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Allocution

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JURISDICTIONS IN WHICH ALLOCUTION IS GOVERNED BY STATUTE

Twenty-one jurisdictions and the American Law Institute have attempted to dispose of allocution and its connected problems by statutory enactment. In thirteen states the statutes are very similar, all of them being copied or modeled after the California provisions. The American Law Institute's proposed statute is a composite of all the statutory enactments on the subject and the slight variations in the various state statutes in this group are set forth in the commentaries to its proposed Code of Criminal Procedure.\textsuperscript{122} California had a statute on the subject as early as 1850.\textsuperscript{123} Its present provisions are from the Penal Code of 1872\textsuperscript{124} as it was amended in 1880.\textsuperscript{125} They are set forth in the Penal Code of California (1937) under the heading The Judgment, preceded by the chapters on Bills of Exception, New Trials, and Arrest of Judgment. The chapter of the Code dealing with The Judgment goes into great detail and covers practically every conceivable matter that could arise at that period in the proceedings from prescribing the time the judgment is to be pronounced to probation and parole.

As to allocution the California Penal Code provides as follows:\textsuperscript{126}

"Arraignment For Sentence . . . When the defendant appears for judgment he must be informed by the court, or by the clerk, under its direction, of the nature of the charge against him and of his plea, and the verdict, if any thereon, and must be asked whether he has any legal cause to show why judgment should not be pronounced against him." (italics added)

The Code then proceeds to set forth the causes that may then be shown against judgment:\textsuperscript{127}

\textsuperscript{1}The first installment of this article appeared in 9 Mo. L. REV. 115 (April 1944).

\*Commissioner, Supreme Court of Missouri. A. B. Drury College 1924; J. D. University of Chicago 1927.


\textsuperscript{123} Ex Parte Gibson, 31 Cal. 620 (1867).

\textsuperscript{124} Cal. Penal Code (1872) §§ 1200-1204.

\textsuperscript{125} Amendments to Code, Pt. III (1880) 26.

\textsuperscript{126} Cal. Penal Code (1939) § 1200.

\textsuperscript{127} Id. at § 1201.
“He may show for cause against the judgment: 1. That he is insane; and if, in the opinion of the court, there is reasonable ground for believing him insane, the question of insanity must be tried as provided in chapter six....

“2. That he has good cause to offer, either in arrest of judgment or for a new trial; in which case the court may, in its discretion, order the judgment to be deferred, and proceed to decide upon the motion in arrest of judgment or for a new trial.”

Copies of the motions contemplated by the preceding Section must be served on the state’s attorney and the motion must relate to the matters set forth in the statute as “any appeal from an order entered upon a motion other than as herein provided” would be dismissed by the court. “If no sufficient cause is alleged or appears to the court at the time fixed for pronouncing judgment... it must thereupon be rendered; and if not rendered or pronounced within the time so fixed... the defendant shall be entitled to a new trial.”

These or substantially identical statutes have been enacted in Idaho, Iowa, Montana, Nevada, New York, North Dakota, Oklahoma, South Dakota, Texas, and Utah. There is some difference in the Texas statutes in that in addition to insanity the defendant may plead a pardon and when one has been arrested as a fugitive after having been convicted he may deny that he is the person convicted.

Except for its omission of the plea of pardon Arizona’s allocution statute is almost identical with the American Law Institute’s Code of Criminal Procedure. In this connection it should be noted that these two codes contain a Section which provides that if the court has not complied with the preceding Section and informed the defendant of the accusation and inquired whether he has any cause to show why sentence should

128. CAL. PENAL CODE (1939) § 1201.5.
129. CAL. PENAL CODE (1939) § 1202.
130. 1 IDAHO CODE ANN. (1932) §§ 19-2410, 19-2411, 19-2412.
131. IOWA CODE (1939) §§ 13955, 13956, 13957, 13958, 13958.2.
132. 5 MONT. REV. CODES (1935) §§ 12064, 12065, 12066.
133. 5 NEV. COMP. L. (1929) §§ 11049, 11050, 11051.
135. COMP. L. N. D. (1913) §§ 10933, 10934, 10935.
136. OKLA. STAT. (1931) §§ 3134-3156.
137. 2 S. D. CODE (1939) §§ 34.3703, 34.3704.
138. TEX. STAT. (Vernon, 1936) art. 773 CODE OF CR. PROC.
139. UTAH REV. STAT. (1933) §§ 105-36-9, 105-36-10, 105-36-11.
140. 3 ARIZ. CODE ANN. (1935) §§ 44-2216, 44-2217.
not be pronounced "... the court shall set aside the sentence. ...," and comply with the provisions of the Code. The causes which may be alleged against sentence and which are then to be determined in the manner provided by specific provisions on the subjects are: "... (a) That he has become insane since the verdict was rendered. (b) That he has been pardoned for the offense for which he is about to be sentenced. (c) That he is not the person against whom the verdict or judgment was rendered. (d) If the defendant is a woman, and the sentence of death is to be pronounced, that she is pregnant." After the procedure for determining these matters has been followed and are not proved or one of these grounds is not alleged, sentence is pronounced. In addition, after this procedure, when the court has a discretion as to the penalty to be inflicted the court may inquire into the aggravating or mitigating circumstances.

Arkansas and Kentucky require that the defendant be informed of the nature of the indictment, his plea, the verdict and that he be asked "... if he has any legal cause to show why judgment should not be pronounced against him. ..." before he is sentenced. "He may show for cause against the judgment any sufficient ground for new trial, or for arrest of judgment ..." or that he has become insane.

Indiana, Kansas, Nebraska, Ohio, Washington and Wyoming have similar allocution statutes. These statutes either say "When the defendant appears for judgment ..." or "Before the sentence is pronounced ..." the defendant must be informed by the court of the verdict or finding and asked "... whether he has any legal cause to show ..." or "... whether he has anything to say ..." why judgment should not be "pronounced" or "passed" upon him. "If no sufficient cause be alleged or appear ..." or "If the defendant have nothing to say, or if he show no good and sufficient cause ..." judgment is thereupon rendered and the court proceeds to pronounce judgment as provided by law. The statutes

142. Id. at § 390.
143. Id. at § 391.
144. Id. at § 396.
150. Wash. Code (Pierce, 1933) § 9309.
in this group of states do not set forth the specific causes or grounds the defendant may allege against the pronouncement of judgment, and the Washington statute has only the one Section which merely requires the allocutory query.

