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APPELLATE REVIEW OF ERRORS CONFESSED BY ATTORNEY GENERAL.—[Federal] Defendants were convicted of arson for setting fire to a fraternity house of which both were members. Reliable evidence as to defendants' innocence was not admitted by the trial court. After judgment, the attorney general conducted an independent investigation which convinced him that the defendants were innocent. Thereupon, he filed a confession of error in respect to the appellants' assignments. *Held,* on appeal, reversed. But, notwithstanding the attorney general's confession of error, the court was bound to review the errors assigned: *Parlton* v. *United States* (1935) 75 F. (2d) 772.

There seems to be no doubt that it is entirely proper for the attorney general to confess error when he deems it apparent: *State* v. *Bailey* (1891) 85 Iowa 713, 50 N. W. 561; *State* v. *Goddard* (1898) 146 Mo. 177, 48 S. W. 62. Nevertheless, no uniformity of decisions can be found as to whether or not the court will reverse without looking into the record. The early common law view appears to have been that a confession of error on the part of the attorney general would not divest the appellate court from its duty of looking into the record to determine for itself whether or not there is error: *Rex* v. *Wilkes* (1770) 4 Burrows 2527, 2551. At the present day many courts express the opinion that the record should be examined, thus throwing the discretion on the court which will not approve unless it is of the opinion that due administration of justice requires that the prosecution be ended: *State* v. *Mortensen* (1922) 224 Ill. App. 221; *Henderson* v. *State* (1921) 18 Okl. Cr. 611, 197 Pac. 720; *Green* v. *State* (1921) 18 Okla. Cr. 715, 197 Pac. 1077; *Bindrum* v. *State* (1924) 27 Okla. Cr. 372, 228 Pac. 168; *State* v. *Stevens* (1910) 153 N. C. 604, 69 S. E. 11. Further, the California court has recognized that the power to set aside or modify a judgment in a criminal case, except for legal grounds appearing on a record duly presented is not judicial. It states that it is a branch of the governor's pardoning power and cannot be exercised by the attorney general either directly or through the medium of the court: *People* v. *Mooney* (1917) 175 Cal. 666, 166 Pac. 999; *People* v. *Mooney* (1917) 176 Cal. 105, 167 Pac. 696. Other courts will reverse without perusing the record upon mere filing a confession. No grounds for so doing are stated: *Purgon* v. *State* (1876) 52 Ind. 390; *People* v. *Lewis* (1899) 127 Cal. 207, 59 Pac. 830; *Zancannetti* v.

People (1917) 63 Colo. 252, 165 Pac. 612; *Richardson* v. *People* (1918) 69 Colo. 155, 170 Pac. 189.

The view taken in the instant case would seem to be the better one. It is claimed that the attorney general is open to danger of corruption, intimidation and coercion. Further, a filing of confession is, in effect, a pardoning power which may be misused, particularly if the reviewing court does not examine the record: *Swancara,* "Confessions of Error in Criminal Cases" (1923) 96 Central L. J. 204. See *Baker* and *DeLong,* "The Prosecuting Attorney" (1923) 24 J. Crim. L. 1065, where the advisability of limiting the wide discretion now possessed by prosecuting attorneys is discussed. Certainly a reversal of conviction for a crime without an examination of the record gives to the prosecuting attorney a wide range of discretion, leaving room for fraud, collusion and "fixing." In *DeLong,* "The State Attorney General" (1934) 25 J. Crim. L. 374 the almost unlimited discretion of the attorney general before and during a criminal trial is explained. Even if wide discretion before trial is necessary, it would seem best, once the defendant is convicted by judicial pronouncement, to take the case out of the prosecuting attorney's hands and to allow only the governor's pardon based upon equitable considerations or the legal mechanism of the court of appeal to operate in reversal of judgment.

EUGENE BUSCH.

EVIDENCE — ADMISSIBILITY OF OTHER CRIMES TO PROVE IDENTITY. [Canada] The defendant was convicted upon a charge of receiving stolen goods. At the trial a police constable was permitted to testify that he recognized the accused from a police photograph. The grounds for the appeal were that the admission of the testimony of the constable was prejudicial in that the jury might infer a police record. *Held,* on appeal, reversed: although the evidence was not affirmatively shown to be prejudicial the defendant is entitled to a new trial: *Rex* v. *McLaren* (Alberta 1935) 63 Can. Cr. Cas. 257.

