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ALLOCUTION

PAUL W. BARRETT*

DEFINITION AND HISTORY

The trial is over, the jury has reached a verdict and the accused is guilty of the crime with which he was charged. Now he stands at the bar of justice, a prisoner, and the judgment of the law is to be pronounced. But, before the court decrees the inexorable legal consequences which necessarily follow the finding of guilt, the court formally addresses the prisoner, informs him of the jury's verdict and directly puts the interrogatory, "Do you know of any reason why judgment should not be pronounced upon you?"

Allocution, sometimes called "the allocutus"¹ is of such ancientness that it is difficult, if not impossible, to discover its historical origin.² In philology, as in law, allocution is an address, especially a formal, hortatory, authoritative address.³ "In Roman antiquity" it was "a formal address by a general-in-chief or imperator to his soldiers," and, "In the Roman Catholic Church" it is "a public address by the pope to his clergy or to the church generally."⁴ In legal parlance, anciently and now, everyone agrees, allocution is the formal address of the trial court⁵ to the prisoner as the prisoner stands at

1. 14 ENG. AND EMP. DIG. § 3445; 24 C. J. S. § 1576; 9 HALSBURY, LAWS OF ENG. (2d ed. 1933) § 408 (n).

2. 79 SOL. J. 137 (Pt. 1, 1935).

3. WEBSTER, NEW INTERNATIONAL DICTIONARY (2d ed. 1940) 70; 1 BOUVIER, LAW DICTIONARY (1914) 180; 3 WORDS & PHRASES (1940) 232. The definitions in BOUVIER and WORDS & PHRASES are from *State v. Ball*, 27 Mo. 324 (1858).

4. 1 CENTURY DICTIONARY & CYCLOPEDIA 149.

5. ". . . this rule of the common law (allocution) . . . applied to the court of original jurisdiction which pronounced the sentence, and not to an appellate court, which, upon review of the proceedings in the trial court, merely affirms the final judgment—no error having been committed to the prejudice of the accused—without rendering a new judgment." *Schwab v. Berggren*, 143 U. S. 442, 447, 12 Sup. Ct. 525, 526, 36 L. ed. 218, 223 (1892).

Although at common law ". . . if the record of the conviction be removed into the king's bench by *certiorari*, and the prisoner also be removed thither by *habeas corpus*, that court may give judgment upon that conviction, but there must be first a filing of the record in the king's bench, . . . and he must be called to say

United States, has been as to what the court's address must consist of; what the bar for sentence.⁶ The great difference of opinion, especially in the official of the court must deliver it; at what stage of the proceedings the ceremony must be performed; in what criminal proceedings is the ritual of allocution obligatory; what is the result and effect on the cause when this ancient ritual is omitted or but imperfectly performed; what response, if any, may the prisoner make to the court's formal, hortatory address; and finally, whether allocution is now necessary or serves any useful purpose.⁷

Although the great commentators on the common law, and especially the authoritative writers on crimes and criminal procedure, relied on the same sources and authorities, they were not of one accord in their statements as to when allocution was required, what it consisted of and who was to perform the ceremony. Though these writers were few in number their importance and influence on this subject, as in much else in the criminal law, cannot be over-emphasized. These great expositors of the common law, especially of the common law of crimes and criminal procedure, were Blackstone, Chitty, and Archbold in England (and of these, Chitty's prestige has always been the greatest in matters pertaining to criminal law) and Wharton and Bishop in the United States. Their texts and the cases they cite are invariably referred to as the authoritative pronouncements of the common law when any problem or question involving allocution arises and it is largely because of their differences in language and their failure to interpret and explain the cases they cite that vexing problems, controversies and questions pertaining to allocution arose at all or continue to be presented and are so variously approached and decided.

Blackstone does not cite a single case or authority to illustrate or authenticate what he has to say on the subject of allocution and so it is possible, as was often the case with him, that he merely stated what was then the prevailing custom and practice. In any event, in the chapter

what he can, why judgment should not be given against him, and thereupon judgment may be given." 2 HALE, PLEAS OF THE CROWN (1736, 1st Amer. ed. 1847) 401. And see *Rex v. Royce*, 4 Burr. 2073 (1767).

6. 1 CHIT. CR. L. *699-700; 3 WORDS & PHRASES 232.

7. Many of the cases are collected in 113 A. L. R. 821; ANN. CAS. 1916C 95; Notes (1880) 36 AM. REP. 97; 15 AM. JUR. § 457, pp. 114-116; 24 C. J. S. § 1576. Statutes and cases are referred to in the notes to the Am. L. I. proposed CODE OF CR. PROCEDURE § 389 (Am. L. I. 1930). No law review notes on the subject have been found.

entitled "Of Judgment, and it's Consequences," this is all he has to say on the subject:⁸

"... We are now to consider the next stage of criminal prosecution, after trial and conviction are past, . . . which is that of judgment. For when, *upon a capital charge*, the jury have brought in their verdict, guilty, in the presence of the prisoner; he is either immediately, or at a convenient time soon after, *asked by the court, if he has anything to offer why judgment should not be awarded against him.* . . . But, whenever he appears in person, upon either a capital or inferior conviction, he may at this period, as well as at his arraignment, offer any exceptions to the indictment, in arrest or stay of judgment . . ." (Italics added.)

Blackstone then points out that at this point in the proceedings the prisoner may urge in arrest of the judgment that he has a pardon or pray the benefit of clergy. "If all these resources fail, the court must pronounce that judgment, which the law hath annexed to the crime . . ."⁹ This statement, apparently, is plain enough and there should have been but little difficulty in applying it. He says: "Upon a capital charge," impliedly at least excluding convictions of crimes not capital. Blackstone says the prisoner "is asked by the court" and so there might be some question whether the judge or the clerk is to address the prisoner. But he does not use language necessarily indicating that it is mandatory that the court address the prisoner, even in capital cases. The allocution the court delivers is the query "if he has anything to offer why judgment should not be awarded against him." Nothing is said as to his being informed of the charge against him and of the jury's verdict. Neither is it required that the *quaere* should say "why judgment of *death*" should not be pronounced against him. Blackstone does not say that the omission of this ceremony is grounds for a new trial or even for a resentencing of the prisoner. What he has to say is with reference to the effect of any objections urged by the prisoner "And, if the objections be valid, the whole proceedings shall be set aside; but the party may be indicted again."¹⁰

Chitty in the chapter "Of the Judgment, and its Incidents" had this to say, (and it has been most frequently quoted and referred to):

"*It is now indispensably necessary, even in clergyable felonies, that the defendant should be asked by the clerk if he has any thing*

8. 4 BL. COMM. *375.

9. 4 BL. COMM. *376.

10. 4 BL. COMM., *loc. cit. supra* note 8.

to say why judgment of *death* should not be pronounced on him; and *it is material that this appear upon record to have been done; and its omission, after judgment in high treason, will be a sufficient ground for the reversal of the attainder.* On this occasion, he may allege any ground in arrest of judgment; or may plead a pardon, if he has obtained one, for it will still have the same consequences which it would have produced before conviction, the stopping of the attainder. If he has nothing to urge in bar, he frequently addresses the court in mitigation of his conduct, and desires their intercession with the king or casts himself upon their mercy. After this nothing more is done, but the proper judge pronounces the sentence."¹¹

The differences between this statement and Blackstone's are readily apparent. It has now become "indispensably necessary even in clergyable felonies" that the prisoner be addressed, and that by "the clerk." A part of the ceremony is that he should be asked "why judgment of death" should not be pronounced upon him. It is also to be noted that allocution is now required to be shown upon the record to have been done, not that a new trial would be granted or the defendant set free in the absence of its having been done and shown in the record, but its omission "It is now indispensably necessary. . . . after judgment in high treason, *will be a sufficient ground for the reversal of the attainder,*"¹² a point often overlooked by subsequent writers and judges. Chitty buttressed his text with the citation of Blackstone and several cases.