In all the states with statutes, the ones setting forth the causes which may be shown, as well as the ones which do not, allocution is mandatory and there must be a substantial compliance with the statutes in felony convictions.\textsuperscript{152} The purpose of requiring the ceremony is to give the defendant an opportunity to show the specific causes set forth in the statute, "... if it be a fact ..." and to accord "... the defendant a final opportunity to defer or defeat the final sentence of the law."\textsuperscript{153} If cause is shown by the defendant, the record should show what it was and what disposition the court made of it.\textsuperscript{154}

A proceeding in observance of the statute is illustrated by a California case.\textsuperscript{154a} The defendant was convicted of murder. His motions for new trial and in arrest of judgment were overruled and when he was arraigned for judgment it was suggested that he was insane. The court ordered a trial of his sanity, he was found to be sane and the death penalty was then assessed. The defendant must specify the cause and furnish evidence of the fact, and if he does not he cannot be injured by its omission.\textsuperscript{155} If the record erroneously recites that the question was put when in fact it had not been, the record may be corrected on motion and the cause will then be remanded for resentencing.\textsuperscript{156} So also the trial court may correct the error of its omission even in the absence of the American Law Institute's specific authority to do so,\textsuperscript{157} and the judge's recital of the nature of the crime charged is sufficiently explicit to comply with the command of the

\textsuperscript{152} Lee v. State, 27 Ariz. 52, 229 Pac. 939 (1924); People v. Walker, 132 Cal. 137, 64 Pac. 133 (1901); Porter v. State, 17 Ind. 415 (1861); State v. Jennings, 24 Kans. 460 (1881); People v. Nesce, 201 N. Y. 111, 94 N. E. 655 (1911); Silsby v. White, 119 Ohio St. 314, 164 N. E. 232 (1928); Bohannan v. State, 14 Tex. App. 271 (1883).
\textsuperscript{153} Lee v. State, 27 Ariz. 52, 67, 229 Pac. 939, 944 (1901) cited supra note 152; State v. Terry, 98 Kans. 796, 161 Pac. 905 (1916); People v. Nesce, 201 N. Y. 111, 94 N. E. 655 (1911) cited supra note 152.
\textsuperscript{154} Ex Parte Gibson, 31 Cal. 620 (1867).
\textsuperscript{154a} People v. Lawson, 178 Cal. 722, 174 Pac. 885 (1918).
\textsuperscript{155} People v. Swift, 140 Cal. App. 7, 34 P.(2d) 1041 (1934).
\textsuperscript{156} People v. Walker, 132 Cal., 137, 64 Pac. 133 (1901) cited supra note 152. This is a leading case in California and the states adopting its statute.
\textsuperscript{157} People v. Murback, 64 Cal. 369, 30 Pac. 608 (1883); Keffer v. State, 12 Wyo. 49, 73 Pac. 556 (1903).
If an appellant does not seek to correct the record its recital of allocution is conclusive. The statutes do not require the record to show allocution and it is therefore presumed from a silent record. In these states the mere omission of the formality does not make the judgment void and is not a ground or reason for a new trial, but the cause is remanded for a compliance with the statutes and a resentencing. It is also a right the defendant may waive, as was the case when the defendant withdrew his plea of not guilty after the trial began and entered a plea of guilty and the court then asked her "... if she desired to waive delay and receive immediate sentence. ..." and both she and her counsel assented. Such circumstances were held to be a waiver of the right to allocution. However, it was held in Wyoming that when allocution is required, the duty is on the court (meaning the judge) to perform the ceremony and no one else is authorized under the statute to do so.

These statutes do not by their terms apply to felonies only, and yet Iowa, Kansas, and New York have held allocution unnecessary in misdemeanor convictions. The statute, on the other hand, was scrupulously followed in a misdemeanor case by the trial court in Montana.

Neither do these statutes make an exception as to the requirement when there is a plea of guilty, but in Ohio the procedure was deemed unnecessary in such instances. In California there had been a plea of guilty to arson and on a hearing for probation the statute requiring allocution was then substantially complied with, and so when the case was continued and sentence subsequently imposed without allocution at that time it was

158. People v. Jung Qung Sing, 70 Cal. 469, 11 Pac. 755 (1886).
161. Ex Parte Gibson, 31 Cal. 619 (1867); People v. Walker, 132 Cal. 137, 64 Pac. 133 (1901) cited supra note 152; Evers v. State, 84 Neb. 708, 121 N. W. 1005 (1909); People v. Nesce, 201 N. Y. 111, 94 N. E. 655 (1911) cited supra note 152; Rhea v. U. S., 6 Okla. 249, 50 Pac. 992 (1897) and cases supra note 152, 160.
163. White v. State, 23 Wyo. 130, 147 Pac. 171 (1914).
held that none of the defendant's substantial rights had been violated. In Idaho a sentence of life imprisonment on a plea of guilty was set aside for several reasons, no one of which was in and of itself a sufficient reason for doing so, but it was noted by way of criticism that the trial court had summarily disposed of allocution. On the other hand, in Oklahoma, a man plead guilty to rape and was sentenced to fifty years' imprisonment. He was not represented by counsel at any time during the proceedings. He appeared before a committing magistrate on July 9, 1925, waived preliminary hearing, was bound over and sentenced on the same day. He was not given a copy of the information nor advised of his rights and claimed to have been misled and coerced into pursuing the course he did. The court in setting aside the judgment noted the various statutory rights, including allocution, which had been violated and held that it was necessary to observe the statutes unless they had been waived.

The Indiana statutes do not specify the causes a defendant may urge against the pronouncement of sentence but the court has held that the purpose of the statutory requirement was to permit the defendant to "... move in arrest of judgment, for want of sufficient certainty in the indictment as to person, time, place or offense. ..." and that if his objections were valid the whole proceeding was to be set aside. As a corollary, if the defendant's motions for a new trial and in arrest of judgment have been heard, he has spoken whether inquired of or not, and allocution is not then necessary.