Generally, the state cannot prove any crime not alleged in the indictment merely for the purpose of raising a presumption that the defendant would be more apt to commit the crime in question: 1 *Wigmore,* "Evidence" (2d ed. 1923) §§193, 194; *People* v. *Shea* (1895) 147 N. Y. 78, 41 N. E. 505. The exceptions to this general rule are when evidence of other crimes tends directly to establish (1) the motive (*People* v. *Scheck* (1934) 356 Ill. 56, 190 N. E. 108), (2) the intent (*People* v. *Cione* (1920) 293 Ill. 321, 127 N. E. 646), (3) absence of mistake or accident (*State* v. *Jones* (1903) 171 Mo. 401, 71 S. W. 680), (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others (*State* v. *Thuna* (1910) 59 Wash. 689, 109 Pac. 331), (5) sex crimes (*State* v. *Sweeney* (1930) 180 Minn. 450, 231 N. W. 225), (6) identity of the person charged with the commission of the crime. 1 *Wigmore, op. cit. supra* §§300-306. See generally the excellent discussion in *People* v. *Molineux* (1901) 168 N. Y. 264, 61 N. E. 286.

It is with exception (6) that this case is involved. Few cases apply the rule in this situation because there cannot be many instances where separate crimes, with no unity or connection of motive, in-

tent or plan will serve to legally identify the defendant. In *Cross* v. *People* (1868) 47 Ill. 152, 95 Am. Dec. 474, the witness, who had talked with the accused after the forgery, was permitted to relate what was said as to how other forgeries were committed, thus helping to identify the defendant. To prove identity of one as a member of a gang it was necessary to show that defendant was present with the gang on other occasions of similar character: *Jenkins* v. *Commonwealth* (1915) 167 Ky. 544, 180 S. W. 961. In a trial for robbery where the identity of the accused was in question, evidence of witnesses who had recognized defendant in other robberies was admissible, when limited to that very point: *State* v. *Caton* (1931) 134 Kan. 136, 4 P. (2d) 677; *Whiteman* v. *State* (1928) 119 Ohio 285, 164 N. E. 5. Again, if properly limited, evidence that defendant had sold liquor at times other than charged is admissible to show identity: *Thomas* v. *State* (1926) 130 Tex. Cr. 671, 282 S. W. 237. In a prosecution for rape, aticles stolen by defendant and lost at the scene of the crime were admissible to prove identity even though they proved a prior robbery: *State* v. *Hicks* (1934) 180 La. 281, 156 So. 353. See annotations in (1919) 3 A. L. R. 1540; (1923) 22 A. L. R. 1016; (1923) 27 A. L. R. 357; (1929) 63 A. L. R. 602.

The question narrows itself to the point directly presented in the instant case. It is well settled that photographs are proper evidence when they accurately portray that which they represent: 2 *Wigmore, op. cit. supra* §792; see Note (1923) 23 J. Crim. L. 853. The trouble arises when a photograph is sought to be introduced that on its face shows or implies a previous criminal record. The question was presented in *People* v. *Goltra* (1931) 115 Cal. App. 539, 2 P. (2d) 35, but was not directly passed upon for the photograph was held inadmissible because no witness testified it was a likeness of the accused. The fact that it came from a rogue's gallery was known. The court in *Commonwealth* v. *Luccitti* (1928) 295 Pa. 190, 145 Atl. 85, admitted a photograph from a rogue's gallery where no markings showed whence it came. It was stated that ordinarily such evidence should be kept from the jury, although it would not necessarily mean that defendant was wanted for a crime. The proposition was directly passed upon in two cases and in both it was held that photographs known to be from a rogue's gallery were admissible to prove identity: *State* v. *Leopold* (1929) 110 Conn. 55, 147 Atl. 118; *State* v. *King* (1918) 102 Kan. 155, 169 Pac. 557. One court has even gone so far as to allow a warden of another state prison to identify the accused from a photograph taken while he was in prison: *State* v. *Jones* (1914) 48 Mont. 505, 139 Pac. 441. *Cf. Rocchia* v. *U. S.* (C. C. A. 9th, 1935) 78 F. (2d) 966 where a fingerprint card which was presented to jury for inspection bore a reference to previous misconduct of defendant. Defendant was there held to have waived any objection he might have had.

The above cases show that the courts have admitted evidence of other crimes when it was reasonably necessary to establish one or more of the exceptions described. In the instant case, if the testimony of the constable was probative and necessary to prove the identity of the accused, the fact alone that it was possibly prejudicial should not have

justified a reversal of the conviction.

CHARLES B. ROBISON.

