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HINTS UPON PRACTICE IN APPEALS.*

To address a body of students on the subject of practice in appeals may seem somewhat like beginning at the wrong end of things, though perhaps, looking at a modern building in process of construction with the solid stone-work coming downward from the sky, it may not seem altogether out of the current fashion. But to a lecturer whose time, like my own, is much engrossed with daily and imperative duties the subject must needs be one which is familiar, and for this one, partly suggested by your faculty, perhaps my best apology will be the hope that all of you may have early and frequent occasion to utilize these remarks in actual experience.

Teaching practice by theory has some inherent difficulties. You will allow me to quote some words of my own on a similar occasion some years ago: "The law has gen-

*An address delivered on the invitation of the Alumni of the Law Department of the University of Pennsylvania, April 15, 1904, by the Hon. James T. Mitchell, Chief Justice of Pennsylvania.

eral principles, capable of scientific and methodical statement in a condensed form which shall nevertheless contain the germ from which all its minutest ramifications may be logically developed. But practice is not general; it is a mass of particulars; nor will logical deduction, even by the strongest reason, be at all sure in its steps from one point to another." On theoretical or general questions of law the advocate has a free range. A fresh mind may strike out a new thought even on an ancient topic, though that is not often to be expected, and it is dangerous to deal with a case on such possibility. But you are at liberty to try, and the consequences of failure are not disastrous. But practice regards the facilitation of business,—your own, your adversary's, and the court's,—and all must work to the same end, or the result will be confusion. Hence it depends largely on mutual convenience as determined by experience.

Practice involves two things—first, what to do, and, secondly, how to do it, both of which, especially the latter, are absolute and follow the precedents. These are the results of years and experience, and have common-sense back of them.

A talk upon practice would not be of much use unless it is really practical. My aim, therefore, this evening, is not to attempt to give you a systematic treatise on practice, but rather to suggest to you, in an informal way, points, or hints I will call them, on practical matters that you may not readily find in the books, and thus to do in a measure what oral argument does for the argument in the paper books, give vitality and precedence to the really important things.

First, study your case carefully before taking your appeal. When the attorney, filled with his client's view of the case, loses it, he is apt to feel sore, to blame the court, and to rush into an appeal. There are few questions which fail to have two sides, and long dwelling on one, as it is the advocate's duty and inclination to do, tends to persuade counsel that it is the strongest one. After a while you learn to appreciate the fact that you cannot always be on the right side, and to accept defeat with equanimity.

Therefore it is a good rule to allow a little time for disappointment to cool off, and study your case with a fresh view of the other side as well as your own before taking an appeal. I do not mean that you are not to keep on studying it after the appeal. On my making a remark once to the late Chief Justice Sharswood how often it occurred that cases raising the same question were reported in the same volume, he said, "Don't you know that in the law it never rains but it pours?" Similar circumstances are producing similar questions and similar results, and while your appeal is pending the Supreme Court may decide the question in some other case. Perhaps once or twice a term it occurs that counsel say the point has been decided since they took their appeal, or the Court informs them that the point has been argued and decided during the current term. It is always well, therefore, to keep a lookout for fresh cases reported from week to week and not yet in the digests.

Having determined to appeal, the first question is, to what court? This is not so easy a matter as it looks, and the question of jurisdiction requires careful attention. The Superior Court act has been in force nearly nine years, and yet mistakes occur every term. The act of the 24th of June, 1895, P. L. 212, gave exclusive and final jurisdiction to the Superior Court *inter alia* in "all actions, claims, and disputes of every kind . . . if the value of the real or personal property, or the amount of money really in controversy in any single action or claim, is not greater than $1000." In determining jurisdiction the judgment in actions of tort is conclusive of the amount unless it be for defendant on a verdict, or a nonsuit, when the damages laid in the statement decide it. In actions not directly for money, such as ejectment, etc., or for the possession of property, the judge's certificate determines the amount in controversy. Rules 20 and 21 of the present rules of the Supreme Court provide for the certificate and this has rarely given any trouble. The certificate is indispensable, and the agreement of parties as to the value of

the property is not a substitute. *Matthews* v. *Rising,* 194 Pa. 217.

