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FAILURE TO ASK DEFENDANT FOR ANY LEGAL CAUSE WHY JUDGMENT SHOULD NOT BE PRONOUNCED.

The New York Court of Appeals held recently, in the case of *The People v. Beecher Faber, New York Law Journal,* Vol. XLIV, No. 9, that the failure of the records to show that the clerk had asked the defendant, in a murder trial, whether he had any legal cause to show why judgment should not be pronounced against him, was a serious error at common law, and is now made so by section 480 of the *Code of Criminal Procedure* of that State.

The custom of making this inquiry seems to have originated in our early common law in trials for high treason, where the defendant was never allowed counsel, but the court was considered the guardian of the interest of the accused. Among the earlier reported cases on the subject are those of *Rex v. Geary,* 2 Salk., 630, and *King v. Speke,* 3 Salk., 358. In each of these cases, the defendant was attainted of high treason, and confessed the same. Upon a writ of error brought to reverse the judgment, the exception taken was, that it did not appear that the accused was asked what he had to say why judgment should not be given against

him; and the court held the exception well taken, for he might have matter to move in arrest of judgment, or a pardon; and the attainder was reversed. This custom was later extended in England to all trials of felonies, and, it may be conceded, formed a part of the common law of that country. 1 *Chitty's Crim. Law.*, 700.

The courts in this country are, by no means, in harmony on this subject. The diversity of opinion among our courts is attributable to the fact that some of the courts have tried to apply strictly, in this country, an established rule of the common law of England which, by our methods of procedure, and the safeguards of our law for human life, have been rendered unimportant.

In *Messner v. The People,* 45 N. Y., 1, the court cited, with approval, the early English cases of *Rex v. Geary, supra,* and *King v. Speke, supra,* and gave the same reasons for holding that the omission of the *allocutus* was error: "The court never gave the prisoner the opportunity of showing cause why the verdict should not be set aside or the judgment thereon arrested. It was not, therefore, legally proper to proceed to judgment. For aught that appears the prisoner may have a legal reason to show why judgment should not pass against him."

There are many decisions in this country which support the principal case, including decisions of the United States Supreme Court. *Croker v. State,* 47 Ala., 53; *Dougherty v. Commonwealth,* 69 Pa. St., 286; *Ball v. United States,* 140 U. S., 118; *Messner v. The People, supra.* In *Ball v. United States, supra,* the court said: "The forms of records are deeply seated in the foundations of the 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 there are not wanting eminent authorities holding that a total omission of the *allocutus* on the record does not constitute error. *State v. Hoyt,* 47 Conn., 518; *State v. Bell,* 27 Mo., 324; *Jeffries v. Commonwealth,* 12 Allen (Mass.), 145; *Gannon v. The People,* 127 Ill., 507.

In stopping to consider the reasons given, under the common law of England, for holding an omission of the *allocutus* on the

record to be error, it is hard to understand why, under our methods of procedure, such omission should be considered fatal. In this country, the accused is always allowed counsel, who is familiar with the proceedings of the trial, and who knows that the verdict is not conclusive on the prisoner. They know all the remedies that may be had after verdict and how they may be instituted. Under our system, the motion in arrest and the motion for a new trial are disposed of before the time for the sentence arrives. "Sentence is not pronounced until the party has had ample opportunity to move for a new trial for any proper cause, and to file his exceptions to the rulings in the matters of law, or a motion in arrest of judgment." *Jeffries v. Commonwealth, supra.*

In the case of *Hoyt v. State, supra,* the court clearly pointed out that the *allocutus* is a mere form, and no harm could possibly come from its omission. The court said: "Under our practice what possible harm can be occasioned to the prisoner by such omission on the part of the court? He can have no pardon to plead, for that can only come from the legislature after sentence, no attainder to save, no benefit of clergy to pray for."

"If he should say anything suggesting ground for some relief, his saying it would not be the remedy; it would have to take on some legal form and be filed within the time prescribed. If he should, in a capital case, urge mitigating circumstances, and put himself on the mercy of the court, it would avail nothing, because the court would have no discretion to exercise in regard to the punishment."