The most original and interesting allocution questions have been urged in the Supreme Court of Nebraska. As indicated, the Nebraska statute requires only that the defendant be informed of the jury's verdict and inquired of whether he has anything to say why sentence should not be passed against him. If he has nothing to say or if he show no good or sufficient cause the court proceeds to pronounce judgment. The statute is mandatory but compliance with it is presumed from a silent record.

In the first case presented, 1876, the statute had not been observed and

172. State v. Wilson, 50 Ind. 487, 489-90 (1875).
173. McCorkle v. State, 14 Ind. 39 (1859); Ayers v State, 88 Ind. 275 (1882);
Lillard v. State, 151 Ind. 322, 50 N. E. 383 (1898).
174. See note 148 supra.
it was insisted that the appellate court had no authority to pass sentence nor to remand the cause with directions merely to resentence in conformity with the law and the prisoner was therefore entitled to be discharged. The supreme court conceded that sentence might not be directly imposed by it, but the court pointed out that it had authority to correct errors in other respects and to review criminal proceedings to the end that a prisoner be given a fair trial. It was noted that the English courts had adopted the view that for errors in the sentence only the prisoner was not discharged but the error was corrected. So while it was necessary that the allocution statute be observed, its omission did not affect the verdict of guilt, and the cause was remanded with directions to the trial court to pronounce judgment on the verdict in the prescribed manner.

In 1895177 one Tracey appealed a conviction of robbery. When he was arraigned for sentence, the trial court asked him how many terms he had served in penitentiaries and he replied, "Two." On appeal it was argued that the court had no authority to ask such a question. The supreme court pointed out that allocution was required by the Code but held that the district court on the occasion of allocution was not "... limited to the sole question whether the person so convicted has anything to say why judgment should not be pronounced against him." Whether the trial court has authority to coerce an answer to any question it may propound on that occasion the court did not decide, "... but what inquiries a court may make of such a prisoner..." aside from the compulsory query, "... is a matter resting entirely in the discretion of the court." Correlatively what may the prisoner respond? "He may make such statements of his previous good behavior, of his previous good character, of his age, of his condition at the time he committed the offense, and the influences which were brought to bear upon him and led to his commission of the crime as may induce the court 'to temper justice with mercy' and to give the prisoner the least punishment provided for by the statute."

The two McCormick cases178 present another absolutely original allocution problem and one of the very rare instances of a defendant's appearing in an appellate court a second time after his sentence has once been set aside and remanded for a resentencing. McCormick was sentenced to twenty years' imprisonment for murder. Before he was sentenced the

court asked him if he had anything to say why sentence should not be passed upon him but the court neglected, as the statute requires, first to inform the defendant of the jury’s verdict. As to the whole matter of allocution the court said, “While we may question the wisdom of such a statute, or doubt that its requirements serve any useful purpose in criminal procedure as conducted in the present age yet the statute remains...” is mandatory and must be observed until the legislature abrogates it. The court not only held the allocutive query mandatory, but also held that it was mandatory that the defendant be informed of the jury’s verdict and the cause was “... remanded for the rendition of a valid judgment.”

When McCormick was again brought before the trial court in compliance with the mandate of his appeal, he immediately objected that the court had no authority to impose sentence upon him and that to do so would violate his constitutional right against being punished twice for the same offense. The trial court disregarded his objections and resentenced him in accordance with the law and the mandate. On his second appeal the Supreme Court of Nebraska held that when the cause was remanded it then stood in the trial court on the verdict of conviction and upon which “... the trial court was required by law and the order of this court to pronounce a valid sentence and judgment.” The supreme court observed that it was not a court of general original jurisdiction but a court of review and as such “... we have the inherent power to make such orders and such disposition of the case as will render our judgment effective,” and so when the former sentence was set aside the matter was in the district court as though sentence and judgment had never been pronounced.

Finally, it was decided by the Nebraska court that a defendant could not raise the point in a *habeas corpus* proceeding that he had not been accorded allocution when he was tried and sentenced, as any objection to the proceedings subsequent to his conviction could be raised by a petition in error in which the whole record would be before the court and all errors corrected and a proper trial awarded. In *Kopp v. State* it was sought to raise the point that allocution had not been accorded and was essential in a contempt proceeding, but the record was silent and the court presumed the observance of the statutes whether necessary or not.

178a. *Id.* at 66 Neb. 337, 347, 92 N. W. 606, 609 (1902) cited *supra* note 178.
178b. This view was again followed in *Evers v. State*, 84 Neb. 708, 21 N. W. 179. *Id.* at 71 Neb. 505, 508, 511, 99 N. W. 237, 240 (1904) cited *supra* note 178.
And that, it would seem, should about exhaust the possibilities of allocu-
tion either with or without a statute. But does it?

Rule 30 of the first proposed draft of the *Federal Rules of Criminal
Procedure* deals with sentence and judgment. The rule provides that sen-
tence shall be imposed, after the jury's verdict, without unreasonable delay,
but may be delayed if there is a motion to withdraw a plea of guilty, for
judgment of acquittal, in arrest of judgment, or for a new trial. There is a
provision for presentence investigation and report and the proposed rule
does not provide in express terms that the traditional allocutory query be
asked but in its stead says: “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.”182 As
previously noted, there has been no statute governing allocution in the
United States courts.183 In its notes and annotations the distinguished ad-
visory committee contrasts this provision with Section 480 of the *New York
Criminal Code* and Section 389 of the American Law Institute's proposed
*Code of Criminal Procedure* and cites Bishop, the *Austin-Bagley* case, and
*Turner v. United States*, but does not refer to the Supreme Court cases of
*Ball v. United States*, and *Schwab v. Berggren*. But is the requirement of
the proposed rules mandatory? Is it allocution? What constitutes a com-
pliance with the statute? What does not? What may or must the court say
and what is relevant on behalf of the prisoner? And finally, what are the
consequences of observing or not observing the rule? There may be no
dispute but that it is well and proper, despite the Wisconsin court's skep-
ticism, that a prisoner should be heard in mitigation of punishment and that
the proposed code provision is an excellent substitute for allocution, but it
is suggested that the matter was more happily put by the court rule from
which this one sentence was doubtless adapted: “After a plea of guilty, or
a verdict of guilt by a jury or finding of guilt by the trial court where a jury
is waived . . . (2) the condition or character of the defendant, or other
pertinent matters, should be investigated in the interest of justice before

182. This rule becomes Rule 34 in the Second Preliminary Draft of *Fed. Rules
of Cr. Proc.* (1944) where the language is more brief and reads as follows: “Sen-
tence shall be imposed without unreasonable delay. Pending sentence the court may
commit the defendant or alter the bail. Before imposing sentence the court shall
afford the defendant an opportunity to make a statement in his own behalf and to
present any information in mitigation of punishment.”