The phrase "amount really in controversy" raised questions at once. In torts the act provided the test of the verdict or claim, but in actions *ex contractu,* if there was a nonsuit or a verdict for defendant, what was the sum in controversy, the damages alleged, or the sum apparently called for by the instrument or contract sued on? If the plaintiff claimed $3000, for instance, and got $1000, but defendant denied that he owed anything, what was the sum in controversy? These and similar questions were solved by the Supreme Court by adopting the test of the difference to appellant between the judgment appealed from and the judgment sought in the Supreme Court. This was a logical test, though even it would not always have produced a uniform result. But the act of May 5, 1899, P. L. 248, provided that the amount of the judgment, decree, or award shall be the conclusive test. "In any suit, distribution, or other proceeding in the Common Pleas or Orphans' Court, if the plaintiff or claimant recover damages either for a tort or for a breach of contract, the amount of the judgment, decree, or award shall be conclusive proof of the amount really in controversy, but if he recover nothing, the amount really in controversy shall be determined by the amount of damages claimed in the statement of claim or in the declaration." Under this act it was held in *Prentice* v. *Hancock,* 204 Pa. 130: "The Legislature intended to provide in these two paragraphs for standards of proof in two classes which should include every possible case, first, issues involving title or possession of specific property, real or personal, and, second, issues involving the payment of money." No phrase has yet been applied or even suggested which will determine the amount really in controversy with absolute uniformity in regard to the question of jurisdiction. Thus, for illustration, where the amount claimed by two distributees is more than $1500 and the decree is adverse to them, they cannot unite in an appeal, but each must take his separate appeal to the Superior Court, though had the decision been in their favor

the residuary legatee or other party from whose share the entire sum would come would be entitled to an appeal to the Supreme Court: *Staib's Estate,* 188 Pa. 238. So, again, suppose in an action of tort, with damages claimed at $5000, the plaintiff obtains a verdict and judgment for $500, if defendant appeals the amount in controversy is clearly $500, but if the plaintiff appeals it is, or may be, $4500: *Weaver* v. *Cone,* 189 Pa. 298. Thus in both the supposed cases the appellate jurisdiction would depend on the party appealing, and in the second case, if both parties should appeal, we should have the same judgment going for final adjudication to two different courts.

"To remedy these discrepancies and get as nearly as practicable a uniform rule, the act of 1899 fixes the amount of a money judgment in any kind of proceeding as conclusive proof of the amount really in controversy. It may not always determine the amount with absolute accuracy, but it constitutes a uniform standard for the determination of the appellate jurisdiction, and has the advantage of being fixed, definite, and of easy application:" *Prentice* v *Hancock, supra.* It is not, however, always as easy as it at first seemed.

Having settled the matter of the court, you have next to consider the nature of the error by which you are harmed, and the process by which you can get it rectified. I pass over the subject of new trials, which are the appropriate remedy for mistakes of fact in general, for verdicts against the weight of evidence, etc., as not within the scope of the present occasion. Broadly speaking, the Supreme Court reviews only the law, and does this in one of three forms—certiorari, writ of error, or appeal properly so-called. It is true that the process now by the act of May 9, 1889, P. L. 158, is all called by the same name, an appeal. In commenting on that act the Chief Justice of that day with a directness and force characteristic of his style said (*In re the act of May, 1889,* 25 Weekly Notes 361): "Instead of simplifying proceedings in this court the act of 1889 has produced nothing but confusion. It was not called for by any great need, it was not asked for by this