So we have in this country these two lines of decisions: one holding that the *allocutus* is a form of record, firmly established in our law, and should not be disregarded, because it is conducive to safety and certainty; the other holding that the *allocutus,* by reason of our court procedure, has become a mere form, an idle ceremony, which may be omitted without prejudicing the interest of the accused.

But in those states where the omission of the *allocutus* is considered a serious error, what effect has such an omission on the proceedings? Is such an omission a ground for a new trial, or should it be remanded with instructions to proceed from verdict? In the principal case the court refrained from deciding this point, saying that it was not necessary, under the circumstances of the

case. Some courts hold that such an omission is ground for a new trial. *Messner v. The People, supra;* while others hold that such an omission is not a ground for a new trial, but the verdict must stand, the case to go back to the *nisi prius* court for the purpose of making the inquiry referred to, and then to pronounce sentence. In *State v. Hoyt, supra,* the court said: "Upon principle it can be no ground for a new trial. There was nc mis-trial. The error (if any) did not enter into or in any manne affect the verdict: so that the verdict must stand; and if judg ment should be arrested or set aside, the case should go back t the Superior Court to be proceeded with from the point where th error intervened, that is, the court would be called upon to mak the inquiry referred to, and then pronounce sentence again." I seems that the preponderance of authority is in accord with th above case. *State v. Johnson,* 67 N. C., 59; *Keech v. The Stat* 15 Fla., 591; *Kinsler v. Wyoming Territory,* 1 Wy. Ter., 112.

IS THE SAME DEGREE OF CARE REQUIRED OF THE OWNER OF A PASSENGER ELEVATOR AS IS REQUIRED OF A COMMON CARRIER?

It seems that the modern inclination of courts is to hold owners of passenger elevators to the same degree of care as common carriers, and yet there are a few holding, with what seems to be sound reasoning, to the contrary. At least, there is sufficient diversity of opinion on the subject to make the topic of practical interest.

In discussing this question, it would be well to bear in mind the status and relation of common carriers and passenger elevators to the public. The chief difference between the two is this: there does not exist any prior or antecedent relation between the common carrier and passenger; but, in the case of passenger elevators, there does exist an antecedent relation. A common carrier holds itself out to carry all who may rightfully apply for carriage; but a passenger elevator only holds itself out to carry those who are tenants of the building, or guests of the hotel, who have, in reality, purchased the elevator privilege. As there exists this difference in these two carriers why should not there exist a difference as to their liability to their passengers?

The case of *Quimby v. Bee Building Co.,* 127 N. W. (Neb.), 118, recently presented itself in the Supreme Court of Nebraska,

and that court laid down the rule, that any one who installs an elevator in his building for the use of his tenants and the public generally, is subject to the same degree of care in transporting and protecting his passengers as is imposed upon common carriers.

The Federal courts have definitely settled this question in the case of *Marker v. Mitchell,* 54 Fed., 637, which lays down the principle that a landlord running an elevator is charged with "the highest degree of care consistent with the possibility of injury," commensurate with or proportionate to the possibility of injury. Judge Taft, agreeing with the Federal rule, in *Treadwell v. Whittier,* 80 Cal., 574, says: "Persons operating passenger elevators are to be treated as carriers of passengers, and the same duty rests upon them as to care and diligence, as upon carriers of passengers by railway." In *Gardsell v. Taylor,* 41 Minn., 207, the above doctrine is virtually reiterated by the presiding judge, who held that the same degree of responsibility rests upon elevator owners as upon common carriers. In Illinois the injury of a passenger in an elevator immediately raises the presumption of negligence and want of care. *Hartford Deposit Co. v. Sollett,* 172 Ill., 222; *Fraser v. Harper House Co.,* 141 Ill. App., 390. And this Illinois court goes further, in its ruling in the *Chicago, etc. Railroad Co. v. Arnol,* 144 Ill., 261, by drawing an analogy between operators of freight elevators and of freight trains, as common carriers. The learned judge says there cannot be the same immunity from peril in travelling on a freight train as on a passenger train, but the same degree of care can be exercised, and the liability of operators of freight elevators is covered by the same rule and degree of diligence as a passenger elevator.