183. See notes 110, 111, 112, 113 *supra.*
sentence is imposed."\textsuperscript{184} Especially is this felt to be true in view of the Code's proposed provisions with reference to plain and harmless error hereinafter noted.

\textbf{Missouri and Allocution}

\textbf{The First Sixty Years 1820-1879}

Allocution has run the gamut of both statutes and decisions in Missouri. In this jurisdiction the course of allocution's history has been so unusual and noteworthy that the subject is entitled to special treatment.

It was almost forty years after statehood that the first appeal involving allocution arose and the opinion in that case became a leading authority throughout the country for the view that the common law required allocution in cases in which there had been a capital conviction only. In \textit{State v. Ball}, the defendant had been found guilty of murder in the second degree and sentenced to ten years' imprisonment. On his appeal it was assigned as error that it did not appear from the record that he had been allocutively addressed by the court before he was sentenced. The court fully considered Blackstone, Chitty, and the old English cases and came to the conclusion that allocution was ". . . the formal address of the judge to the prisoner asking him why sentence should not be pronounced."\textsuperscript{185} The court pointed out that importance had been attached to the ceremony in England because the reviewing court determined from the observance or non-observance of this formality whether the prisoner had been given an opportunity to plead a pardon or to urge any of the traditional grounds in arrest of judgment. The court noted that a pardon would now be recognized either before or after judgment, that attainder was no longer a consequence of a capital conviction, and held allocution necessary in capital cases only. It was twenty-two years before the question was raised again and that was in a non-capital case and \textit{State v. Ball} was followed.\textsuperscript{185a}

\textbf{The Second Sixty Years 1879-1943}

Despite the fact that in over half a century there had been but two cases involving allocution; and despite the fact that there is now no known

\textsuperscript{184} Rules of practice and procedure, after plea of guilty, verdict, or finding of guilt in criminal cases in the United States court as promulgated by the Supreme Court of the United States pursuant to act of congress, 47 \textit{Stat.} 904 (1933), 28 U. S. C. § 723a (1940). These rules are reported in 301 \textit{U. S.} 717, amending those found in 292 \textit{U. S.} 661.

\textsuperscript{185} \textit{State v. Ball}, 27 Mo. 324, 326 (1858).

\textsuperscript{185a} \textit{State v. Stark}, 72 Mo. 37 (1880).
or discoverable reason for the legislature's taking the matter over from the courts, the statute revision commission of 1879 inserted two new Sections into the statutes relating to criminal procedure and thereby undertook to govern and settle the subject of allocution and its related problems. The revision was of the General Statutes of 1865 and the new sections were inserted in the chapter entitled Of The Verdict And Judgment And The Proceedings Thereon which thereafter, in all subsequent revisions, precedes the articles dealing with new trials, arrest of judgment, and appeals.

The statutes adopted differ in phraseology from all other statutes on the subject and the second Section is absolutely unique. They have remained unchanged in text since they appeared in the revision of 1879 as Sections 1939 and 1940:

"Sec. 1939. Prisoner may be heard before sentence.—When the defendant appears for judgment, he must be informed by the court of the verdict of the jury, and asked whether he has any legal cause to show why judgment should not be pronounced against him; and if no such sufficient cause be shown against it, the court must render the proper judgment.

"Sec. 1940. Preceding section, when directory.—If the defendant has been heard on a motion for a new trial, or in arrest of judgment, and in all cases of misdemeanor, the requirements of the next preceding section shall be deemed directory, and the omission to comply with it shall not invalidate the judgment or sentence of the court."

Clearly, when applicable, the statute is mandatory and apparently, plain enough. It is what is not expressly contained in the statutes that has provoked the difficulties in Missouri. But before the problems can be fully appreciated and the cases properly considered, it is necessary briefly to direct attention to certain other procedural provisions of the Criminal Code. Then (1879), and now, the statutes set forth the procedure to be followed from the time the jury brings in its verdict. The verdict must be rendered in open court, if the offense is punishable by imprisonment "... for the

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186a. See Mo. Gen. Stat. (1865) 851-855. They were inserted between Section 11, dealing with recognizances, and Section 12 on the duty of the clerk in entering criminal judgments on the minutes and the duty of the court in inspecting and conforming the minutes to the facts. See Mo. Rev. Stat. (1879) §§ 1936 to 1941.
purpose of judgment the defendant must be personally present, and when a judgment upon conviction is rendered the clerk enters the judgment ‘...fully on the minutes, stating briefly the offense....’ and the court inspects the entries and conforms them to the facts. The statutes specify the five causes for which the trial court may grant a new trial and today provide that a motion for a new trial must be in writing and ‘...must set forth in detail and with particularity...the specific grounds or causes therefor. Such motion shall be filed before judgment and within four days after the return of the verdict,’ but the time may be extended for thirty days and no longer. An appeal in a criminal case is from a ‘...final judgment rendered upon any indictment or information...’ and ‘...when any appeal shall be taken...it shall be the duty of the clerk...to make out a full transcript of the record in the cause including the bill of exceptions, judgment and sentence and certify...same....’ to the proper appellate court.

In the very first case decided after the enactment of the statutes, and that was sixteen years, the court got off to a bad beginning. In a grand larceny case the court very carefully considered all the questions raised by the defendant’s motions for new trial and in arrest of judgment; and then of its own volition, and, although no statute so specified, called attention to the fact that “it does not appear from the record,” prior to sentence, that the defendant was asked if he had anything to say why sentence should not be passed upon him. The court referred to the common law and the cases generally and stated that our statute made it very plain that the formality of allocution ‘...must occur in court...’ and ‘...before the court proceeds to sentence the prisoner.” But the court finally observed that the succeeding Section made the requirement directory when the defendant had been heard on motion for a new trial or in arrest of judgment, which was the fact in the instance before the court, and therefore the judgment was affirmed. Thus, in a case clearly within the directory provisions of the statute and the question being in no way involved in the case before the court, the doctrine became established that the fact of allocution must appear from the record.