EVIDENCE IN MITIGATION OR EXCUSE AFTER PROOF OF HOMICIDE.—[California] Defendant was convicted on a charge of first-degree murder. The court instructed the jury in the words of Cal. Pen. Code (1935) §1105 that, if they believed that the killing had been proved, the defendant must make out his case in mitigation, justification, or excuse by some proof strong enough to create in the minds of the jurors a reasonable doubt as to his guilt. Objection was made that the instruction was erroneous, in that it shifted the burden of proof to defendant. *Held,* on appeal, affirmed. The statute did not impose the ultimate burden of proof on defendant, but merely the burden of going forward with the evidence: *People* v. *Madison* (Cal. 1935) 46 P. (2d) 159.

Apparent contradictions in both civil and criminal cases have arisen from a loose use of the phrase, "burden of proof." The ultimate burden in criminal cases is on the prosecution at all times to prove its case beyond a reasonable doubt. But in a secondary sense the burden *does* shift to the accused to produce some evidence in excuse or mitigation, once the killing has been proved by the prosecution: 4 *Wigmore,* "Evidence" (2 ed. 1923) §2485.

California Penal Code (1935) §1105 declares: "The homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon the accused." This is a correct statement of the law as found in decisions of other states: *Wheeler* v. *State* (1934) 179 Ga. 287, 175 S. E. 540; *State* v. *Ward* (1931) 51 Idaho 68, 11 P. (2d) 620; *State* v. *Mangino* (1931) 108 N. J. L. 475, 156 Atl. 430, Note (1932) 22 J. Crim. L. 907; *Commonwealth* v. *Marshall* (1927) 287 Pa. 512, 135 Atl. 301; *Oliver* v. *Commonwealth* (1928) 151 Va. 533, 145 S. E. 307. See Note (1931) 21 J. Crim. L. 609. It is also in accord with similar statutes in other jurisdictions: *Rosser* v. *State* (Ariz. 1935) 42 P. (2d) 613; *Wilson* v. *State* (1916) 126 Ark. 354, 190 S. W. 441; *Lumpkin* v. *State* (1911) 5 Okla. Cr. 485, 115 Pac. 478.

The California court has uniformly held it is not error to give an instruction in the words of §1105: *People* v. *McClure* (1906) 148 Cal. 418, 83 Pac. 437; *People* v. *Bannon* (1922) 59 Cal. App. 50, 209 Pac. 1029; *People* v. *McCurdy* (1934) 140 Cal. App. 499, 35 P. (2d) 569. In the instant case, the instruction is even more favorable to defendant than is §1105 given alone. For the trial judge explained to the jury the legal meaning of the statute, *viz.,* that the only burden on accused is to raise a reasonable doubt in the minds of the jurors as to his guilt. Clearly the court could not call such a favorable and unambiguous instruction reversible error: *People* v. *Casey* (1907) 231 Ill. 261, 83 N. E. 278.

The Illinois statute, Ill. Rev. Stat. (Smith-Hurd 1935) c. 38, §373, is almost identical to California Penal Code §1105, and over a long period of years the Illinois court has followed the general rule as shown above. There are numerous decisions to the effect that, once the killing by the defendant is proved, the burden of proof shifts to him to produce evidence in justification

or excuse: *Murphy* v. *People* (1865) 37 Ill. 447; *Kota* v. *People* (1891) 136 Ill. 655, 27 N. E. 53; *Wacaser* v. *People* (1890) 134 Ill. 438, 25 N. E. 564 (instruction erroneous in requiring proof by defendant to satisfaction of jury); *People* v. *Duncan* (1890) 134 Ill. 110, 24 N. E. 765 (instruction in exact language of §373); *Wallace* v. *People* (1896) 159 Ill. 446, 42 N. E. 771; *Henry* v. *People* (1902) 198 Ill. 162, 65 N. E. 120 (accused must merely raise reasonable doubt when all evidence considered). But in *People* v. *Durand* (1923) 307 Ill. 611, 139 N. E. 78, the court said an instruction in the language of §373 should not be given. Then came a similar holding in *People* v. *Sterankovich* (1924) 313 Ill. 556, 145 N. E. 172. As a result, although §373 is still included in the Illinois Revised Statutes (Smith-Hurd 1929, 1935), the annotations infer it should never be given in a charge to the jury, and this seems to be the generally accepted view. It is true that in the *Durand* case, *supra,* court said §373 should not be given to the jury, but it qualified its statement as follows: "Some instructions given for the people on self-defense are erroneous. Had all the other instructions bearing on self-defense been accurate, then the giving of this instruction (§373) *would not necessarily be reversible error.*"

Therefore it is believed that the giving of §373 *verbatim* to the jury is not *per se* erroneous, in spite of the fact that such is the prevalent opinion, based on the annotations. It is conceivable that §373 might be prejudicial if given by itself, but not if it is properly supplemented by other correct instructions. This is indicated by the language of the court in two later cases: *People* v. *Meyer* (1928) 331 Ill. 608, 163 N. E. 453; *People* v. *Russell* (1926) 322 Ill. 295, 153 N. E. 389. These cases clearly show that the Illinois court recognizes the principle that the burden of proof in its secondary meaning *does* shift to the accused to produce evidence in mitigation or justification, once the killing by the defendant has been proved.