court, nor by any considerable number of the members of the bar who practised therein, and it serves no useful purpose," and in *Rand* v. *King,* 134 Pa. 641, the late Justice Williams said: "Prior to the act of May, 1889, there were three of these (forms of appeal) in common use, and the peculiar characteristics of each were well understood by the profession. That most generally employed was the writ of error, which lay against any final judgment in any court of record and against such interlocutory and auxiliary orders as have been made reviewable upon it by statute. On this writ the judgment is reviewed with reference to alleged errors which are pointed out by exceptions taken to the action of the trial court at the time when the rulings are made, and as a general rule the power of the Supreme Court is limited to the questions so raised: *Warsaw Tp. Poor D.* v. *Knox Tp. Poor D.,* 107 Pa. 301. In all equity cases and those following the equity forms an appeal from the decree complained of is the proper mode of review. It brings up the pleadings and the evidence on which the decree rests, and makes it necessary for the appellate court to examine, and see whether the decision is just and conscionable on the case that was presented to the chancellor who made it. The remaining method was by writ of certiorari. This writ brought up the record in any given case for review and correction, but it brought the record only: *Carlson's License,* 127 Pa. 330; *Holland* v. *White,* 120 Pa. 228. The errors to be corrected must appear on the face of the record: *Chase* v. *Miller,* 41 Pa. 403; and the merits cannot be inquired into upon this writ, but are left to the judgment of the court below: *Election Cases,* 65 Pa. 20. Neither the opinion of the court nor the evidence forms any part of the record proper, and for that reason they will not be examined on certiorari: *Holland* v. *White, supra.* The character of the proceeding to be reviewed suggested, therefore, the method to be adopted and the limits within which the practitioner should direct his preparation.

"Since the act of 1889 these modes remain applicable in the same cases, within the same limits, and with the same

effect as before, the only difference being that now they are all called by the same name. The act provides 'that all appellate proceedings in the Supreme Court heretofore taken by writ of error, appeal, or certiorari shall hereafter be taken in a proceeding to be called an appeal.' It will be noticed that this act does not profess to extend the right of review, to change its extent in cases already provided for, or to modify in any manner its exercise. It simply provides that dissimilar proceedings shall be called by the same name. An appeal in name may therefore be a writ of error or a certiorari in legal effect, and it is necessary in every case to look into the record and determine at the outset of our examination whether what is 'called an appeal' is such in fact, or is a writ of error or a certiorari. The practical effect of calling proceedings so essentially unlike by the same name is to obscure and divert attention from the peculiar characteristics of each. This increases the sense of uncertainty on the part of the practitioner, and the labor on the part of the appellate court."

After fifteen years of experience of the act these are still the views of the court. The act has probably done no great harm, but it has certainly done no good. It saves indolent counsel the trouble of considering what his writ should be called, but it puts on the court the labor of looking into the real nature of the appeal, whether though the voice is Jacob's voice the hands are the hands of Esau. This labor, not great in any one case, perhaps, when it has to be done six or seven hundred times a year becomes burdensome to the court and is no real benefit to the practitioner, and it carries with it a certain amount of danger to the student and the inexperienced practitioner.

The assignments of error in modern practice constitute pretty much all the pleadings. They are analogous to the narr or statement from which the court learns the cause of action. When you reach this point I cannot urge you too strongly to study the rules of court. They do not contain all the law of the land, but they do contain nearly all the law of practice on the subjects which they cover. Study them, therefore, as you studied the multiplication table,

which admits of no variation or exception. I do not say that the rules are as inelastic as the multiplication table, but elasticity is not their quality and variations are dangerous. Besides, the great principle never to be forgotten is, that it is just as easy to do a thing the right way as the wrong, and very much safer. Therefore study your rules of court with the full conviction that they mean exactly what they say, and follow them literally. Don't allow yourself to do something that you think is an equivalent or just as good. With your mind full of your view of the case something may seem an equivalent to you which will not seem so to your adversary, with his mind full of a different view, and he may point out variances and shortcomings, and, what is worse for you, the court may agree with him. You may think that this is making rather too much of a small point, but the number of men who ought to know better, who find themselves in trouble every term of court by carelessness in this respect, demonstrates the necessity of emphasis.

Rule 11 requires counsel for appellant on or before the third day of the term "to specify in writing the particular errors which he assigns" and file them in the Prothonotary's office. This is indispensable, as errors not specifically assigned, no matter how plain or how important, are disregarded. As already said, the assignments are the declaration of your cause of action, what is not in them is not before the court. Errors not properly assigned in accordance with the rules are treated as not assigned at all.