189. *Id.* at § 4100.
190. *Id.* at § 4104.
191. *Id.* at § 4124.
192. *Id.* at § 4125.
193. *Id.* at § 4130.
194. *Id.* at § 4146.
There was another lapse of sixteen years before the court again considered the problems of the statute and that time the case had its seriocomic aspects and a rather ironic ending. One Kile was found guilty of seduction under promise of marriage and sentenced to two years' imprisonment. He was sorely aggrieved by the jury's finding and thought himself entitled to a new trial but "...without any objection or exception being interposed," the court pronounced sentence the same day the verdict was returned and two days later his motion for a new trial was filed. The point before the court was that contrary to the new trial statute his motion was filed after and not before judgment and therefore the query was whether the case was before the court on the record proper only, excluding consideration of any matters of exception. The court so held and confined itself solely to a consideration of errors appearing on the record proper, after which the court, again of its own volition apparently, quoted the allocution statutes and said that since he had not been heard on his motion for a new trial, its being filed after judgment but within four days, it was the trial court's duty before pronouncing sentence to comply with the statute, inform the prisoner of the jury's verdict, and put the allocutory question to him. In so doing it was observed that the right to be so heard (allocutively) had come down to us from the common law, and "...had its origin and has become imbedded in our laws because of the necessity of safeguarding against error and injustice by securing to the accused, even after he has been found guilty, the right to speak and show cause, if any he has, why judgment should not be pronounced, before the final act of the law shall take from him the right of life and liberty." The court stated that the directory Section of the statute added emphasis to the mandatory character of the statute when the defendant had not been heard on his motion for a new trial. The court remanded the cause with specific directions that the prisoner be brought again into court and that judgment be pronounced in accordance with the opinion. When the cause came up the second time it developed that the trial court, instead of observing the mandate of the supreme court, on motion of the state's attorney, made a nunc pro tunc entry showing the verdict, allocution, and judgment. The court then stated that if the first judgment had not reflected the true facts it could have been corrected by a motion in diminution of the record, but that the trial court's nunc pro tunc entry could not affect the court's previous judgment as "Under our mandate, the

trial court had but one duty to perform, namely, to call into court and re-
sentence the defendant.” “As all the issues...were finally settled...[this left] nothing to be done except pronouncing a proper judgment.” Neither could the prisoner, the court said, by a proceeding subsequent to its former judgment bring the first record of the trial court up for review. Since the court’s mandate had not been complied with, and astonishingly enough it would seem, an indignant court held “...this appeal is without warrant of law and must be dismissed.” (Italics added) And so, despite the hortatory discussion by the court, in its first opinion, of the value and purpose of allocution, neither the statute nor the court’s mandate appear to have been so imperative after all.197

Thereafter it became firmly established that when the motion for a new trial had been filed out of time, after sentence and judgment, only the record proper could be considered; and if that record failed to show allocution in a felony conviction, the cause was remanded with directions to the trial court to observe the mandate of the statute, grant allocution, and resentence the prisoner.198

The leading cases were State v. Caulder199 and State v. Taylor200 decided in 1923. In the first case Caulder was convicted of bigamy and sentenced to two years’ imprisonment. His motion for a new trial was filed three days after the verdict but it was not filed before he was sentenced; hence, only the record proper was before the court for review, and that did not show allocution. The court cited State v. Dunnegan, State v. Kanupa and State v. Ball, supra, and held allocution mandatory in all felony convictions. The majority of the court held, and this became the crux of the matter in Missouri, that allocution would not “...be presumed where the record is silent upon the subject and it does not otherwise properly appear that the requirement was not complied with.” Judge Walker wrote a most interesting dissenting opinion in which he pointed out that in any event the omission was not such an error as to require a reversal of the judgment and

197. This, the Potter case infra note 211 and the McCormick cases, supra note 178, in Nebraska are the only three instances of cases involving allocution coming before the court a second time, and in none of them was the result changed.
198. State v. Dunnegan, 258 Mo. 373, 167 S. W. 497 (1914); State v. Keller, 304 Mo. 65, 263 S. W. 171 (1924); State v. Cantrell, 263 S. W. 177 (Mo. 1924); State v. Deck, 262 S. W. 712 (Mo. 1924); State v. Huffman, 267 S. W. 838 (Mo. 1924); State v. McSame, 267 S. W. 888 (Mo. 1924); State v. Barrett, 44 S. W. (2d) 76 (Mo. 1931); State v. Broyles, 340 Mo. 962, 104 S. W. (2) 70 (1937).
199. 301 Mo. 276, 279, 256 S. W. 1063, 1064 (1923).
200. 301 Mo. 432, 256 S. W. 1059 (1923).
put the query as to whether a more wholesome disposition of the case would not be "... to entertain the presumption of regularity permissible in regard to proceedings of courts acting within the scope of their jurisdiction, and to have held (therefore) that the defendant was not denied the right in question." Judge Walker thought the presumption of regularity in the trial court's proceedings should be entertained because, in the case before the court "... the failure of the record to show allocution is not complained of by the defendant." He noted, as the statute says, that one of its purposes is to inform the defendant of the verdict, of which Caulder had full knowledge, because he not only filed a motion for a new trial but also it was in fact heard and overruled though filed out of time—that is after judgment. He reviewed the history of allocution and pointed to the fact that invariably a defendant now had counsel. He argued that by the second Section, when a motion for a new trial was filed notice of the verdict was shown, and the legislature in such circumstances intended the requirement to be directory only. The most important part of his argument related to the motion for a new trial. He said the majority view was based on the fact that the motion for a new trial was not filed before judgment as the motion for new trial statute requires and that that fact in and of itself prohibited the court from considering the allocution statute as mandatory. Judge Walker emphasized that the purpose and effect of failing to comply with the new trial statute was to limit the appellate court's review and had nothing to do with allocution and whether the allocution statute was directory or mandatory or whether compliance with its terms could be reasonably assumed under the circumstances. He concluded that the majority opinion occasioned only unnecessary delay and the useless process of sending the case back for resentencing.