The decision in the instant case seems to be in accord with the weight of authority. Since the statute contains a correct statement of the law, an instruction in the words thereof should not be considered prejudicial. However, it would seem abvisable for the trial judge to explain the technical language of the legislature to the jury by additional instructions making it clear that, as to mitigation, the accused merely has the burden of going forward with the evidence and that there, as elsewhere, the state must prove its case beyond a reasonable doubt.

HENRY D. LINDAUER.

RECEIVING STOLEN GOODS—INFERENCE OF GUILTY KNOWLEDGE FROM RECENT POSSESSION.—[Federal] Defendant was convicted of knowingly receiving, concealing and retaining in his possession with intent to convert to his own use, two army pistols, stamped with the words "United States Property." They had been stolen from a National Guard Armory 293 days before being found on defendant's person when he was arrested for participating in a shooting affray in company with gangsters. Defendant denied having possession. *Held:* on appeal, reversed. Defendant's possession, in absence of supporting evidence, was not sufficiently recent to sustain a finding of guilty knowledge:

Gargotta v. *United States* (C. C. A. 8th, 1935) 77 F. (2d) 977.

It has often been stated as a general rule that possession, to justify an inference of guilty knowledge, must be "recent possession:" See generally, *Wertheimer* v. *State* (1929) 201 Ind. 572, 169 N. E. 40, 68 A. L. R. 178, Annotation at 187. The cases persistently use the term, often quite casually; but what constitutes "recent" possession depends largely upon the circumstances in any particular case, and no attempt is made to define it: See annotation to the case of *State* v. *Drew* (1904) 179 Mo. 315, 78 S. W. 594, 101 A. S. R. 474, at 510.

Mr. Wharton says that the significance of "recent possession" is affected by the identifying earmarks on the stolen article in question: 2 *Wharton,* "Crim. Ev." (10th ed. 1912), §760. Early English cases placed importance on the "readiness with which goods might pass from hand to hand." In *Rex* v. *Adams* (1829) 172 Eng. Rep. 563, a man was found in possession of some tools three months after the theft; it was observed by the court that these might pass readily from hand to hand, and the defendant was acquitted without being called upon for explanation. But in *Rex* v. *Partridge* (1836) 173 Eng. Rep. 243, a man was found in possession of two ends of woolen cloth in an unfinished state, two months after they had been stolen; the court thought that these particular goods were not such as might pass readily from hand to hand, and it was held a question to go to the jury, which subsequently found him guilty. The same idea is incorporated in *Roscoe,* "Crim. Ev." (14th ed. 1921), page 22. The author agrees with the decisions that the possession must be recent, "but what shall be deemed recent possession," he elaborates, "must be detemined by the nature of the articles stolen, i. e., whether they are of a nature likely to pass rapidly from hand to hand; or of which the accused would be likely from his situation in life, or vocation, to become possessed innocently."

If we accept *Roscoe's* viewpoint, the determination of what constitutes "recent" in any particular case is not a question of law to be decided by the court having in mind only the time element. "Recentness" of possession will be affected by the nature of the article, its readiness in passing from hand to hand, defendant's situation in life, and the circumstances of the possession; and whether a question of fact is presented for the jury will depend upon the violence of the inference to be drawn from a combination of these evidentiary elements: *State* v. *Jennett* (1883) 88 N. C. 665. These elements are weighed by the courts today in raising an inference of guilt, but collaterally with the time element. Few cases consider them as part of the "recentness" problem itself. See *State* v. *Jenkins* (Mo. 1919) 213 S. W. 796, at 799.

The Circuit Court of Appeals in the principal case excuses defendant's failure to explain possession by the fact that he consistently denied possession, holding that therefore no explanation was necessary: Opinion, page 983. Nevertheless, the court recognizes as one of the proven facts that the pistols were actually found in defendant's possession: Opinion, page 981. If we are to believe the testimony of the two police officers who took the pistols from defendant, then defendant's testimony is perjured. But the effect of the court's ruling

that the evidence was insufficient to go to the jury, is to condone the perjury and hold that it is not a guilty circumstance which expands the inference rising out of the possession. It has been held that denial of possession of stolen goods, if shown to be false, is a circumstance of guilt against the defendant as a matter of substantive proof and not merely as affecting credibility: *People* v. *Levison* (1860) 16 Cal. 99; *Huggins* v. *People* (1890) 135 Ill. 243, 25 N. E. 1002. The opinion in the principal case, however, not only fails to appraise defendant's denial, in the light of the police officers' testimony, but allows the perjury to operate as a device to relieve defendant of explaining some very untoward circumstances.