By rule 29 each error relied on must be specified particularly and by itself. If any specification embrace more than one point, or refer to more than one bill of exceptions, or raise more than one distinct question, it shall be considered a waiver of all the errors so alleged. No matter how closely connected points may be, they must be assigned separately. "An assignment of error specifying that the court erred in refusing defendant's second and third points, both of which are recited therein, offends against rule 29 in that it embraces more than one point, and is therefore a waiver of both alleged errors," *Crawford* v. *McKinney,*

165 Pa. 605, and in assignments to answers to points the point itself must be given in immediate connection with the answer.

By rule 30, when the error assigned is to the charge of the court or to answers to points, the part of the charge or the points and answers referred to must be quoted *totidem verbis* in the specification. Under this rule it is highly important to avoid giving detached or incomplete portions of the charge, or running such parts together when they seem to relate to the same question or the same rule of law. It may be unfair and is always dangerous: *Commonwealth* v. *Eckerd,* 174 Pa. 137; *Commonwealth* v. *Zappe,* 153 Pa. 498. In your assignments therefore quote the charge or the answers to points not only with scrupulous accuracy, but with enough of the context to make it entirely clear that you have given the meaning correctly.

By rule 31, when the error assigned is to the admission or rejection of evidence the specification must quote the questions or offers, the ruling of the court thereon, and the testimony or evidence admitted, if any, together with a reference to the page of the paper book where the matter may be found in its regular order in the printed evidence or notes of trial. The reason of this rule is plain. The court must have the offer or the evidence before it, otherwise it will not appear how its rejection or admission would be injurious to the appellant (*Bailey* v. *Pittsburgh,* 207 Pa. 553), and the court must have its information there without having to hunt for it in the appendix. Then there should always be, as the rule requires, a reference to where it can be found in the notes of testimony, so that it can be read in connection with the preceding or following context if it should be so desired.

The most laborious and probably the most important of all the matters with which we are concerned is the preparation of your paper books. I would again repeat the caution to study thoroughly the rules of court. They are the ultimate authority on questions of practice. Departures from settled forms are dangerous, and even if they have no serious consequences at the moment, they have to justify

themselves, which takes time, and time is the essence of life in the Supreme Court as well as elsewhere. In the accustomed forms the trained eye gets at the substance of the case in a glance. Nothing, for instance, could be simpler than the common counts and the bill of particulars, a mode of statement resulting from centuries of experience and efforts of as acute intellects as ever devoted themselves to human affairs. Now each individual, learned and skilful, or otherwise as it may be, states the case in his own way, and instead of having the story told in accurate phrase by a trained mind knowing what is relevant or irrelevant, what is material or immaterial, you have it told, as a distinguished English judge said, "Just as one old woman would tell it to another." Even the experienced must read closely to see whether it is a special narr or just the common counts beclouded with verbiage. So it is with departures in matters of practice: they waste time and attention that could be easily saved by correct practice.

The requirements of paper books are distinctly and authoritatively prescribed, together with the order in which they should be arranged in appeals from judgment on a verdict, which is the example *mutatis mutandis* for all other appeals, in rule 19: First, the names of all the parties as they stood on the record of the court below at the time of the trial, with the addition of the word appellant after the name of the party taking the appeal; second, an abstract of the proceedings showing the form of the action, the docket entries, the issue and how it was made; third, the verdict of the jury and the judgment thereon; fourth, a statement of the question involved; fifth, the history of the case; sixth, the charge of the court with the points, if any, which were submitted in writing to the court below; seventh, the specifications of error; eighth, a brief of argument for the appellant; ninth, an appendix containing the evidence and the pleadings in full, including any opinion of the court below filed in the case.

The first will be referred to further on.

The second, the abstract of the proceedings, means the docket entries, the nature of the action, and the form in

which it came up for determination, as, for instance, on a rule for judgment, on demurrer, on verdict of a jury, etc.

Third, the verdict, if any, and judgment thereon needs no comment.