The Taylor case was a larceny conviction with the motions for new trial and in arrest of judgment filed and overruled after sentence; consequently, only the record proper was before the court and it did not show allocution. The court adhered to its ruling in the Caulder case and again refused to indulge the presumption of regularity of the proceedings in the trial court from a silent record. But there was present in the Taylor case this very significant difference. "The record here affirmatively shows that the defendant was not given time to file his motion for new trial, nor granted allocution." (Italics added) All the proceedings occurred on the same day

and the record "...recital shows a continuous sequence from the returning of the verdict to the pronouncement of sentence." The court then said: "In the present case the defendant, apparently, did not have any appreciable time to prepare and file his motion. Here, then, comes in the importance of allocution." The court continued that if allocution had been granted the defendant could have demanded a deferment of sentence because he had not had time to file his motion for a new trial. "A defendant convicted of a felony is by the statute allowed four days to file his motion for new trial. ... The court must allow time for him to file said motion after the verdict and before the pronouncement of judgment. If he is allowed allocution and fails to ask time in which to file his motion he may be deemed to have waived it." The court set the judgment aside because sufficient time in which to file the motion for a new trial had not been given, ordered allocution and permitted the defendant, if he desired, to appeal, using the motion already filed to save for review all exceptions preserved in his bill of exceptions. Judge Walker again dissented, setting forth the views he had previously expressed in the Caulder case.

So it was when a defendant was prevented or unable to file his motion for new trial because of the illegal act of the circuit clerk and the record failed to show allocution, the judgment was set aside "...immediately following the verdict aforesaid, leaving the record as it stands, showing the filing of the defendant's motion for a new trial on March 18, 1924. The court is further directed, if said motion for a new trial is overruled, that defendant shall be granted allocution before judgment is entered and sentence pronounced; and that he be allowed to appeal from said judgment to this court if he desires to do so." In 1933, the whole matter was again reviewed in State v. Turpin under a somewhat different record. There was no bill of exceptions and consequently the case was before the court on the record proper only. The record showed that there had been a motion for a new trial but it was filed after sentence and judgment. The court en banc, unanimously said the verdict was received and "...judgment and sentence were pronounced all in one proceeding, without opportunity for allocution or the filing of a motion for new trial before judgment." Citing the Dunnegan, Caulder, Taylor, Madden and Barrett cases the court said: "In these cir-

202. 332 Mo. 1012, 1020 61 S. W. (2d) 945, 949 (1933).
cumstances the judgment must be reversed and the cause remanded." It was said, comparing the *Nagel, Kile and Dunnegan* cases, that formerly the practice had been to remand the case for allocution only but since the *Taylor* case the failure to accord allocution and the pronouncement of judgment and sentence before the filing and hearing of the motion for new trial entitled the defendant to have the cause reversed and remanded because the defendant's substantial right to be heard on the motion had been prejudiced.\(^{203}\)

Meantime *State v. Madden*\(^{204}\) had added to this rule the further requirement that not only was the court bound to grant allocution but also it was not necessary for the defendant to request that judgment be withheld until he could file a motion for a new trial—it was the duty of the court to inform him of his right in that regard. And finally, a defendant was convicted of exhibiting a deadly weapon\(^{205}\) on October 21, 1939, and on that day filed his motion for a new trial; but the court proceeded to sentence him before the motion was overruled the following January 4, and because the record did not show allocution the cause was remanded with directions to set aside the judgment, hear the motion, then pass sentence and permit the appeal. And, of course, the statute applies and allocution is mandatory when a motion for a new trial is not filed within the extended time allowed by the court.\(^{206}\)

Not only must the record show the formality of allocution "unless the same is waived,"\(^{207}\) but also the record must state the facts, and not the conclusion, that allocution was accorded.\(^{208}\) It is not enough that the record may indicate the ceremony may have been performed defectively or imperfectly but the record must show that the court first informed the defendant of the verdict of the jury and then asked him whether he had any legal cause to show why sentence should not be pronounced against him, just as the statute says.\(^{209}\) In 1905 a judgment which recited "The defendant being now asked if he had any legal cause to show why sentence should not be pronounced against him according to law, the defendant failing to show such

\(^{203}\) State v. Crow, 337 Mo. 397, 84 S. W. (2d) 926 (1935); State v. Mauzy, 79 S. W. (2d) 1044 (Mo., 1935).

\(^{204}\) State v. Madden, 324 Mo. 877, 24 S. W. (2d) 1003 (1930).

\(^{205}\) State v. Carrow, 147 S. W. (2d) 436 (Mo. 1941).

\(^{206}\) State v. Harrison, 29 S. W. (2d) 63 (Mo. 1930).

\(^{207}\) State v. Barr, 326 Mo. 1095, 1100, 34 S. W. (2d) 477, 479 (1930).

\(^{208}\) State v. Madele, 347 Mo. 575, 148 S. W. (2d) 793 (1941).

cause. . . .” was approved.210 And an incorrect record, erroneously showing sentence without allocution, was corrected in the supreme court by the state, with leave of court, filing a duly certified transcript of the record showing the defendant was sentenced in accordance with the requirements of the statute,211 the court’s former opinion remanding the cause was then withdrawn, a rehearing granted on the court’s own motion and the judgment affirmed on the record proper, there being no bill of exceptions.

But, when a timely motion for a new trial is interposed prior to the pronouncement of judgment and therefore heard, presumably, the statutory necessity for allocution ceases to be mandatory and becomes directory only,212 such circumstances bringing the case squarely within the directory, which seems to mean discretionary, provisions of the statute.213 In such cases, allocution being omitted, it is not necessary that the trial court set the sentence aside and grant allocution because the motion for a new trial is a showing of cause against pronouncing judgment.214 Or, when allocution is accorded and the defendant fails to ask leave to file a motion for a new trial, he must be deemed to have waived it.215

In misdemeanor convictions the statute is directory only, regardless of the fact that the motion for a new trial is filed after judgment and only the record proper is before the court for consideration.216 In these cases the court has held that when the appellant makes no objection to the court’s pronouncing judgment before the motion for new trial has been filed it cannot be convicted of error in failing to grant allocution.217 And singularly enough, it would seem, in a misdemeanor case certified to the supreme court by the Springfield Court of Appeals, when the “... record proper does not show that defendant was denied allocution, nor that he was sentenced before he filed his motion for a new trial. ... In the absence of evidence to the