At a later day Archbold, without the citation of authority, (although his American editors in a note refer the reader to Blackstone, Chitty, and the cases he cited, as well as a few early American cases) describing the procedure to be followed prior to sentence, said:¹³

11. 1 CHIT. CR. L. *700. (Italics supplied). Chitty adds (*701) a rather interesting report of the manner in which judges often addressed the prisoner: "The judge usually precedes the judgment by an address to the prisoner, especially if his crime be capital, in which he states that he has been convicted on satisfactory evidence, and informs him when there is little hope that mercy will be extended to him. Sometimes also he takes an opportunity of impressing the circumstances of the prisoner's guilt on the minds of the spectators, and traces out the remote but important causes which have led him to his unhappy condition. Even in case of an acquittal, he may often usefully warn the defendant against the circumstances which might again place him in an equivocal situation, especially if there seems reasonable ground to suppose him guilty."

12. *Id.* at *700.

13. 1 ARCH., CR. PROC. (8th ed. 1877) 577. The definitions of allocution in Wharton's *Law Lexicon* and the *CYCLOPEDIA LAW DICTIONARY* are from this text.

"In capital cases, also, whether sentence is to be passed, or only recorded, the clerk of arraigns at the assizes asks the prisoner: 'A. B., have you anything to say why sentence of death should not be passed (or recorded) against you;' upon which the prisoner may move in arrest of judgment, if that have not already been done, or he may address any other observations to the judge which he may think proper. *In other cases*, when sentence is about to be passed, the defendant may address the court in mitigation of punishment, as well as in arrest of judgment, whether he was tried and convicted or pleaded guilty . . ."

Wharton, throughout the many editions of his treatise on criminal procedure, stated that in earlier times the rule with respect to allocution was as follows:¹⁴

"At common law, in all capital felonies, the practice has been for the clerk, before sentence is pronounced, to ask the defendant if he has anything to say why sentence should not be pronounced; and it is essential that it should appear on record that this was done."

Bishop, in the first edition of his commentaries on *Criminal Procedure*,¹⁵ contented himself with quoting Chitty, verbatim, for the formalities to be observed prior to sentence. In subsequent editions his text was modified to reflect the divergent views of the various American jurisdictions.¹⁶

Preliminary to a consideration of the cases from which the common law rules of allocution emanated certain other features of the common law of crimes and criminal procedure should be noted. The common law punishment for all felonies except petty larceny and mayhem was death.¹⁷ Though there were said to be degrees of judgments in treason, they invariably resulted in the same punishment—death—if and when the sentence was carried out. The judgments in case of treason were "... the solemn and severe judgment, and the less."¹⁸ The common law did not stop with punishing the felon or the traitor; but his ancestors, his immediate family, and

14. WHARTON, A TREATISE ON CRIMINAL PLEADING (9th ed. 1889) § 906; see 3 WHAR. CR. PROC. (10th ed. 1918) § 1845.

15. 1 BISHOP, CR. PROC. (1866) §§ 865-866.

16. 2 BISHOP, NEW CR. PROC. (2d ed. 1896 and 1913) § 1293.

17. 1 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENG. (1883) 487.

18. 1 HALE, P. C. 351 (1680, 1st Amer. ed. 1847). "The less solemn judgment is only to be drawn and hanged" says the great Lord Chief-Justice of the King's Bench. On the other hand, a woman convicted of treason in those days was never subjected to the humiliation of being hanged or beheaded but the sentence was that she be "drawn and burnt." (*id.* at 351.)

his posterity suffered the direst of consequences, as well. When the defendant was convicted of a felony or treason, he not only suffered the penalty of death but also "immediately, by operation of law," he was "placed in a state of *attainder*,"¹⁹ which meant that he was "regarded as dead in law" even before he was executed. The consequences of attainder were that the defendant could not be a witness, he could not maintain an action, he could not perform any legal function and of greater immediate concern to his family was the fact that he could not make a will or otherwise dispose of his property.²⁰ In fact, the offender's property, both real and personal, was forfeited to the crown and, as a further safeguard against possible claims by his posterity, "the blood of the offender is corrupted."²¹ "His blood is so stained and corrupted, . . . his children cannot be heires to him, or any other ancestor" and if he were noble or gentle before, he and his posterity became ignoble by reason of the incidence of corruption of blood, says Coke.²²

Of necessity some palliatives to these severe judgments and their consequences had to develop or be invented. One of these was that a large number of people, though guilty, were exempted from these extreme penalties; those in a position to claim benefit of clergy, which in the beginning applied to the clergy only, then to anyone who could read, and finally to everyone.²³ Since the crown was the prosecutor and the beneficiary of the forfeitures, the crown in turn could intervene and remit either the punishment, the fine or the forfeiture,²⁴ providing the forfeiture was to the monarch personally, otherwise only Parliament could forgive a forfeiture or reverse an attainder.²⁵ Such pardons were often granted as a matter of grace and frequently they were purchased.²⁶ Then, of course, if the person about to be sentenced was not in fact the person tried and convicted but was, in fact, someone else, that was a valid reason for not inflicting the penalties of the

19. 1 CHIT. CR. L. *723; see 1 ENCYCL. OF THE LAWS OF ENG. 616.

20. *Id.* at *725; see 2 CO. LITT. *390 b.

21. *Id.* at *739, 740; see 1 STEPHEN, HIST. OF THE CR. L. OF ENG. 487; 1 HALE, P. C. 239.

22. 1 CO. LITT. *391 b; see 1 CHIT. CR. L. *740; HAWKINS, TREATISE OF P.C. (7th ed. 1795) 477 (c. 49 § 1).

23. 1 STEPHEN, HIST. OF THE CR. L. OF ENG. (1883) 487. Benefit of clergy was an immunity claimed by the church and conferred by the monarch from scriptural authority, "touch not mine anointed, and do my prophets no harm." 1 CHIT. CR. L. *668. As to benefit of clergy, especially in United States, see C. J. § 3067.

24. 1 CHIT. CR. L. *762.

25. *Ibid.*

26. 3 STEPHEN, HIST OF CR. L. OF ENG. 38-40.

common law upon him.²⁷ The death sentence of a pregnant woman was reprieved until she was delivered of her child.²⁸ And insanity of the prisoner after conviction was always a ground for a reprieve.²⁹

"On this occasion . . ." (when the prisoner was asked why judgment should not be pronounced upon him; that is, when the ceremony of allocution was performed) he plead his benefit of clergy, that he had obtained a pardon, identity of person, pregnancy or ". . . any ground in arrest of judgment . . ."³⁰ If allocution was not granted, if the query was not put to the prisoner and he was not given an opportunity to advance any of these matters, he was not given another trial nor was his sentence necessarily set aside, but ". . . its omission, after judgment in high treason, will be a sufficient ground for the reversal of the attainder."³¹

The four cases cited by Chitty (and in almost every text and opinion since his time), and upon which the whole doctrine of allocution is based, are an *Anonymous* case,³² *Rex & Regina v. Geary*,³³ *The King v. Speke*,³⁴ and *Rex v. Royce*.³⁵

The following is Salkeld's complete report of the *Geary* case: "Geary was attainted of high treason on an indictment to which he *pleaded guilty*. Upon a *writ of error brought to reverse this attainder* (italics added), the exception taken was, that it did not appear he was asked what he had to say why judgment should not be given against him; and all the precedents are with an *allocutus quid*, or *si quid pro se dicere habeat, etc.* Vide *Plowden*, 387. *Co. Ent.* 532; *Rast.* 455. And the Court held the exception good, for he might have matter to move in arrest of judgment, or a pardon; and *the attainder was reversed*."³⁶ Showers, who argued the case, reports it thus (spelling modernized): "Error to reverse an attainder of treason . . . for

27. 1 CHIT. CR. L. *698; 2 HALE, P. C. 401

28. 4 BL. COMM. *394-395. Apparently the respite applied to the first pregnancy only. If she were found to be with child after the delivery for which her sentence was respited, no further reprieves were granted. *Anon.*, B. N. C. 48 (1536 K.B.).

29. 1 CHIT. CR. L. *761.

30. *Id.* at *700; 4 BL. COMM. *376-377.

31. *Id.* at *700.

32. 3 Mod. 265 (K. and Q. B. 1682-1690).

33. 2 Salk. 630 (K. B. 1689-1712).

34. 3 Salk. (K. B. 1689-1712).

35. 4 Burr. 2073, 2086 (K. B. 1767).