Fourth, the statement of the question involved is the key to the front door of the case, the natural and proper entrance. This requirement is one of the most important and one of the most rigid. The court when the case is called has no knowledge of it whatever, and the first thing is to learn what it is about. The question involved, therefore, is a convenience to the court and an indispensable requirement of the paper book, but it is also good practice for yourselves to get a clear view of the real question in the case. It is a study in the art of elimination of details not really material. It must state the question, as prescribed in rule 26, "in the briefest and most general terms, without names, dates, amounts, or particulars of any kind whatever. It should not exceed six or eight lines and must not under any circumstances exceed half a page." The rule is rigidly enforced. In the very late case of *Roush's Estate,* 23 Super. Ct. 652, the paper book was suppressed and the appeal non prossed for want of a statement of the question, and at the present term in the case of *H.* v. *T.,* not yet reported, the same action was taken by the Supreme Court for violation of that part of the rule which limits the length to half a page. The history of the case was originally intended to develop this feature, but the custom having become inveterate to make this too full of details the court adopted the new requirement, and does not intend to let it be frittered away in the same manner. It is due to the profession to say here to its credit that the way in which the rule has been received and followed is exceedingly gratifying. When it was first prescribed it was anticipated that it might take the bar some time to grasp its full meaning and to adapt themselves to it. The Prothonotary of the Western District said to me: "What! If you tell Blank"—naming a well-known learned but rather long-winded member of the bar,—"if you tell Blank that he must state the substance of his case in half a page you will

frighten him to death." But the intrinsic merits of the requirement were promptly recognized, the paper books seldom transgressing, and nearly always stating the question with such accuracy that the other side acquiesces in the statement of the appellant.

The next requirement, the history of the case, allows more latitude in the relation of facts, but it is still intended to be a legal history, setting forth only such facts as are material to show what the controversy was, and how it came about. Under rule 28 it must not contain argument or any portion of the testimony. Here again is opportunity for practice in the clear, orderly, and concise narration of facts and the elimination of details. It will be worth to you all the trouble you take in regard to it. Actual dates, amounts, or figures of any kind are rarely important. Apart from the statute of limitations or similar questions, the only relevancy or importance of dates depends usually upon their priority. *Qui prior in tempore potior in jure.* Therefore in your history study the true use of dates, give them clearly with such prominence as they merit, but do not overload your narrative with those not really important. And the same remark applies generally to amounts, names, etc., and similar details.

The provision as to the charge needs no explanation except the caution to see that it is accurately printed and in full.

Specifications of error I have already considered.

The next step is the brief of argument, and here, of course, comes into operation the individuality of the advocate. Each must present his case in the way that seems to him the most effective, and I can only give you a few general observations. The printed brief of argument is the packhorse that carries the burden of the case. Therefore make it full, not necessarily long, but cover all your points that you deem material. Subdivide and arrange it methodically under clear headings. Remember that the argument is addressed to a court of seven judges whose minds will not all work alike. On some points with which he is especially familiar one judge may be with you from the start while

another may desire to investigate further. Arrange your brief so that the latter may readily find your authorities, while the former may not waste time on the argument for a view in which he already concurs.

Rule 33 requires: "When an authority is cited the principle intended to be proved by it must be stated, and a naked reference to the book will not be sufficient. Pennsylvania cases decided since the commencement of the State Reports must be cited by the volume of such State Reports." This is a rule that gave much trouble at first. The elder men who knew the cases as reported in Barr or Casey or Harris did not take readily to the different mode of citation, but the new is the better method. I speak with experience and authority on this subject, for I grew up myself under the old style, and I had some trouble to unlearn it, but experience has shown that the new one is much the better way, and getting more so every year. In citing other reports do so by the full titles or by approved contractions. Reports have become so numerous that citing by single initials or by very short abbreviations no longer suffices. Accuracy requires the avoidance of all doubt as to the reference intended. Therefore do not let apparent convenience lead you into the bad habit of using short references. Do not, for instance, cite "75 F." for 75 Federal Reporter, as I have seen twice in paper books at this present term. Don't write "Cyc." for a popular work now in much use. The book-makers will try to persuade you that everybody does it, and therefore it must be right, but it is not right, it is slovenly and bad. The book-publishers are your natural enemies. No sooner do they get your shelves loaded with one work than they start another which they tell you you must have. In this respect they are very much like the fashion-makers, whose chief aim seems to be to make this season's clothes so unlike the last that you cannot possibly wear the old ones. Remember that your arguments, including your citations, go into the reports not only for yourselves and your contemporaries, but for the bar of the next fifty years or more. When I came to the bar and for some years afterwards two series of