211. State v. Potter, 278 S. W. 711 (Mo. 1926); Id. at 285 S. W. 424 (Mo. 1926).
212. State v. Padgett, 316 Mo. 179, 289 S. W. 954 (1926); State v. Pind, 55 S. W. (2d) 941 (Mo. 1932); State v. Ross, 334 Mo. 870, 69 S. W. (2d) 293 (1934).
213. State v. Darby, 165 S. W. (2d) 419 (Mo. 1942).
214. State v. Williams, 273 S. W. 1069 (Mo. 1925).
216. State v. Clinkenbeard, 232 Mo. 539, 134 S. W. 537 (1911); State v. Turner, 273 S. W. 739 (Mo. 1925); State v. Baker, 274 S. W. 359 (Mo. 1925); State v. Selleck, 46 S. W. (2d) 570 (Mo. 1932).
217. State v. Legan, 80 S. W. (2d) 122 (Mo. 1935).
contrary, it will be presumed that the trial court did its duty in granting allocation before the judgment was rendered."\(^{218}\) (Italics added.)

Our allocution statutes do not by their terms make the ceremony directory or discretionary when there is a plea of guilty; neither do they expressly require it, but because they say the court must inform the defendant of the jury's verdict unless he has been heard on motion for a new trial the court has held that they have no application in such cases and are required only after the accused has been tried and found guilty by a jury.\(^{219}\) The court stresses the fact, also, in such cases that there is no bill of exceptions and the cases are invariably before the court on the record proper only. There had never been a capital case in Missouri, on a plea of guilty, involving allocation until State v. Ashworth in 1940.\(^{220}\) In that case the defendant pled guilty to the charge of kidnapping. Before he was sentenced the court interrogated the defendant as to his prior criminal record which showed a larceny conviction, rape upon a girl thirteen, and that in the instant case he had ravished a child of seven. The court then sentenced the prisoner to be executed. The case was in the supreme court on the record proper, of course, and showed the appointment of counsel to defend the accused, arraignment, his plea and the punishment, but it did not show allocation and there was diversity of opinion among the members of the court as to whether it was required on a plea of guilty. For that reason the whole subject of allocation was again reviewed and the conclusion reaffirmed that the formality was not required upon a plea of guilty. The defendant specifically raised the point, urging that the court had failed to inquire into the facts and ascertain if any legal reason existed against the pronouncement of sentence and judgment. The court construed the statutes and came to the conclusion that they were intended to apply only when there had been a jury trial. The common law of allocation and its applicability to present conditions was discussed and it was noted that our statutes, enacted in 1879, superseded the common law. It was observed that the statutes extended allocation even to misdemeanors but made the requirement directory only in such instances. "As a sentence on a plea of guilty is not within the statute, it follows that allocation was not required in the case at bar."

In conclusion, as to Missouri, it is plain that as long as the statutes

\(^{218}\) State v. Dalton, 289 S. W. 569, 570 (Mo., 1926).
\(^{219}\) State v. Rogers, 285 S. W. 976 (Mo., 1926); State v. Borchert, 312 Mo. 447, 279 S. W. 72 (1926).
\(^{220}\) State v. Ashworth, 346 Mo. 869, 881, 143 S. W. (2) 279, 286 (1940).
remain in force, allocution is mandatory in the instances specifically within their provisions. Those obligatory instances and the purposes to which the statutory ceremony is now put are a far cry from the common law usage from which the practice came and as contrasted with present day practice and procedure elsewhere. They are peculiar to Missouri. It is an absurdity that a defendant's rights, and especially his right to a review of his conviction, should be made to depend upon and turn on whether his motion for a new trial was filed before judgment, as the new trial statute in criminal cases requires, and not after. In a criminal case the judgment is the sentence—it is the formal declaration by the court to the accused of the legal consequences of his guilt which he has confessed or of which he has been convicted and it is of this final declaration that he is aggrieved and desires relief. Furthermore, appeals are allowed only by statute from this final declaration or judgment.

Missouri's judicial interpretation of its allocution statutes is unique. That compliance with the statutes is mandatory when the defendant has been tried and not heard on motion for new trial cannot be denied, but to hold that the statutes compel the setting aside of the judgment and a remanding of the cause for allocution and in addition a hearing on the motion for a new trial and then an appeal, using the untimely motion to preserve errors, is to read something into the statutes that is not there. In the first place, the statutes do not say what the consequence of omitting the ceremony is to be nor for that matter even expressly declare the purpose of requiring it. In the second place, if on appeal the defendant complains that the clerk, the court or the circumstances unjustly deprived him of his right to file a timely motion for new trial and either of these is the fact, is not that in and of itself enough to entitle the defendant to relief? If none of these are true, is not the duty on the appellant to show that he has been prejudicially injured in some way? Is not the duty his to see to it that a correct and proper record is presented? If not, is it necessary to tie such objections up with the doctrine of allocution as a prerequisite to administering justice? Such circumstances, being unjustly or improperly prevented from filing a motion for new trial, have been held to be good and sufficient reasons or grounds for granting relief and that without reference to allocution. To illustrate, after a five day trial for rape a jury returned a capital

verdict at 11:45 of the last day of the term. Obviously the remaining fifteen
minutes was not sufficient time in which to prepare and file a motion for a
new trial and to prevent such an injustice the cause was remanded, the court
pointing out that any other course would deprive the accused of his liberty
and his life, even, without due process of law.\footnote{223} Would the court have ar-
vived at the same conclusion if in the fifteen minutes the ceremony of allocu-
tion had been performed? Allocation was not even mentioned. It is stated
in the \textit{Taylor} case that the defendant had not had time to prepare a motion
for new trial and in the \textit{Turpin} case the record shows verdict, sentence and
judgment all in one proceeding without an opportunity for allocution or a
motion of any kind before judgment. If it is of that the prisoner complains
should he not be entitled to relief regardless of allocution? Had it been
accorded would he have been aided if at the same time he had been denied
the privilege of filing his motion? In \textit{State v. West}, the defendant was de-
prived of his right to file his motion for a new trial by the illegal act of the
clerk. Had the record affirmatively shown allocation before judgment would
the court have refused him relief?