36. This business of attainder had some interesting sidelights and limitations. In the same volume with the *Geary* case is *Corbet v. Tichborn*, 2 Salk. 576 (K. B. 1689-1712), and the report of the case is this: "Ejectment, and trial at bar; the case was, F. S. was tenant for life, remainder to his wife for life, remainder to his

levying war . . . with *Monmouth* . . . ; Upon argument I urged these errors . . . Fourthly, There is no *allocutus* before judgment; and all the precedents are so; for the law requires that of necessity; for he might have a pardon to plead, or he might move in arrest of judgment. . . . All held the last to be a fatal exception."³⁷

Note in the *Anonymous* case that the prisoner had already been executed. All that is contained in the report of the case with reference to allocution is this (spelling modernized): "A Gentleman was convicted upon his own confession for high treason in the rebellion of the Duke of Monmouth, and executed. It was moved that his attainder might be reversed; the Judges were attended with Books, and the exceptions taken were, *viz.* . . . Thirdly, Because after the confession the judgment followed, and it does not appear that the party was asked what he had to say why sentence of death shall not pass upon him; for possibly he might have pleaded a pardon. For these reasons the attainder was reversed." (Italics supplied.)

In *King v. Speke* all that Salkeld reports with respect to allocution is this (italics supplied): "Writ of error to reverse an attainder of high treason, the error assigned was, that upon *oyer* of the indictment, the defendant Speke confessed it, and thereupon judgment was given, but without demanding of him, what he had to say for himself, why judgment should not be given, and per Curiam, this is erroneous, for it is a necessary question, because he may have a pardon to plead, or may move in arrest of judgment, for which reason *the attainder was reversed.*"³⁸

In *Rex v. Royce* the defendant had been convicted of the capital felony of pulling down and demolishing a dwelling-house.³⁹ The case merely illus-

first, second, etc. sons in tail, remainder to the right heirs of J. S. The said J. S. commits treason, and then has a son, and then is attainted; and the Court held, that whether the son was born before or after the attainder, the contingent remainder to him was not discharged by the vesting in the Crown during the life of J. S., because of the wife's estate, which is sufficient to support it."

37. Showers also raised the interesting and rather quaint point "Upon argument I urged these errors. . . . that though the indictments be in *Latin*, yet they are not to be read to the prisoner but in *English*; for it is the matter, and not the form they must answer to." (italics, the author's) *King v. Geary*, 1 Show. 127 (K. B. 1678-1695).

38. Curiously enough the last paragraph of the report states that the defendant had been acquitted. "The defendant was indicted for high treason in raising a rebellion in *Carolina* in *America*, and tried at bar in *Westminster-hall* and acquitted; and it was held, that the trial was good by virtue of the statute 25 H. 8. cap. 2 . . ."

39. The principal question argued before the King's Bench was whether the defendant was guilty as a principal in the second degree, if so, by statute, he was without benefit of clergy.

trates what allocution meant to the King's Bench. After the principal arguments had been concluded and adversely ruled, at the request of counsel, the prisoner was again brought before the bar and the Solicitor General prayed judgment against him. Counsel then "... mentioned some objections to the record, in arrest of judgment," but "... The Court were clear there were no grounds for any of them . . . Whereupon—The defendant being first asked 'What he had to say why judgment should not be pronounced upon him and sentence awarded against him;' Mr. Justice Yates, the second Judge of the Court, (after a very proper expostulation with the defendant, to convince him of the enormity of his crime, and a very serious and pathetic exhortation to repentance, as he could have but small or no hope of mercy,) pronounced sentence of death upon him."^{39a}

O'Brien and others were convicted of treason in Ireland. On writ of error to the House of Lords it was urged that the form of the allocution was defective because it omitted the words "of death."⁴⁰ The Lord Chief Justice said: "As to the objection to the *Allocutus*, we think it is the proper form. All that the prisoner in that stage of the proceedings can properly be asked is, what he has to say why judgment should not be pronounced; and as to the precedents which go further, we deem the matter beyond the question stated to be surplusage."^{40a} In *O'Neill v. The Queen*,⁴¹ an Irish wilful murder case, it was again urged that the allocution was insufficient because it omitted the words "against him." The Queen's Bench said: "Now we have on the record the finding of the jury immediately before the *allocutus*, that they had found the prisoner guilty of the crime charged against him, and that thereupon he was asked what he had to say why the court should not proceed to judgment. Why it is only to read the word judgment with the preceding words (they form part of the same sentence), and there could not be an imaginable doubt that this was addressed to him; but, if there was any necessity for an authority, that case of *Reg. v. O'Brien* furnishes it."^{41a}

Except for the above no other English cases involving allocution have been found.⁴² The present status of allocution in English criminal juris-

39a. 4 Burr. 2073, 2084-2086 (K. B. 1767) cited *supra* note 35.

40. *O'Brien and MacManus v. The Queen*, 2 H. L. C. 465 (H. L. 1849).

40a. *Id.* at 493.

41. 6 Cox's Cr. Cas. 495 (Q. B. 1854).

41a. *Id.* at 504.

42. There was a treason case (the trial of Lord Stafford) in the House of Lords, 7 How. St. Tr. 1217 (H. L. 1680) in which after the Lords were polled the prisoner was asked, "What can your lordship say for yourself, why judgment of

prudence is perhaps best summarized in a footnote to an American case, *Commonwealth v. Senauskas*,⁴³ which reads: "In a letter dated August 17, 1937, the Master of The Crown Office and Registrar of the Court of Criminal Appeal of England, informed the writer that the question here discussed (allocution) is invariably asked in England of all prisoners before sentence in capital cases, but there is no statutory requirement that this question must be asked. The official expressed his opinion as follows: 'If such an objection was raised it would be brushed aside by the Court of Criminal Appeal because manifestly any substantial point which could be put by a prisoner in the Court of the first instance, could also be put by him on appeal, but of course I speak under correction.'"

Curiously enough, however, a writer in the *Solicitor's Journal*⁴⁴ in 1935 pointed out that the ceremony of allocution was no longer performed in non-capital felonies and urged, after reviewing the cases and Chitty, that the practice be resumed, though he conceded that the common law circumstances necessitating such procedure no longer existed.⁴⁵

ALLOCUTION IN THE UNITED STATES—IN GENERAL

The American jurisdictions are readily divisible into three classes with respect to their treatment of allocution; (1) those in which there has never been a case or a statute relating to the subject, and hence no problems concerning it, (2) those in which there is no statute but in which the matter has been determined and governed by the decided cases, and (3) those in which there has been an attempt to handle the problem by statute.

death should not be given upon you according to law." The prisoner, personally, raised certain technical objections, the Lords retired "found of no moment at all" his objections and sentence was pronounced.

Then there was a capital murder case in the King's Bench, *King v. Garside and Mosley*, 2 Ad. & E. 266 (K. B. 1834) in which the prisoners were asked whether they had any thing to say why execution should not be awarded, and "merely said that he (they) was (were) not guilty." Certain points were raised and decided and "The prisoners being asked again what they had to say, *why the court should not award execution against them upon their attainder*, answered nothing." (italics supplied)

43. 327 Pa. 541, 551, 113 A. L. R. 814, 819 (1937).

44. Note, *Allocutus (A Point In Criminal Law)* (1935) 79 SOL. J. 137-138 (Pt. 1, 1935).

45. The instance causing the article was that of a prisoner who collapsed, when the jury returned a verdict finding him guilty of larceny, and remained unconscious to the end of the proceedings.

In nine states⁴⁶ there has never been a reported case nor a statute concerning allocution. In five of these, Colorado, Minnesota, New Hampshire, Vermont and Virginia, it is the custom for the trial judge, before imposing sentence, to inquire of the prisoner if he has anything further to say why sentence should not be passed upon him even though there is neither case nor statute requiring it.⁴⁷ The question is sometimes put in Maine. In Rhode Island when the circumstances of the case seem to warrant such an inquiry the court exercises its discretion and propounds the allocutory question, especially when there has been a plea of *nolo contendere* or a plea of guilty. The fact of allocution is seldom made to appear from the record in Colorado. On the other hand, the records in Virginia from the earliest times show allocution in all types of criminal cases, misdemeanors as well as felonies.⁴⁸

In eighteen states⁴⁹ and in the laws of the United States⁵⁰ there is no statute referring to allocution but in those jurisdictions cases concerning allocution have been presented and the various jurisdictions' policies regarding it have been determined and governed by what was understood to be the common law rule on the subject and by whether the rationale of the common law was yet thought applicable and served any useful purpose.

