams, *loc. cit.*