reports were in very much use, English Common Law Reports and English Law and Equity. They were cited as E. C. L. R. and E. L. and E. The former was a Philadelphia enterprise for the republication of English reports in full. They were well edited and had the advantage of specifying on each volume the English reporter's name and the number of the volume in his series. The latter was a mixed selection of cases from various courts with a view to their interest to American lawyers. The former is rarely cited now, the latter practically never, and if in our reports of forty or more years ago you find a case that you would like to examine cited from E. L. and E., even if you remember what the letters E. L. and E. stand for, you will have difficulty in learning where the case can be found in any of the books now easily accessible. Such series are ephemeral and their day is usually short. Therefore if you must cite any such sources give their titles in full, but do not cite them at all if you can trace up the case and cite it, as you usually can, from its proper volume in its official series. The rule of court makes this mandatory in regard to Pennsylvania cases, and it is good practice in all others.

In citing text-books always give the edition, and it is well to remember that text-books, modern ones, at least, are not authoritative. They are convenient and valuable as scientifically arranged indexes to decisions and as affording frequently the best form of expression of a recognized legal principle. Unless cited only for this last feature, examine the cases which they refer to and cite the best and most applicable of those. As Coke expresses it, "*Melius est petere fontes quam sectari rivulos.*"

Do not be led away to cite cases from other states however apposite until you are sure there is no case of our own. Pennsylvania has developed a system of its own, and has a long line of decisions beginning with the volumes of Dallas, who was practically the first American reporter, being antedated by Root in Connecticut by only a few weeks. The early Philadelphia lawyers studied at the Inns of Court, and they brought back profound learning in the doctrines of the Common Law. The circumstances of the

province led to such modification as best suited our own institutions. In this connection I would recommend to you a very valuable address by the late Chief Justice Sharswood before the Law Academy of Philadelphia on the "Common Law of Pennsylvania." From these beginnings the law of Pennsylvania has been developed into a consistent system of its own, and you as Pennsylvania lawyers should strive to catch the true spirit of it. Therefore, the first requisite of your argument is to give the Pennsylvania authorities. The searching out of the cases is the work of counsel. When the court finds Pennsylvania cases in point that have not been cited by counsel a veil of doubt is thrown over the whole brief as the result of haste or careless preparation. In *Duggan* v. *B. & O. R. R.*, 159 Pa. 248, the Court says: "The paper book of the appellant is open to just complaint. In a rather full brief of cases from other states not a single Pennsylvania decision is referred to, although, as the opinion shows, there are several which are much closer in point than any of those cited, and they are, of course, much more authoritative with us than those of other states however well reasoned. In the pressure of business on this court we ought not to be called upon to do counsel's work. It is not always possible to recall at once even cases with which we are familiar, and we should be able to rely on counsel for reference at least to everything relevant and material in our own reports. Counsel who neglect this duty take a risk not fair either to the court or their client." Reinforce your Pennsylvania cases as you may be able from other states; often it is useful, never hurtful, to know the law as other courts have held it. It may be, even when there are Pennsylvania decisions, that before the line of precedents has become too long and too firmly established, an array from other states may cause a revision in accord with a general current of authorities, but if so it should be done in the open, and with full knowledge how far it is untrodden ground, or the path has been already marked out.

The appendix, as prescribed by rule 19, should contain the evidence and pleadings in full. In putting the evidence

on record the court strongly recommends the bill of exceptions, or in its absence the certificate of the judge in the prescribed form. The introduction of stenographers led to the attempt to substitute the stenographer's notes for the bill of exceptions, but it was not successful. The judge is the responsible and authoritative head of the court and cannot be displaced from that position either by legislative enactment or the indolence of counsel: *Connell* v. *O'Neill,* 154 Pa. 582. The bill of exceptions has stood the test of six hundred years of practice, and no better method of getting matters *in pais* on the record has yet been invented. It secures the authoritative certification of what took place while it is yet fresh in the memory of counsel and court, and though it costs a little, and only a little, more trouble at the time, it often saves much more important trouble in the end.