Twenty-one states⁵¹ and the American Law Institute's proposed Code

46. Colo., Del., Me., Minn., N. H., R. I., Vt., Va. and W. Va. The attorney generals of these states very graciously supplied full information as to the practice in their jurisdictions. The letters from Colo., Me., Minn., N. H., R. I., Vt. and Va. were particularly helpful.

47. There seems to be no practice or precedent on the subject in Del. and W. Va.

48. Because the record of the address in Virginia has been the same for so long ("it being demanded of the defendant, if anything for himself he had or knew to say why the court should not now proceed to pronounce judgment against him according to law"). Attorney General Staples thinks it was taken from some old form book no longer extant. It may be an adaptation of the record printed as an appendix to 4 BL. COMM. *355-358, "And upon this it is forthwith demanded of the said Peter Hunt, if he hath or knoweth anything to say, wherefore the said justices here ought not upon the premises and verdict aforesaid to proceed to judgment and execution against him."

49. Ala., Conn., Fla., Ga., Ill., La., Md., Mass., Mich., Miss., N. J., N. M., N. C., Ore., Pa., S. C., Tenn. and Wis.

50. The preliminary draft of the Federal Rules of Criminal Procedure has this sentence which will be noted later: "Before imposing sentence the court shall afford the defendant the opportunity to make a statement in his own behalf and to present any relevant information in mitigation of punishment." Rule 30a.

51. Ariz., Ark., Cal., Idaho, Ind., Ia., Kan., Ky., Mo., Mont., Neb., Nev., N. Y., N. D., Ohio, Okla., S. D., Tex., Utah, Wash. and Wyo.

of Criminal Procedure⁵² have statutes specifically covering the subject of allocution.

Strangely enough, the greater number of cases involving allocution have arisen in a jurisdiction without a statute—Alabama, and one in which there is a statute—Missouri.⁵³

JURISDICTIONS IN WHICH THERE HAVE BEEN CASES AND IN WHICH THERE ARE NO STATUTES

A. *Jurisdictions Requiring Allocution.*

In the jurisdictions in which there are no statutes and in which there have been cases the courts have divided into two groups: (1) those requiring allocution and (2) those in which allocution is thought to be a useless ceremony, no longer necessary or required. Those in the first group purport to follow Chitty and the common law, while those in the second group have decided that the common law reasons for allocution have long since disappeared and there is no further need to continue so vain and inutile a practice.

Alabama's treatment of allocution is typical of the jurisdictions following the view that the common law requires the court, before sentence, to inquire of the prisoner if he has anything to say why judgment should not be pronounced upon him. In 1869 two cases arose,⁵⁴ a non-capital murder case and an arson case, and it was objected that the allocutory question had not been propounded. Despite the fact that the question had been before the court in 1866⁵⁵ in a larceny conviction it was stated that "So far as we know, this question has not, until the present term of this court, been made in this State." Citing the old English cases and the New York case of *Safford v. People*,^{55a} the Supreme Court of Alabama held that since the convictions were for felonies the judgments were erroneous because they failed to show allocution. Because of the court's exceptional attitude in the next case before it involving allocution, it is well to note that in the *Crim* and *Perry* cases there were errors other than the failure of the record

52. A. L. I. Code of Cr. Proc. §§ 389-397 and commentaries thereto pp. 1094-1102.

53. There are at least 44 opinions in Missouri criminal cases involving allocution.

54. See *Perry v. State*, 43 Ala. 21, 23 (1869); *Crim v. State*, 43 Ala. 53 (1869).

55. *Aaron and Ely v. State*, 39 Ala. 684, 690 (1866).

55a. See 1 Park Cr. Rep. 474 (N. Y. 1854).

to show allocution and for those reasons the defendants were granted new trials. Five years later *Mullen* appealed a conviction of assault with intent to murder,⁵⁶ other errors were assigned and overruled but as to allocution the court said: "But there is one error shown by the record for which the judgment must be reversed. It does not appear that the defendant was asked by the court if he had any thing to say why sentence should not be passed upon him. In felonies . . . this is necessary." This is one of three known instances of defendants' being granted new trials in criminal cases on the sole ground that the record did not show allocution. The case is exceptional for these views and rather astonishing as well in view of the *Aaron and Ely* case decided in 1866 and apparently overlooked by the court in the *Perry* and *Crim* cases as well as in the *Mullen* case.

Aaron and Ely were convicted of grand larceny and the record in their case failed to show allocution. The court fully reviewed the English cases, *Chitty*, *Archbold* and *Safford v. People* and held allocution necessary "In West. The State. . . in all convictions of felony." The court's arguments in favor of the requirement were that "It is not a mere *form*, but is a *substantial right*, given by the law. If a prisoner has no ground to allege in arrest of judgment, no pardon to plead, he may address the court in mitigation of his conduct, desire its intercession with the pardoning power, or cast himself upon its mercy." (Italics added.) But the record was *silent* as to whether there had been allocution and the majority of the court ruled that in the absence of a showing to the contrary it would be presumed that the question had in fact been asked. This was the view of the court in another case,⁵⁷ decided prior to the *Mullen* case. Also it had been presumed that the question had been put when the record recited that "In the present case . . . the prisoner 'said nothing . . .'" when sentence was pronounced.⁵⁸ In 1877 the Alabama court further modified the requirement in *Spigner v. State*.⁵⁹ In that case the record failed to show allocution but the record showed that after verdict the defendant had filed two motions, one in arrest of judgment and one for a new trial. The court pointed out that the purpose of the requirement was that the prisoner might have an opportunity after verdict and prior to sentence "to make any motion which will prevent judgment" and the court added the novel wrinkle, in the absence of statutory

56. *Mullen v. State*, 45 Ala. 43, 47, 6 Am. Rep. 691 (1871).

57. *Robin v. State*, 40 Ala. 72 (1866).

58. *Taylor v. State*, 42 Ala. 529 (1868).

59. *Spigner v. State*, 58 Ala. 421, 424 (1877).

requirement, that the record recital of these two motions “. . . proves that the usual question must have been in substance propounded” and as a matter of fact “the prisoner had accorded to him substantially, all the rule was intended to secure.”^{59a} In view of this the court said: “It would look like child’s play to remand this cause, when the only effect could be to propound the question to the prisoner, receive his answer that he had nothing to offer, and then pronounce the sentence of the law . . .” and the court affirmed the judgment without so much as remanding the case for resentencing.

The Supreme Court of Alabama had held that a merely erroneous sentence could be corrected by the trial court⁶⁰ or by a remanding of the case for that purpose only⁶¹ and so in 1915 when a record in a felony case appeared⁶² and there was no recital of allocution the court adopted this view: “The end and aim of the law in requiring such question to be asked of the defendant will be fully met, however, by reversing the judgment merely back to the sentence, leaving the judgment of conviction to stand, and directing the court to resentence the prisoner, after first asking such question, unless defendant’s answer discloses good reasons why he should not be sentenced.” And that has been the practice and the procedure in Alabama ever since.⁶³ However, there seems to be some confusion when the record fails to show allocution and in addition, “there is in the judgment entry no formal adjudication of guilt.” In two such instances⁶⁴ the cases were reversed and remanded for a new trial and apparently for that reason; while in a later case⁶⁵ the court, with an identical record, remanded the case with this suggestion: “If upon a further consideration of the case there should be found sufficient record evidence to support a judgment *nunc pro tunc*, a retrial on the facts would not be necessary.”

The view obtains in Alabama, therefore, that the common law requires allocation in all instances of felony trials and convictions,⁶⁶ but it is not

59a. *See Ibid.*

60. *Reynolds v. State*, 68 Ala. 502 (1881).

61. *Ex Parte Robinson*, 183 Ala. 30, 63 So. 177 (1914).

62. *Bryant v. State*, 13 Ala. App. 206, 68 So. 704 (1915).

63. *Frazier v. State*, 17 Ala. App. 486, 86 So. 173 (1920); *Cheney v. State*, 23 Ala. App. 144, 122 So. 301 (1929); *Brooks v. State*, 234 Ala. 140, 173 So. 869 (1937); *Smith v. State*, 189 So. 86 (Ala. 1939).

64. *Coleman v. State*, 20 Ala. App. 120, 121, 101 So. 81 (1924); *See McMahan v. State*, 21 Ala. App. 522, 109 So. 553 (1926).