The Supreme Court of Arkansas, in *Sweden v. Atkinson Improvement Co.,* 125 S. W. (Ark.), 439, holds with very good reasoning that an elevator does not have to serve the public as a common carrier, and is for the use of the hotel patrons only, yet the law imposes the same duty upon the owner as is exacted from common carriers. It was so held in the *Kentucky Hotel Co. v. Camp,* 97 Ky., 424, that the highest degree of care and skill usually exercised by prudent men in the same business was the rule. Also, the *Southern Bldg. and Loan Ass'n v. Lawson,* 67 Tenn., 367, agrees with the Kentucky rule.

In *Griffin v. Manice,* 166 N. Y., 188, on the other hand, the principle is laid down with great emphasis that the highest degree of care and foresight is not required of elevator owners, but only reasonable care. This case is sustained by *McGreel v. Buffalo Office Building Co.,* 153 N. Y., 265, and *Biddiscomb v. Cameron,* 35 N. Y. App., 563, both holding that an elevator owner is liable only to the extent of reasonable care. Also, in *Kaye v. Rob Roy Hosiery Co.,* 51 Hun (N. Y.), 519, it was said that the falling of an elevator which had been successfully used daily, with no reasonable cause of apprehension of defect, would allow no recovery from a person injured in it.

Numerous text-writers have commented upon this queston, and they seem well divided as to the amount of care exacted from elevator owners. *Shearman and Redfield on Negligence,* Sec. 704-719, lays down a rule quite different from any other, saying that an occupant of premises is bound to use ordinary care and diligence to keep such in a safe condition; that the mere fact of the existence of elevators is no evidence of negligence, and the owner of the elevator is only liable for that injury which reasonable care and vigilance would have prevented. However, *Goddard's Outlines of Bailments and Carriers,* p. 609, and *Hutchinson on Carriers,* Sec. 100, hold contrary to the above view, citing numerous cases to sustain their holding.

In a very strong case, *Burgess v. Stowe,* 134 Mich., 204, Justice Carpenter is quoted as saying that "an elevator operator is not bound to exercise the highest degree of care and diligence of a cautious person so far as human foresight can go," but is only required to exercise the care of an ordinarily prudent man under the circumstances. This learned judge reviews numerous cases, and New York cases which pertinently rule, "that the stairway is always open to those who deem this degree of diligence inadequate for their protection." It might be added in view of the above statement, that elevators are merely substitutes for stairways, yet it would be highly impracticable and inexpedient to hold the keeper of a stairway with the same degree of care as a common carrier. But, there are buildings with moving stairways, which answer the purpose of elevators, and since this stairway is in fact, though not in form, an elevator, one is tempted to ask would a court be justified in holding the owner of such a stairway with a common carrier's liability. Such a case is yet to be decided, but

should it arise, it would present several novel features not heretofore settled.

It is contended in *Edwards v. Mfg. Bldg. Co.*, 27 R. I., 248, that a landlord owning an elevator is not a common carrier, nor is he bound by the same degree of care that is imposed upon common carriers, but must exercise only reasonable care for the safety of those who enter his premises. He is not like a common carrier, but his duties are limited to those who have contracted with him for the use of his premises, or those who have business with his tenants. The above view is also held in *Shattuck v. Rand*, 142 Mass., 83.

In conclusion, it might be said that the numerical preponderance, including the Federal court, is without a doubt in favor of holding elevators and common carriers to the same liability, yet it appears that the position taken by the courts of New York, Michigan and Rhode Island is far from being unsound or unjust, and in many cases may be conducive to justice.

DEVOTIONAL EXERCISES IN THE PUBLIC SCHOOLS AS INTERFERING WITH RELIGIOUS FREEDOM.

The Constitution of the United States provides that no religious test shall ever be required as a qualification to any office or public trust under the United States. *U. S. Constitution*, Art. VI. It also provides that Congress shall make no law respecting the establishment of religion, or the free enjoyment thereof. *U. S. Constitution*, Amend. I. These provisions do not establish religious freedom within the common meaning of the term. It is not their purpose to secure to every person the right to worship according to the dictates of conscience. They only intend to remove the matter of religion or worship, man's duty to his Creator, from the cognizance of the civil Government. And even in this they go no further than to limit the actions of Congress. They do not undertake "to protect the religious liberty of the people of the states against the actions of their respective State governments." Cooley: *Prin. of Const. Law*, Chap XIII, Sec. 1.