Rule 39 requires the paper books to be printed in ordinary octavo size. The reason of this is convenience in handling, as the court nearly always has a large number together. Dr. Johnson said of Boswell that he was a "very clubbable man," that is that he fitted well into the company wherever he happened to find himself, and the octavo paper book is clubbable in the sense that it fits conveniently into the bundle.

The cover should not be overloaded. Rule 39 sets forth the real requirements. The number and term at the top, followed by the title of the appellate court; then the names of parties, and these should be stated exactly as they stand on the appearance docket of the court below, with the addition of the single word "appellant" to the name of the party taking the appeal; then the title of the court from which the appeal is taken, with the statement "paper book of appellant," or "appellee," as it may be, and the names of the counsel whose book it is. Everything else is unnecessary and therefore objectionable.

The improvement in the retention of the title of the case throughout, for improvement it is, was made by the act of May 9, 1889, of which I have already spoken, and it is the only good thing in the act. As said by Chief Justice

Sterrett in *Christner* v. *John*, 171 Pa. 527: "The justly deserved criticisms (upon the act of 1889) were not intended to apply to the commendable provision in the second section of the act which requires that the parties to any appellate proceeding in this court shall be stated in the same order in which they stood in the court below. The practical utility of that provision is obvious." It enables the court to see at a glance and to keep easily in mind the position of the parties and the bearing of questions upon their respective rights, yet notwithstanding these manifest advantages, such is the inveteracy of professional habit that to this day, after fifteen years of existence of the act, this feature is often only partially obeyed, and not infrequently disregarded altogether. You have the advantage that you have no bad habits to unlearn and you can begin right.

At this point, apropos of habits, let me digress a few moments from strict matter of law to one of less serious but not unimportant consideration. Be careful of your English. Do not allow yourselves to drift into the slipshod habit of saying ápellant and appellée. The words are appéllant and appéllée. Apéllée, a bacchius in prosody, does not run trippingly on the English-speaking tongue, in fact the bacchic metre was not a favorite even with the nimble-tongued Greeks, accustomed as they were to hard words. Appellée has therefore acquired some standing, and perhaps, following the genius of the language to distinguish by change of accent words which are apt to run too closely together, it is likely to establish its place, but it is not yet correct, and for ápellant there is no excuse whatever.

Your profession will require of you the study and use of language with accuracy. Whether in an argument on the interpretation of a statute, the meaning of a contract, or perhaps, most of all, the construction of a will, there will be no time in which you will not be required to make close study of the accurate use of words, and along with accuracy, hand-in-hand should go propriety and even elegance. There is no collateral accomplishment that will better repay your time and attention than the acquirement of a habit of

correct and even elegant use of your native language. The men who made the reputation of the Philadelphia bar were as careful of their style as they were of their law. In fact, one of the master orators who survived to my day, David Paul Brown, carried this feeling perhaps to excess, and I think would have been more mortified by a slip in pronunciation than by a slip in the statement of a legal proposition. It was their proud feeling that the standard of the language of the bar did not yield to the standard of the stage even in the palmy days of Garrick and Kean and the Kembles. It is not uncommon to hear it said that the day of oratory is over, but it is a mistake. The day of mere declamation has gone by, but the day of oratory is unending. Style has changed, but the art has not perished or lost its power. Oratory, at least of the bar, no longer aims at entertainment, but confines itself to its true purpose, to persuade or convince. For these ends it was never more needed than now, and never more potent. Clear, orderly, and forcible statement is the first step to victory to-day as it always has been and always will be. The stage has largely degenerated into burlesque and slang, and literature tends to run into slovenly newspaper English. All the more reason is there that you, the young men of the day, to whom we look to maintain the ancient reputation of this bar, should strive to do it in your clear and correct use of language as well as in the learned and accurate statement of the law.