65. *Oliver v. State*, 25 Ala. App. 34, 35, 140 So. 180, 181 (1932).

66. *Croker v. State*, 47 Ala. 53 (1872); *Boynton v. State*, 77 Ala. 29 (1884).

required in misdemeanor cases.⁶⁷ Alabama has not been confronted with the question of whether or not allocution is required upon a plea of guilty.

Other than Chitty and the English cases, the early New York decisions, especially *Safford v. People*,⁶⁸ appear to have been most persuasive with the courts adopting the view that the common law compelled allocution in felony convictions and for that reason the early New York cases (prior to the enactment of a statute in 1881) should be interpolated, especially so since that court sought to examine into and advance reasons for the requirement. The *Safford* case was a seduction conviction in which the record failed to show allocution. Citing the English cases previously noted but paraphrasing Chitty's text the court held it necessary that the record show allocution. The court said that most of the English cases involved convictions for treason, "... but the principle is the same; and the reason stated in all the books is, that the prisoner may have a pardon to plead or he may move in arrest of judgment; and neither Chitty or Blackstone make any distinction." The second reason given is that "The practice has its foundation in good sense and common justice, and the principle certainly applies to all cases of felony . . ." Despite these views the court rather dubiously thought the omission from the record might have been an inadvertence and if so the trial court might amend its record.

Subsequently it was decided that allocution was necessary in capital cases and while it would not be presumed from a silent record⁶⁹ the record could be corrected to show the fact.⁷⁰ In 1871 a record in a capital case⁷¹ failed to show allocution and the New York court again reviewed Chitty and the English cases fully and followed *Safford v. People*. The effect of the omission was said to be that "It deprived the defendant of a substantial legal right." Because, "It was his right, at this stage, to move in arrest of judgment for any legal defect in the indictment or other proceedings . . ."; or (and this was a new idea suggested by the court) "to show that the verdict was vitiated and should be set aside for the misconduct of the jury or for any other legal reason . . ."; or "to plead a pardon." The court concluded this phase of its opinion by stating that allocution was an integral part of

67. *Bowles v. State*, 241 Ala. 142, 1 So. (2d) 665 (1941); *Cole v. State*, 27 Ala. App. 90, 166 So. 58 (1936); *Estes v. State*, 18 Ala. App. 606, 93 So. 217 (1922); *Crawford v. State*, 16 Ala. App. 68, 75 So. 274 (1917).

68. 1 Park., Cr. R. 474, 476-77 (N. Y. 1854).

69. *Graham v. People*, 63 Barb. 468 (N. Y. 1872).

70. *Graham v. People*, 6 Lans. 149 (N. Y. 1871).

71. *Messner v. People*, 45 N. Y. 1, 5, 7, 8(1871).

the trial, and "Indeed this may be. . . essential prerequisite to an adjudication of the guilt of the prisoner", a rule of law with which the trial court could not dispense and "which the wisdom and experience of ages has found necessary for the protection of the innocent." And the majority of the court adopted the astonishing view that because of this omission "The judgment must be reversed and a new trial ordered," and that was the practice in New York until 1911.⁷²

When the problem of whether allocution was an indispensable requirement of the common law was presented to the Supreme Court of Florida in a capital case⁷³ that court relied on Bishop, Blackstone, the cases cited by Chitty and the New York cases, but the applicability of the requirement was considerably modified. That court interpreted the common law authorities as holding the ceremony of allocution indispensably necessary in cases in which there had been a *capital conviction only* and not in other felony convictions.⁷⁴ The court said the ceremony was material in such cases only because the prisoner was then informed that sentence was about to be pronounced and that he might then urge any reason why final judgment should not be entered. The court also pointed out that while the omission of this tradition ceremony ". . . may be sufficient ground for arresting or setting aside the judgment or sentence, *it does not seem to be good ground for a new trial,*" and the cause was remanded with the "verdict standing unimpaired." (Italics added.) In the next case⁷⁵ before the court there had been a motion for a new trial and the court examined the record and finding no error for which the judgment should have been arrested said: ". . . it does look like child's play to send the case back for the purpose of asking a question to which there can be no answer that will change the prisoner's fate" and ". . . in the absence of a meritorious reason (we) are not disposed to do so." Despite its prior interpretation of the common law of allocution and as late as 1917,⁷⁶ in a violation of a local option liquor law case which had to be remanded anyway the court added this disconcerting sentence concerning allocution: "It would be a prudent thing to do in all cases, whether capital

72. See *People v. McClure*, 148 N. Y. 95, 42 N. E. 523 (1895); *People v. Faber*, 199 N. Y. 256, 92 N. E. 674 (1910); cf. *People v. Nesce*, 201 N. Y. 111, 94 N. E. 655 (1911). In praise of the former cases see Note (1911) 2 J. Crim. L. 170.

73. *Keech v. State*, 15 Fla. 591 (1876).

74. *Hodge v. State*, 29 Fla. 500, 10 So. 556 (1892); *Blount v. Fla.*, 30 Fla. 287, 11 So. 547 (1892).

75. *Hodge v. State*, 29 Fla. 500, 510-11, 10 So. 556, 558 (1892).

76. *Thomas v. Fla.*, 74 Fla. 200, 213, 76 So. 780, 785 (1917).

or not, because it may happen in any case that some valid reason exists why sentence should not be pronounced."

In Georgia an abolitionist defendant was sentenced to four years' imprisonment for attempting to procure a slave to "carry away" two other slaves and the record of his conviction failed to show allocution.⁷⁷ The court reviewed the common law and decided the ceremony was required in capital cases only, that it was not material in "minor felonies" unless the defendant had been deprived of an opportunity to move in arrest of judgment or of some other legal right to which he was entitled. Seven years later, in 1859,⁷⁸ Sarah, a slave, attempted to poison her master and his family for which she was sentenced to be executed. The record in her case failed to show that she had been asked if there was any reason why sentence should not be pronounced. The Georgia court conceded that the "ancient practice" required the question to be propounded but pointed out that the rule originated at a time when prisoners were not allowed the benefit of counsel (a fact which seems not to have disturbed common law judges and writers in the slightest); that benefit of clergy was then allowed and that a prisoner at that stage in the proceedings could plead a pardon. While in Georgia benefit of clergy had been abolished and a pardon would be available and honored "even under the gallows." The court observed that its penal code made no reference to the ceremony but did prescribe with minuteness the procedure to be observed in the trial of criminal cases, including motions in arrest of judgment which were invariably filed before sentence. And so the court added this limitation to the requirement, even in a capital case: "Had it been made to appear that *the prisoner had lost any right by the failure of the court to observe this ceremony, relief would be extended.*" (Italics added.)

In the absence of the record's showing the contrary the Georgia court assumes the ceremony of allocution was performed, even in a capital case.⁷⁹ In 1919, in a capital case,⁸⁰ the Georgia court reexamined Sarah's case, as well as Grady's, and found that the appellant had been defended by a court appointed lawyer, that motions for new trial and in arrest of judgment had been filed, that prisoner and counsel were present and made no request to be heard when sentence was pronounced and therefore adhered to the view

77. Grady v. State, 11 Ga. 253 (1852).

78. Sarah (a slave) v. State, 28 Ga. 576, 584 (1859).

79. Rawlins v. Mitchell, 127 Ga. 24, 55 S. E. 958 (1906).

80. Steel v. State, 149 Ga. 134, 137, 99 S. E. 305 (1919).

that unless it appeared that the appellant had been deprived of some substantial right by reason of the omission it would “. . . not require a vain thing to be done” and affirmed the conviction.

A capital case involving allocution has never been presented to the Illinois court, but in non-capital felonies the court had failed to find anything the prisoner could possibly say that would stay the pronouncing of judgment at that period in the proceedings⁸¹ and has therefore held it unnecessary to put the question in such cases although the practice of doing so obtains and is recommended.⁸² If the record recites that neither the defendant nor his counsel said anything before judgment was pronounced it is implied that an opportunity to speak was afforded.⁸³

In Louisiana allocution is “not sacramental”, though customary and prudent, and therefore its omission in a non-capital felony is not such an error as vitiates the proceedings in any respect.⁸⁴ Especially is this true when it does not appear that the defendant has been deprived of any of his rights, as when it appears he was present when sentenced and made no objection⁸⁵ or was heard on motion for new trial and in arrest of judgment. “These are the only modes in which cause could be shewn why the sentence should not be pronounced.”⁸⁶ Furthermore, when the record implies that the prisoner was asked the question he cannot complain⁸⁷ and it is not error for the clerk, rather than the judge, to put the question.⁸⁸ And though allocution is indispensably necessary in a capital case,⁸⁹ it is interesting to note the very novel manner in which the Louisiana court handled the matter in the *Ikenor* case. The record failed to show allocution and “The Attorney General was thereupon directed to ascertain whether that formality had been omitted

81. *Bressler v. People*, 117 Ill. 422, 3 N. E. 521 (1886).