The states, left free to adjust religious liberty as they saw fit, have without exception made provision by constitutional guaran-

ties to their subjects. *Ibid.* These constitutional restrictions provide not for a system of religious toleration, but for a system of religious equality, respecting all religions, without favor, discrimination or distinction, so long as they do not offend the common sense of public decency or extend their teachings to the sanction of things which in a Christian land are generally looked upon as *contra bonos mores.* It is true that in addition to this policy of religious equality, these restrictions also exempt the citizens from compulsory support and attendance of religious worship as well as restraints upon its free exercise, never forgetting, however, that it must always be borne in mind that the prevailing religion of the country is Christian. *Vidal v. Girard's Ex'rs.* 2 Howard (U. S.), 127.

The courts have often been called upon to determine from these constitutional restrictions against compulsory support of religion and from the constitutional guarantee of religious freedom, whether or not the Bible can be used in the public schools. These cases have almost without exception involved the consideration of two questions, namely: Is the Bible a sectarian book? and does the use of it in the exercises of the schools convert the school building into a place of worship, so that the school patron as a taxpayer is thereby being compelled to support a religious institution? The Supreme Court of Illinois in a recent case, *The People ex rel. Ring v. The Board of Education of School District* 24, 92 N. E. (Ill.), 251, held, in over-ruling a decision of the lower court, that the reading of the King James version of the Bible in the school was a violation of both these restrictions. While this decision is in harmony with the result reached by the Nebraska courts in *State v. Scheve,* 65 Neb., 853 and the Supreme Court of Wisconsin in *State v. District Board,* 76 Wis., 177, it was dissented to in a strong minority opinion by two of the judges of the court, and it seems evident that the weight of authority favors the minority opinion.

The leading case upon this subject is *Donahue v. Richards,* 38 Me., 379. In this case a regulation of the school board required that a portion of the Protestant version of the Bible be read each morning and that during such reading the pupils be required to bow their heads and remain quiet and orderly; no pupil was required to attend this part of the exercise against the wish of his

parent or guardian. The court held that the school board had authority to make such a regulation for the school if they saw fit, and that they were justified in expelling a pupil from school who refused to abide by the regulation. Such a regulation, they said, was not in violation of the Constitution and did not constitute sectarian worship.

The same question came before the Massachusetts court in an early case, and the court gave it as their opinion that a school committee have legal power to pass a rule requiring a school to be opened by reading from the Bible and praying every morning, that during such prayer each child shall bow his head, excusing any scholar from these exercises whose parent or guardian requests it, but that any pupil whose parents refuse to make the request and who refuses to obey the rule may be expelled from the school. *Spiller v. Inhabitants of Woburn,* 12 Allen (Mass.), 127.

The use in the public schools for fifteen minutes at the close of each day's session as a supplemental text-book on reading of a book entitled *Readings from the Bible,* which is largely made up of extracts from the Bible, emphasizing the moral precepts of the Ten Commandments, where the teacher is forbidden to make any comment and is required to excuse any pupil from that part of the session whose parent or guardian requests it, is not a violation of the constitutional guaranty of religious freedom or exemption from compulsory worship. Mandamus proceedings to stop it will be refused. *Pfeiffer v. Board of Education of Detroit,* 118 Mich., 560.

The Supreme Court of Iowa, *Moore v. Monroe,* 64 Iowa, 367, refused to grant an injunction at the instance of a taxpayer whose children were not required to be present or take part in such exercises to restrain the reading and repeating portions of the Bible in the school where his children attended, and declared that a statute which provided that the Bible should not be excluded from any school or institution, no pupil being required to read it contrary to his own or his parents or guardian's wishes, is not a violation of the constitutional guaranty of religious freedom.

It seems also that even the Illinois court has heretofore been in accord with this principle. In the case of *North v. The Trustees*

of the University of Illinois (a school supported by appropriations by the State), 137 Ill., 296, the court held that a rule requiring the students to attend chapel exercises, which consisted of brief sessions of reading the Bible, repeating the Lord's prayer, and singing religious hymns was not a violation of the Constitution, and that the exercises were not sectarian. The court refused writ of mandamus to permit a student who had been expelled for non-compliance with this rule to re-enter the University.