Before leaving the subject of paper books I would remind you of the importance of proof-reading. In *Tanney* v. *Tanney,* 159 Pa. 277, Mr. Justice Dean calls attention to the importance of this part of counsel's duty: "Care and accuracy in the preparation of paper books is as much a professional duty as pointed and logical presentation of a client's cause. While not seldom many authorities are cited which have little or no bearing on the questions to be decided, still our duty requires of us an examination of all those which counsel points out to us as sustaining his argument. In view of this he should correctly give us the volume, page, and names of the parties in each citation."

Rule 15 relates to motions for reargument. It does not require any discussion except to call attention to the fact that such motions are frequently founded on the failure of the opinion of the court to notice some particular fact or special argument of counsel. But that is a very ineffectual ground for reargument. The court always considers the whole case, but does not always think it necessary to prolong the opinion by separate mention or discussion of every particular point made. It is only when some substantial misconception of a really material fact appears clearly in the opinion that the motion for reargument is likely to be successfully made.

I come lastly to the oral argument. Here most of all it is apparent that everything must depend on the individuality of the counsel. Each must present his views in such method and style as his own convictions and capabilities dictate. All I can do is to present a few hints as to what is desirable to do or to avoid. The printed argument in the paper book, as already stated, is the packhorse to carry the burden of the case. It is therefore loaded with all the points involved, but in print all assignments of error, big and little, look alike, and the space they occupy respectively is not always in proportion to their relative importance. The office of oral argument is to vitalize the inert print, to inform and convince the court on the general bearing and really important issues of the case. It should therefore in some respects be the opposite of the paper book. Dwell on the main point, leaving the lesser ones to the book. The older lawyer, who fought his case on common law issues, had to study closely the real hinge on which it must finally turn. Approximate that somewhat in your oral argument. Study to know what you are to say, and say it, and then, perhaps the most difficult part of all, know when you have done. I doubt if any man, even the veteran in constant training, has said when he sits down exactly what he intended when he got up to speak. Every man talks longer than he thinks he will when he begins. It is one of the little jokes the court have to themselves that when the second counsel on the side opens by saying that he has but

a few words to add to what his colleague has so well said, the court look at the clock, with the confidence born of experience that that speaker, unless stopped, is going to talk twice as long as his colleague whom he has just complimented as having said all there was to say. The argument is somewhat like a battle, the plans must be modified by the movement of the enemy, but you should have your plan and follow it as best you may. Whether to make notes or not is a matter which must be determined by each for himself. It tends to keep the speaker down to the thread of his discourse, and not unduly to amplify any one part, because he has before him the constant reminder that there are others he has yet to treat of. But whether you makes notes or not, consider carefully beforehand what points you will touch on and what leave to your paper book. Study what to say, therefore, but I would not recommend that you try to study the very words in which to say it. Memorizing is to a certain extent trying to follow the thread of thought and at the same time recall a prepared phrase. It has always seemed to me somewhat like riding two horses at once, an acrobatic feat that not everyone can do successfully. If you think out your line of argument carefully, you will not often have any difficulty about the hour rule, or have occasion to ask for additional time. Moreover, if you are talking directly to the point, not repeating yourself and not unduly dilating on what you have already made clear, the Court is not likely to cut the thread without at least a timely warning. This with other gifts or acquirements of advocacy must be the result of practice and experience to each man in his own case.

I bring these remarks to a close by recalling to you that they are only hints to aid you in what, after all, you must learn for yourselves by experience. My preceptor would not allow me as a student to learn anything about practice. He said there would be time enough for that when the occasion came to warrant the study. It may have been a good plan. It certainly confined my studies to legal principles, but it gave me more than one bad quarter of an hour

to learn in the pinch of a contest what perhaps my adversary, a graduate as an office boy and not as a bachelor of laws, had at his fingers' ends. You will find it, therefore, comfortable as well as advantageous to know something of practice, and if you have the rules and the reasons for them well fixed in your minds, the actual application will not be hard to learn. Accuracy of habit even in small matters tends to cultivate accuracy of thought, and that I need hardly say to you is the essential foundation in all professional success.