82. *Gannon v. People*, 127 Ill. 507, 21 N. E. 525, 11 An. St. Rep. 147 (1889); *Harris v. People*, 130 Ill. 457, 22 N. E. 826 (1889).

83. *Bressler v. People*, 117 Ill. 422, 3 N. E. 521 (1886) cited *supra* note 81; *Gillespie v. People*, 176 Ill. 238, 52 N. E. 250 (1898); *Lamb v. People*, 219 Ill. 399, 76 N. E. 576 (1905).

84. *State v. Shields*, 33 La. Ann. 991 (1881); see *State v. Taylor*, 27 La. Ann. 393, 21 Am. Rep. 561, (1875); *State v. Smith*, 33 La. Ann. 1414 (1881); *State v. Sims*, 117 La. 1036, 42 So. 494 (1906).

85. *State v. Bradley*, 30 La. Ann. 326 (1878); *State v. Avery*, Man. Unrep. Cas. 257 (La. 1880).

86. *State v. Cheney*, Man. Unrep. Cas. 394, 397 (La. 1878).

87. *State v. Fritz*, 27 La. Ann. 360 (1875); *State v. Hugel*, 27 La. Ann. 375 (1875); *State v. Coleman*, 27 La. Ann. 691 (1875).

88. *State v. Ross*, 32 La. Ann. 854 (1880).

89. *State v. Askins*, 33 La. Ann. 1253 (1881); *State v. Ikenor*, 107 La. 480, 32 So. 74 (1901).

as a matter of fact or whether the minutes were incomplete.” Then the report continues: “Through due proceedings we have been informed that the question was, in point of fact, propounded to the defendant before sentence. Defendant and his counsel admitted this fact on being ruled into court to show cause why the minutes should not be corrected, and consented to the correction of the minutes.”

The Supreme Court of Maryland pointed out that most of the reasons originally given for requiring allocution were no longer applicable in that state.^{89a} It was stated that a pardon from the chief executive would be recognized any time. In Maryland, if sentence was pronounced before expiration of the time permitted for filing motions for a new trial or in arrest of judgment the sentence and judgment for that reason could be set aside on motion any time during the term, as was done in the instant case, and the motions filed and considered. The court then held the omission was not error “. . . unless it is apparent that the prisoner was or may have been injured by the omission” and the practice was strongly recommended, especially in capital cases in which the court exercised some discretion in fixing the penalty. The court thought, however, if it appeared the prisoner had been injured, the case would be remanded for resentencing only, after the prisoner had been heard on what was thought to be a meritorious objection. When the death penalty was inflicted upon a plea of guilty^{89b} the court disposed of the point that allocution had been omitted by saying “It is settled that it is not grounds for reversing a sentence in this state.”

It is doubtful that Massachusetts and Michigan belong in this class of cases. There has been but a single case in each state, both non-capital felonies, but since allocution is the practice they are noted here rather than with the cases denying the necessity of allocution at all. When it was objected that the allocutus had been omitted in a false pretense case^{89c} it was stated that the common law required it in capital cases only and whether it was required in Massachusetts was to be determined by its own rules rather than those of England. The defendant had moved for a new trial and in arrest of judgment and so it was held the recitals in the record showed all that was necessary and established either a demand or a waiver of it, the court observing as to the custom, however: “No such recital on the record

89a. *Dutton v. State*, 123 Md. 373, 383, 91 Atl. 417, 421 (1914).

89b. *Duker v. State*, 162 Md. 546, 548, 160 Atl. 279, 280 (1932).

89c. *Jeffries v. Com.*, 12 Allen 145, 153 (Mass. 1866).

has been deemed necessary here, nor has such fact usually been stated, except in capital trials. We do not understand that in felonies not capital any formal question corresponding to that stated is required to be put to the defendant upon his conviction by the jury and before sentence. Practically, full opportunity is to be given for assigning reasons why judgment should not proceed against him, (motions for new trial and in arrest) and the opportunity is secured by the course of proceedings in each case."

In the Michigan case there was a sentence of twenty-five years for murder.^{89d} The court stated that allocution had never been deemed essential except in capital cases and that in the present case there had been ample time to move for a new trial and in arrest of judgment. As to the ancient custom, which if necessary was only ground for resentencing, the court said: "Whatever good purpose this practice may have served in England when parties charged with crime were not allowed counsel, it is now a mere idle ceremony."

The Mississippi court reviewed the cases, Blackstone, Chitty, Archbold and Bishop as "the highest authorities" and held allocution indispensable in a capital case.⁹⁰ "As these forms of records are deeply seated in the foundations of law, and as they conduce to safety and certainty, they surely ought not to be disregarded when the life of a human being is in question." But even in a capital case, allocution was assumed when "The record states. . . 'after hearing the defendant' sentence was pronounced."⁹¹ When the court was asked to require the ceremony in all felony cases the authorities were again fully reviewed but the court being particularly impressed with the Missouri case of *State v. Ball*^{91a} said, "While concurring in the sentiment . . . we are disposed to enforce it in capital cases only."⁹²

In New Mexico allocution has been handled with some indecision, though the court was not influenced so much by the common law writers except Wharton. It is not now required in the instance of a non-capital felony⁹³ nor upon a plea of guilty⁹⁴ even though the defendant was not represented by counsel. In the first capital case presented⁹⁵ the court, in a

89d. *People v. Palmer*, 105 Mich. 568, 579, 63 N. W. 656, 659 (1895).

90. *James v. State*, 45 Miss. 572, 579 (1871).

91. *Edwards v. State*, 47 Miss. 581, 591 (1873).

91a. 27 Mo. 324 (1858).

92. *Jones v. State*, 51 Miss. 718, 728 (1875).

93. *U. S. v. Sena*, 15 N. M. 187, 106 Pac. 383 (1909).

94. *State v. Jones*, 34 N. M. 499, 285 Pac. 501 (1930).

95. *Territory v. Webb*, 2 N. M. 147, 158 (1881).

rather confusing manner, pointed out what it considered the benefits, the shortcomings, and the reasons for requiring or not requiring the ceremony, as they appeared under its practice, and held it necessary in such cases but presumed the observance of the requirement from a silent record and affirmed the judgment. Quoting from Wharton the court observed, however, that the occasion of the allocutory address was not an invitation to a defendant to bring forward additional grounds or motions for new trial or in arrest of judgment but "The object of the address is to give defendant the opportunity to personally lay before the court statements, which, by the strict rules of law, could not have been admitted when urged by his counsel in the due course of legal procedure; but which, when thus informally offered from man to man, may be used to extenuate guilt and to mitigate punishment." Twenty years later a non-capital murder appeal in which allocution had been omitted came before the court.⁹⁶ The court adhered to the common law rule that allocution was essential in a capital case and interpreting *Ball v. U. S.*,⁹⁷ stated that "This privilege was deemed to be of such substantial value to the accused that *the judgment would be reversed if the record did not affirmatively show that it was accorded to him.*" (Italics added.) Since this defendant had not been sentenced to be executed, however, the court remanded the cause for a resentencing only. But, as noted above,⁹⁸ the court subsequently adopted the view that allocution was not essential in a non-capital case.

Finally, when a record in a capital case⁹⁹ came before the court the appellant relied on *Territory v. Herrera* and asked the court to abide by its former statement and grant him a new trial, while the state relied on the original case of *Territory v. Webb* and contended that since the omission did not affirmatively appear from the record but was only presumed from its silence the appellant was not entitled to a new trial. The court followed its first opinion and sent the case back for resentence only.

In North Carolina there has been but one appeal involving allocution. In that case the death penalty was assessed for rape.¹⁰⁰ The court would not permit the penalty to be inflicted in such cases until the defendant had been informed of his rights, even though the only effect of the omission

96. *Territory v. Herrera*, 11 N. M. 129, 143, 66 Pac. 523, 525 (1901).