There is, perhaps, no book that is so widely used and so highly respected as the Bible; no other that has been translated into as many tongues; no other that has had such marked influence upon the habits and life of the world. It is not the least of its marvelous attributes that it is so catholic that every seeming phase of belief finds comfort in its comprehensive precepts. There are many translations of it. The authenticity of parts of some of the editions are disputed by different denominations, while there are some persons who doubt that any of it is the inspired word of God; yet it remains that civilized mankind generally accord to it a reverential regard, and all who study it carefully admit that it is, from any point of view, one of the most important of books. That it, or any particular version of it, has been adopted by one or more denominations as authentic, or by them asserted to be inspired, cannot make it a sectarian book. *Hackett v. Brookville School District,* 120 Ky., 608, 616.

A law is not unconstitutional because it may prohibit what one may conscientiously think right or require what one may conscientiously think wrong. The civil law knows no religion or form of religion as such as having any binding effect against its will as constitutionally expressed. It regards all religions as having equal rights. It goes no further than to recognize the Supreme goodness of a Sovereign Ruler of the Universe. Its doctrine is the supremacy of the people and that all free governments are founded on their authority and for their benefit. The basic principle of all Republican Government is the right of the majority of the people to establish, through the legislatures, the general rules or laws of conduct for the citizens of that government, and it is inconsistent with such a form of government that any citizen, or body of citizens less than a majority, shall be legally absolved from obedience to those rules because they may conflict with his or their conscientious views of religious duty or right.

It is injecting religious controversy into the Civil Government when that is the very thing from which these constitutional guaranties sought to keep it free. *Donahue v. Richards, supra.* It is not the object of these provisions to insure the aid of the courts to propagandists who would take upon themselves the mission of destroying the influence of the Bible. *Moore v. Monroe, supra.*

THE RIGHT OF PRIVACY.

In *Jeffries v. New York Evening Journal,* 124 N. Y. Supp., 780, the plaintiff sought to enjoin the defendant from using the plaintiff's name, portrait or picture in, or in connection with, a so-called biography or life history of the plaintiff. Plaintiff relied upon section 51 of the *Civil Rights Law,* which prohibits the use of any person's name, portrait or picture, without his consent, for advertising purposes, or for purposes of trade. It was held that a person's picture is not used for advertising purposes, or for purposes of trade, unless it is a part of an advertisement, nor is it used for purposes of trade, within the section, when merely used for dissemination of information, and not for commerce or traffic.

That the individual shall have full protection in person and property, is a principle as old as the common law. As Judge Cooley states it, "he has the absolute right to be let alone." *Cooley on Torts,* third ed., p. 29. None of the great commentators mention a "right of privacy." The courts are by no means uniform upon the point, therefore in many of the states, where the right is denied to exist as a legal doctrine, civil rights laws are passed.

A close analysis of all the English cases cited in support of the right, show that they turned upon property or contract rights. In order that an injunction may issue to restrain the defendant from using a plaintiff's name, the use of it must be such as to injure plaintiff's reputation or property. *Dockrell v. Dougall,* 78 L. T. R., 840. In *Prince Albert v. Strange,* 1 M. N. & G., 23, the queen and prince having made some etchings and drawings for their amusement, decided to have copies made from the etched plates, for presentation to their friends. The workman employed

to make the copies made some on his own account, and transferre them to Strange, who purported to exhibit them. Lord Cotten ham, in granting an injunction, said: "Privacy is the right ir vaded. A man is entitled to be protected in the exclusive use an enjoyment of that which is exclusively his." The court's dec sion, however, was based upon the property rights in the etche plates, and breach of faith on the part of the workman.