Even if these suggestions are not well founded it is not possible to find
from the forty-four cases in Missouri involving allocution that the result in
a single case was ever changed or modified in the slightest by reason of its
having been remanded for this purpose, even under the view that the judg-
ment is set aside when the defendant is deprived of his right to move for a
new trial. In only two instances did the remanded cases ever reappear in
the appellate court and in one of those, \textit{State v. Potter}, the record was cor-
rected and the former opinion withdrawn, and in the other case Kile’s appeal
was dismissed and the judgment against him remained.

\footnote{223. \textit{State v. Guerringer}, 265 Mo. 408, 178 S. W. 65 (1915).}

If the motion for a new trial must be filed before judgment there should
be a provision against the pronouncement or entry of judgment during the
time in which the motion is to be filed, as is now provided in many jurisdic-
tions. In any event it should not be necessary to observe this ancient

\textit{Barrett: Barrett: Allocution}
basis of modern conceptions of social control, it would seem that where life or liberty is at stake, as in a criminal prosecution, a rational re-examination of the whole case after trial, at least at the instance of a convicted accused, to be made by a tribunal insuring the best judicial power in the jurisdiction, in order to insure that justice has been done, would be a matter of course.\(^{223a}\)

The only justification for devoting time, space and energy to a consideration of the subject of allocution and its necessarily limited, boresome and repetitious vocabulary is that it again demonstrates the need for change in the administration of criminal justice and particularly of the process of appellate criminal procedure. That the individual's rights or the state's administration of justice should turn and depend upon the observance or non-observance of so ancient and futile a ceremony as allocution is absurd indeed.

As an alternative for appellate procedure and the process leading up to appellate review the first preliminary draft of the *Federal Rules of Criminal Procedure* are suggested for Missouri and elsewhere, particularly Rule 48:\(^{223b}\)

\[
\begin{align*}
(a) \text{ Harmless Error. Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.} \\
(b) \text{ Plain Error. Plain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.}
\end{align*}
\]

The most zealous advocate of defendant's rights in criminal causes could not object to such a provision. That one man should have a new or another trial because his more skillful advocate specifically pointed out *plain error* in a motion for a new trial, while another must serve his sentence, without appellate review, merely because his not so clever counsel did not use the magic phrases is an indefensible incongruity in the administration of justice and inconsistent with even a sporting theory of justice. Such a change might necessitate a considerable educational program as to what should and what should not reasonably be presented for appellate review, but, nevertheless, is more likely to bring about efficiency and equality in the administration of criminal jurisprudence without legerdemain. It is the cause or case itself and not the record that is entitled to review.\(^{223c}\)

\(^{223a}\) Pound, *Introduction to Orfield, Criminal Appeals in America.* (1939) 3.

\(^{223b}\) This appears as Rule 55 in the Second Preliminary Draft, which does not materially differ.

\(^{223c}\) Id. at 9; Orfield, *Criminal Appeals in America* 274-275, 288, 295-296; Orfield, *The Scope Of Appeal In Criminal Cases* 84 U. of Pa. L. Rev. 825.

http://scholarship.law.missouri.edu/mlr/vol9/iss3/2
Today, as always, allocution is an authoritative address by the court to the prisoner as he stands at the bar for sentence. It is no longer so hortatory and interesting as it once was because it has been reduced to the trite formula and query of whether the prisoner has any cause to show why sentence or judgment should not be pronounced against him. As a subject it is not worthy of the hundreds of pages the courts have devoted to it. Its intrinsic value and importance is out of proportion to the time necessary to consider the subject and its origin.\textsuperscript{224}

All the common law reasons or uses for allocution have long since disappeared. Missouri is illustrative of the fact in all the jurisdictions. Both the constitution and the statutes have abolished attainder, corruption of blood and forfeiture of estates as a consequence of conviction of a felony or even conviction of treason.\textsuperscript{225} The power to grant pardons, or reprieves, or to commute sentences has been conferred on the chief executive by the constitution\textsuperscript{226} and these matters have no connection whatever with the judiciary or the judicial process. Benefit of clergy has been abolished by statute.\textsuperscript{227} Specific statutory provision is made for the suspension of the sentence of a condemned pregnant woman.\textsuperscript{228} Motions in arrest of judgment have been abolished and the insanity of an accused, either before or after conviction, may be inquired into in the manner provided by statute.\textsuperscript{229}

There may be more semblance of reason for the requirement of allocution in the jurisdictions adopting the American Law Institute type statutes and yet the causes which those statutes permit to be alleged against the rendition of judgment could and doubtless would be otherwise provided for and that regardless of and without the sacrament of allocution. It is submitted that if the formula is to be observed there is more reason and justification for compelling it upon a plea of guilty—especially in a capital case—than there is after a jury trial; otherwise, there can be no assurance that the trial court went into the mitigating and aggravating circumstances before assessing so severe and irrevocable a penalty as death.

\textsuperscript{224} As a friend and better at the law practice so eloquently put it "Who gives a damn?"

\textsuperscript{225} Mo. Const. Art. II, § 13; Mo. Rev. Stat. § 4858.

\textsuperscript{226} Mo. Const. Art. V, § 8.

\textsuperscript{227} Mo. Rev. Stat. (1939) § 4859.

\textsuperscript{228} Id. at § 4196.

\textsuperscript{229} Id. at § 4126.

\textsuperscript{230} Id. at §§ 4046-4049, 4191-4195. Id. at § 4046.
It is not demonstrable that anyone was ever substantially benefited by compelling the observance of the ceremony of allocution except those who received additional fees or compensation by reason of the prisoner's being resentenced and excepting always, of course, those three extremely lucky individuals, one in Alabama and two in New York, who were fortunate enough to have been granted new trials for the sole reason that the trial courts had failed to observe this ancient and obscure ritual. In no event should the omission of this hoary ceremony be considered as error, plain or harmless, unless it is complained of by the prisoner and prejudice to substantial rights is demonstrated. If the appellant's only complaint is of the judge's failure to inquire whether he had any reason why sentence should not be imposed, he is indeed clinging to a plank in a shipwreck, "tabula in naufragio." As the Wisconsin court bluntly put it: "It is time the law be rid of this technicality, which rests only in tradition and is barren of any substantial benefit to the defendant."

"It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past," said Mr. Justice Holmes.

231. Holmes, The Path Of The Law (1897) 10 Harv. L. Rev. 457, 469.