97. 140 U. S. 118, 11 Sup. Ct. 761, 35 L. ed. 377 (1890).

98. *U. S. v. Sena*, 15 N. M. 187, 106 Pac. 383 (1909) cited *supra* note 93.

99. *State v. Ybarra*, 24 N. M. 413, 420, 174 Pac. 212, 214 (1918).

100. *State v. Johnson*, 67 N. C. 55, 59 (1872).

would be to arrest the judgment until he was so informed. As to allocution the court made the rather different observation that: "There is, in capital trials, much that is formal, and intended only to make them impressive and solemn; but even these purposes are useful, and such ceremonies ought not to be neglected. It is, however, not a matter of formality, but of necessity, that the prisoner should be informed that his case is not closed by the verdict of the jury against him, and that he may still urge any reason he may have why he should not suffer death." Since the court conceived this to be the policy of the requirement it was also of the view that: "There is no mere formula in which the prisoner should be informed of his rights; it is sufficient that it appears that he was informed that the verdict did not conclude him from urging anything he might think necessary," and because he had been heard on motion for a new trial and had had, in the appellate court, the benefit of everything he could have urged in arrest of judgment it was held that he had in fact been informed of his rights and had advanced such reasons as he had. Because all the defendant's rights had been protected the court specifically held there was no error in omitting allocution.

The Supreme Court of Oregon has had but one felony case in which allocution was omitted.¹⁰¹ The court was of the view that the common law compelled the ceremony in capital cases only. The court further pointed out, however, that if compelled in other felonies (following the North Carolina court) a defendant who moved for a new trial and in arrest of judgment was thereby accorded, as a practical matter, all the rights the common law was intended to secure and such an instance was thought to be, substantially, a compliance with the rule of the common law.

For the most part there has been nothing unusual about Pennsylvania's attitude toward allocution, even though one of its earliest decisions¹⁰² became a leading authority for the view that it was compelled by the common law in a capital case.¹⁰³ The court, in its first case, may have considered the omission such an error as to warrant a new trial but when the same error appeared twenty-four years later¹⁰⁴ the court held the ceremony necessary but remanded the case for allocution so as to give the defendant an opportunity "It is necessary. . . to plead in bar of the sentence any matter

101. *State v. Sally*, 41 Ore. 366, 70 Pac. 396 (1902).

102. *Hamilton alias Thocker v. Com.* 16 Pa. 129 (1851).

103. *Com. v. Preston*, 188 Pa. 429, 437, 41 Atl. 534, 535 (1898); *Com. v. Tauza*, 300 Pa. 375, 150 Atl. 649 (1930).

104. *McCue v. Com.*, 78 Pa. 185, 191 (1875).

sufficient to prevent its execution"; for example, a pardon or supervening insanity. The court did say: "The question and the answer that he hath nothing to say other than that which he hath before said, or this in substance, must appear in the record before sentence can be pronounced." While it is necessary to thus observe the ceremony, in capital cases only, it is enough that the prisoner was asked "The record shows. . . if he had anything to say why sentence should not be passed upon him" without saying and the record showing the words "of death" following the word "sentence."¹⁰⁵ In 1925¹⁰⁶ with a record silent as to allocution it was observed the only effect of the omission could be to remit the cause for a resentencing and because the defendants made no request for an opportunity to make an explanation, and it appearing that no advantage could have been gained had they been given the chance, the judgment was affirmed.

The leading case in Pennsylvania at present is *Commonwealth v. Senauskas*,¹⁰⁷ dealing with the problem of whether allocution is required upon a plea of guilty and there is a sentence of death.

The allocutive question was put in this case but the words "of death" were omitted and although that was the only omission the court went into the whole subject exhaustively. The defendant plead guilty on June 2, and the case was continued to June 10, for the purpose of hearing evidence to determine the degree of the murder. Evidence was heard and on June 23, the defendant was sentenced to be executed. On June 27 motions for a new trial, in arrest and to withdraw the plea of guilty were filed, the defendant claiming that he had been coerced into pleading guilty and that the judge had agreed not to inflict the death penalty. The court, while affirming its view that the common law compelled the allocutive query in a capital case, pointed out that the common law reasons for the rule no longer obtained. To illustrate, at common law a defendant had no counsel and no absolute right to an appeal, and when the prisoner was thus addressed allocutively he alleged any reason which was ground for arresting the judgment. "Putting this question to the prisoner gave him his last opportunity to speak to some one with power to save him from his impending doom." So at common law it was a serious invasion of his rights, the court said, to deprive him of this last opportunity to speak. While at the present time even "A sentence of

105. *Rizzolo v. Com.*, 126 Pa. 54, 73, 17 Atl. 520, 521 (1889); see *Com. v. Senauskas*, 327 Pa. 541, 549, 194 Atl. 646, 649-650 (1937).

106. *Com. v. Weiss*, 284 Pa. 105, 130 Atl. 403 (1925).

107. 327 Pa. 541, 549-550, 194 Atl. 646, 649, 113 A. L. R. 821 (1937).

death. . . has no such irrevocability about it as it had at common law." The court observed that anything the defendant could have said before sentence was pronounced could have been said with equal effect by himself or his counsel in either the trial or appellate court after sentence. "Modern criminal procedure has thus taken away this rule's *raison d'être*" but even so "careful judges will continue to make in such cases this ancient inquiry in unequivocal language." But, "*Failure to do so will constitute reversible error only when it is shown that the prisoner has been thereby prejudiced.*" (Italics added.) There being no showing of prejudice, Senauskas' sentence was affirmed.

In South Carolina when the record in a non-capital felony does not affirmatively disclose that allocution was omitted it is presumed that sentence was imposed "with the formalities required by law."¹⁰⁸ However, citing Blackstone, Chitty, Archbold and Bishop, the court found it has always been the practice and is required in capital cases¹⁰⁹ "And it seems. . . not simply because it was formal and seemly, but because of legal requirement founded upon wise consideration"; but even so, its omission is not an error affecting the whole proceeding so as to require a new trial and the remedy for "The error. . . should extend only as far as the error extended."

The first criminal appeal involving allocution in the United States courts was of a misdemeanor¹¹⁰ and the court summarily disposed of the question by holding it unnecessary in such cases. The first capital case was presented to the Supreme Court of the United States in 1891,¹¹¹ and Mr. Chief Justice Fuller, citing the old English cases, Chitty, Bishop and Wharton, came to the conclusion the common law compelled allocution in all capital cases. The case was remanded for a new trial for other reasons and the court did not indicate what the consequences of omitting allocution would be. The following year a *habeas corpus* case¹¹² was before the court on demurrer to the petition and the case was this: Schwab, one of the Haymarket rioters, was tried and sentenced to be executed on October 6, 1886, by an Illinois

108. *State v. Hunter*, 82 S. C. 153, 159, 63 S. E. 685, 687 (1908).

109. *State v. Trezevant*, 20 S. C. 363, 364 (1883); *State v. Jefcoat*, 20 S. C. 383 (1883).

110. *Turner v. U. S.*, 66 Fed. 287 (C.C.A. 5th, 1895); *Turner v. U. S.*, 66 Fed. 289 (C.C.A. 5th, 1895).

111. *Ball v. U. S.*, 140 U. S. 118, 11 Sup. Ct. 761, 35 L. ed. 377 (1890), cited *supra* note 97.

112. *Schwab v. Berggren*, 143 U. S. 442, 446, 447, 12 Sup. Ct. 525, 526, 36 L. ed. 218, 219 (1892).

state court. His conviction was affirmed and the Supreme Court of Illinois fixed November 11, 1887, as the date for executing the sentence of the criminal court of Cook County. The day preceding that fixed for the execution the governor of Illinois commuted the death sentence to life imprisonment. In his *habeas corpus* petition Schwab alleged that the recital in the judgment of the Supreme Court of Illinois that "It is averred. . . 'on this day came again the said parties' was . . . false and untrue," that neither he nor his counsel was present when the court imposed the sentence of death and therefore his confinement was illegal. The court held that the common law rule requiring allocution applied to the trial court only and not to an appellate court, because the appellate court only carried out the sentence of the trial court. But, in discussing the subject the court again collated all the common law authorities and by way of dictum, obviously, held allocution essential in all capital cases and, citing *Ball v. United States*, stated that "This privilege was deemed of such substantial value to the accused, that the judgment would be reversed if the record did not show that it was accorded to him." There have been no other cases in the United States courts involving allocution except the Austin-Bagley Corporation's appeal¹¹³ when it was convicted of conspiracy to violate the prohibition law. When the corporation complained that it had not been hortatorily queried by the trial court Judge Learned Hand aptly and appropriately translated the Federal Code's harmless error section into the Latin maxim "The complaint. . . is indeed *tabula in naufragio*."