In *Tuck & Sons v. Priester,* 19 Q. B. D., 639, the plaintiff wa owner of a picture, and employed defendant to make a certai number of copies. The defendant also made a number of copie for himself, and offered them for sale. The court issued an in junction, and awarded damages, upon the ground of an implie contract not to make more copies than were ordered by plaintiff. So also in the case of *Pollard v. Photographic Co.,* 40 Ch. Div. 345, the plaintiff had her photograph made by defendant, whc made some extra copies from the negative, and placed them upor exhibition. Injunction was issued upon the theory of the property right of the plaintiff in the negative likeness, and upon the implie contract of defendant. There is a *dictum* in this case, that if defendant had secured the original likeness without plaintiff's knowledge, there would have been no right of action.

In the United States, the earliest mention we find of the "right of privacy," as such, is an able article, "The Right of Privacy," 4 Harv. Law R., 193 (1890). The earliest case in point is *Schuyler v. Curtis,* 147 N. Y., 434. In this case the plaintiff sought to enjoin the defendant from exhibiting a statue or bust of a relative. Injunction was denied, on the ground that if a right had existed, it expired at the death of the person. There is *dictum* in that case, that courts have power, in some cases, to enjoin the doing of an act, when the nature or character of the act itself is well calculated to wound the sensibilities of an individual, and when the doing of the act is wholly unjustifiable, and is, in legal contemplation, a wrong, even though the existence of no property is involved in the subject. Relying upon this *dictum,* the plaintiff in *Roberson v. Rochester Box Co.,* 171 N. Y., 538, sought to enjoin the defendant from publishing her picture without her consent, upon an advertisement of a brand of flour. The injunction was denied by a divided court, four to three. Parker, Ch. J., in delivering the opinion of the majority, said, "If such a principle be incorporated into the body of the law, the attempt to logically apply the princi-

ple will lead not only to a vast amount of litigation, but to litigation bordering upon the absurd. The right of privacy once established as a legal doctrine cannot be confined to the restraint of the publication of a likeness, but must necessarily embrace, as well, the publication of a word picture." This holding was followed by a very recent case, *Henry v. Cherry*, 73 Atl., 97 (R. I., 1909), emphatically denying the existence of such a right, which held: "There is no common law right of privacy, which will give one a right of action for the publication, by another, of his photograph as part of an advertisement of the latter's business, although mental suffering is thereby inflicted upon him."

But opposed to this view the Federal court in *Corliss v. Walker*, 64 Fed., 280, recognizes the right of a private individual to prohibit the reproduction of his photograph. They distinguish between a private and a public individual, and define a public character as any individual who seeks or desires public recognition. Doubtless the courts will get into hopeless confusion in any attempt to enforce such a distinction, for if the right of privacy exists in one individual, it exists in all, although it may have more value to one person than to another.

The Georgia court, in *Paversick v. Life Ins. Co.*, 122 Ga., 190, declare in favor of the right of privacy. Adopting and following the dissenting opinion of Gray, J., in *Roberson v. Box Co., supra*, Cobb, J., in delivering the unanimous opinion of the court, said: "The right of privacy is derived from the natural law. The right of privacy may be waived expressly or by implication. A waiver authorizes an invasion of the right only to such an extent as is necessarily implied from the purposes for which the waiver was made. A person who desires to live a life of seclusion cannot be compelled, against his consent, to exhibit his person in a public place, unless such exhibition be demanded by law. One who desires to live a life of partial seclusion has a right to choose the times, places, and manner, in which, and at which, he will submit to the public gaze. Subject to the limitations above referred to, the body of a person cannot be put on exhibiton at any time, or at any place, without his consent." *Foster v. Chinn*, 134 Ky., 424, holds, that a person is entitled to the right of privacy as to his picture, and that the publication of his picture, without his consent, as a part of an advertisement for the purpose of exploiting

the publisher's business, is a violation of his right of privacy, and entitled him to recover without proof of special damages.

Our Supreme Court raises a sensible query in *Brown v. Meyer,* 139 U. S., 540, when it says: "It is difficult to understand why the peculiar cast of one's features is not also one's property, and why its pecuniary value, if it has any, does not belong to its owner, rather than to the person seeking to make an unauthorized use of it."

From a close survey of all the cases involving the so-called right of privacy, it seems, by the weight of authority, that injury to property, in some form, is an essential element to relief. But following the suggestion in *Brown v. Meyer,* supra, it seems that one has a property right in his photograph.