Regardless of surrounding circumstances it is hard to call possession 293 days after the theft "recent" possession. But defendant's possession of pistols plainly marked "United States Property," discovered when he was using the pistols for an unlawful purpose and in company with gangsters, which possession is further characterized by the fact that defendant not only refused to offer any explanation but perjured himself by falsely disclaiming that he had possession, would seem to be sufficient to take the case to the jury.

LAWRENCE B. MURDOCK.

STATUTE OF LIMITATIONS — DEMURRER TO INFORMATION.—[Minn.] The defendant was arraigned on November 26, 1934, on an information, filed the same day, charging that he had, on October 13, 1925, been guilty of acts constituting him an accessory after the fact to a felony. The defendant demurred to the information on the ground that it showed on its face that the crime was committed more than three years before the date of filing. The demurrer was overruled and the defendant entered a plea of guilty. Defendant then moved the court to reconsider its ruling on the demurrer, and, if still of the opinion that it should be overruled, to grant a new trial. From an order denying the motion the defendant appealed. *Held:* on appeal, reversed, with order to discharge the defendant from custody. When the information shows that, since the offense charged was committed, the time within which prosecution may be had has elapsed, and there is no allegation of facts which would avoid the operation of the statute, that information is demurrable: *State* v. *Tupa* (Minn. 1935) 260 N. W. 875.

The rule in the majority of jurisdictions is that the objection of the statute of limitations is not ground for demurrer. However, 2 Minn. Stat. (Mason 1927) §10690 provides that a defendant may demur to an indictment when there appears on its face any "legal bar to the prosecution." An identical statutory provision in another jurisdiction has been interpreted to allow the statute to be raised on demurrer: *People* v. *Ayherns* (1890) 85 Cal. 86, 24 P. 635.

While there is some authority to the effect that it is not necessary for an indictment to anticipate a defense of the statute of limitations by allegation of matter avoiding it: *People* v. *Bailey* (1918) 103 Misc. 366, 171 N. Y. S. 394; *State* v. *Unsworth* (1913) 85 N. J. Law 237, 88 Atl. 1097; *U. S.* v. *Cook* (1872) 84 U. S. 168, the more general rule is that the statute must be avoided by appropriate allegation: *Lamkin* v.

People (1880) 94 Ill. 501; *Garrison* v. *People* (1877), 87 Ill. 96; *Rouse* v. *State* (1902) 44 Fla. 148, 37 S. 784; *Heckmar* v. *State* (1903) 44 Tex. Cr. 533, 72 S. W. 587. Reasons for this divergence from the rule in civil cases that the statute is matter of defense and need not be anticipated by appropriate allegation, which rule is carried over into the criminal law by those courts adhering to the minority rule, are seldom advanced. Perhaps it is an attribute of the policy which dictates that all intendments be in favor of the accused. Regardless of which rule is followed, the matter avoiding the statute would seem to become part of the state's case, to be proved "beyond a reasonable doubt and to a moral certainty." However, the modern trend is toward the relaxation of the formal requirements of indictments; indeed, indictments going little further than to specify the section of the criminal code claimed to have been violated have been sustained: *People* v. *Bogdanoff* (1930) 254 N. Y. 16, 171 N. E. 890. The accused certainly would know whether the statute would offer him a valid defense, so it is difficult to see how he would be materially prejudiced by requiring the statute to be raised first at the trial. The requisites of a fair trial do not demand that he be informed in advance that the state is prepared to meet his objection based on the statute when he raises it.

Ordinarily, if the facts were such as would avoid the statute, the prosecution could, by virtue of the liberal amendment statute, 2 Minn. Stat. (Mason 1927) §10648, have amended the information by inserting appropriate allegations after the sustaining of the demurrer and before the trial had commenced. In the instant case, since the demurrer was overruled by the lower court, there was no occasion for the prosecution to amend at that time; the action of the appellate court in dismissing precluded any opportunity of doing so. It is submitted that in requiring the anticipatory allegation the court demonstrated an unnecessary adherence to the technical requirements of criminal pleading, and reached an undesirable result in this case.

FRANCIS D. ROTH.