In this class then there are thirteen jurisdictions (twelve states and the United States courts) which, in the absence of statutory requirement, have held that the common law requires that a convicted defendant, before he is sentenced, be asked if he has anything to say why sentence should not be imposed upon him. There are two jurisdictions, Massachusetts and Michigan, in which it may be the custom but probably is not required even in capital cases. In Alabama and New Mexico the question is required in all felony convictions, while the ten other jurisdictions require it in capital cases only. In none of them is it required in the instance of a misdemeanor and in the three states, Maryland, New Mexico and Pennsylvania, in which the problem was presented, it was held not essential upon a plea of guilty even in a capital case. But in none of the jurisdictions, unless the dictum

113. *U. S. v. Austin-Bagley Corp.*, 31 F. (2d) 229 (C.C.A. 2d, 1929), *cert. denied* 279 U. S. 863, 49 Sup. Ct. 479, 73 L. ed. 1002 (1928).

by the Supreme Court of the United States stands, is the omission of allocution grounds for a new trial, nor even for a remanding for resentence in Florida, Georgia, Maryland, and North Carolina unless some meritorious reason for doing so appears from the record and it is shown that the defendant's rights have been impinged and he has been prejudiced by the omission.

B. *Jurisdictions Denying the Necessity of Allocution*

The leading case supporting the view that failure to grant allocution is not an error, in the absence of a statute requiring it, and that the practice no longer serves any useful purpose and is therefore not compelled in any case is *State v. Hoyt*.¹¹⁴ The appeal was from a trial and conviction of murder and a sentence of death in which allocution had been omitted. The court inquired into the rationale of the common law requirement and examined into whether the common law reasons for the rule then obtained in Connecticut. The court noted that in any event the omission did not issue out of the verdict and could not therefore constitute a ground or reason for granting a new trial. Then the court fairly faced the issue: "But was the omission referred to fatal to the validity of the sentence?" The common law rule was recognized to be as stated by Chitty. It was observed, however, that anciently a defendant in a criminal case, even a felony charge, was not allowed counsel, the theory being that the presiding judge and the law adequately safeguarded the defendant's rights. The court then asked what harm could be occasioned the prisoner by the omission of the ceremony under its practice. It was stated that there was no discretion as to the punishment to be inflicted, there was and had been a year in which to determine the prisoner's sanity and the opinion was expressed that had counsel been present and made no request to be further heard and there had been no objection to sentence without a further hearing such conduct would have constituted a waiver of the formality. Attention was directed to the fact that the prisoner could not have a pardon to plead as a pardon came from the chief executive or the legislature after sentence. There could be no attainder and there could be no benefit of clergy. And finally, the court emphasized: "*If he should say anything suggesting ground for some relief, his saying it would not be the remedy; it would have to take some other legal form and be filed within the time pre-*

114. 47 Conn. 518, 543, 544, 546, 36 Am. Rep. 89, 97 (1880).

scribed."^{114a} (Italics added.) Therefore, the court thought "After all this it would seem a most absurd, frivolous and idle ceremony for this court to set aside the judgment and remand the case to the Superior Court, to the end that the accused may be asked 'whether he has anything to say,' " and the judgment was affirmed.

In New Jersey's early cases it was decided that allocution was not necessary in non-capital convictions,¹¹⁵ though it was stated to be required under the common law when the sentence of death was imposed. When the first and only capital case¹¹⁶ involving the question came before the court forty years later the court stated that the formula had always been employed in capital cases but "Under the condition of affairs existing in this state, however, the reason for the form has entirely disappeared." The court adopted the view that when one was represented by counsel and especially when he moved for a new trial the interrogatory was unnecessary. The next case before the court presented the novel question of whether allocution was required in a contempt proceeding.¹¹⁷ The court fully reviewed the doctrine of allocution and its own cases on the subject and concluded the ceremony was no longer required. "Now, because a defendant no longer has to be asked in any case whether he had anything to say why sentence should not be pronounced against him, *that does not mean that he may not say anything that would show the fact. He still has that right*" (italics added), and so New Jersey is placed in the category of jurisdictions no longer compelling allocution, though concededly there could be some question about the classification and whether it is required in capital cases.

In Tennessee, Henry and Frazier¹¹⁸ were convicted of larceny and without reference to the common law authorities and what has been most unusual on this subject, without the citation of a single authority, the court summarily disposed of the matter thus: "As to the objection. . . we need but say this is no ground for reversal in this court. The practice grew in England out of the fact, that until within the present century the prisoner defended himself, not being allowed the aid of counsel. It has been kept up generally as a matter of form, but has nothing in it under our rule, which

114a. *Id.* at 544.

115. *West v. State*, 22 N. J. L. 212 (Sup. Ct. 1849); *Dodge v. State*, 24 N. J. L. 455 (Sup. Ct. 1854).

116. *Warner v. State*, 56 N. J. L. 686, 695, 29 Atl. 505, 508 (1894).

117. *In the matter of Hayden*, 101 N. J. Eq. 361, 366, 139 Atl. 328, 330 (Ch. 1927).

118. *State v. Henry and Frazier*, 65 Tenn. 539, 544 (1873).

not only allows counsel, but imposing upon the court the duty of appointing counsel, learned in the law, to defend in all cases where the party is unable to employ such aid."

In its first case,¹¹⁹ Wisconsin followed *United States v. Ball* and held allocution necessary in a capital conviction. Its second case¹²⁰ was a *habeas corpus* proceeding in which a defendant had plead guilty to murder in the first degree and been sentenced to life imprisonment. Despite the fact that it was not a capital case and despite the fact, as Judge Rosenberry said, that the question was not strictly within the issues, the court called attention to the fact that allocution had been omitted and, pointing to its former opinion and the Pennsylvania case of *Hamilton v. Commonwealth*, said it "is not a mere formality." There were other reasons for remanding the cause and in discussing allocution the court did not consider that there had been a plea of guilty. In Wisconsin's third case,¹²¹ the appellant had been convicted of failing to stop, give his name and give aid to one he had run down with an automobile. When it was objected that allocution had been omitted the court reexamined its previous cases and came to this conclusion: "Upon mature reflection it seems utterly hopeless to attempt to state a reason for regarding such a failure as prejudicial error . . . The practice has obtained quite generally in this county, but it seems to have nothing more to support it than its traditionary existence . . . It is time that the law be rid of this technicality, which rests only in tradition and is barren of any substantial benefit to the defendant."

The court then made this most interesting observation: "We do not condemn the custom, which generally prevails with the trial judges of this state. It is quite possible that in response to this question the trial court often obtains information which is of aid in fixing a just and intelligent sentence. But it is just as possible also that courts are often misled and imposed upon by the crafty criminal who understands the frailties not only of human nature in general but the peculiar weaknesses of individual men whose attitude toward life, their foibles and fancies are of more or less concern to him who is about to be sentenced."

Consequently, there are four jurisdictions in which the conclusion has been reached that the common law reasons for allocution no longer exist

119. *French v. State*, 85 Wis. 400, 55 N. W. 566 (1893).

120. *Ex Parte Carlson*, 176 Wis. 538, 186 N. W. 722 (1922).

121. *Boehm v. State*, 190 Wis. 609, 612-13, 209 N. W. 730 (1926).

or apply and therefore the ceremony is not compelled in any case. There have been no cases involving the matter in Massachusetts and Michigan since 1866 and 1895, respectively, and it is probable those jurisdictions should be placed in this category. There may be some doubt about Tennessee since its only case was not a capital one but that was in 1873, and the question has not been presented again. Possibly these four or six jurisdictions should or could be placed in the class with the nine in which there has never been a case nor a statute concerning allocution since it should no longer constitute a problem in those states.

[To be continued]