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Charles S. Desmond

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WHERE HAVE THE LITIGANTS GONE?

CHARLES S. DESMOND†

I DO not mean to suggest, by the rhetorical question which heads this article, that there has been a mass exodus from this state of litigiously inclined citizens, or that the New York appellate courts suddenly find themselves without cases or calendars. There is still plenty of work for all the judges, but the fact is that the volume of appellate litigation in this state is slowly but steadily declining, and that the percentage reduction in purely "private" appeals (where no branch of government is a party) is even greater. My purpose is to call attention, statistically, to those two facts, and to indicate at least one principal reason for the falling off, and suggest possible remedies.

For reasons that will become obvious as we go along, I deal here with appeals in civil cases only, and principally with appeals to the New York Court of Appeals. In the year 1900, the Court of Appeals disposed of 637 civil cases. A quarter-century later, in 1925, it handed down decisions in exactly 400 civil appeals. At mid-century, in 1950, the court's grist of appeals in civil cases was 258. Those decreases, substantial as they are, are not in themselves alarming. Those 258 civil appeals for 1950, plus 40 appeals in criminal cases, make up a gross total for the court's 1950 work of 298 appeals decided, which added to several hundred motions, is enough to keep any court fully occupied. But the figures just given do not tell the whole story. Of the 658 civil-case appeals decided by the Court of Appeals back in the year 1900, 20 per cent involved governmental bodies or officers as litigants, while in 1925 that percentage was 28, and in 1950 it had climbed to 38 per cent. In other words, the whole number of civil appeals slowly but consistently declines, as does the percentage of appeals in purely "private" litigations, while the percentage of appeals in cases involving government, on one side or the other, gets larger. For a contrast even more striking, we can go all the way back to 1848, the first year of operation of the Court of Appeals. Of the 65 appeals reported as having been determined that year, in civil causes, 8 per cent only involved, as parties, governmental agencies or officials. Thus, the percentage of "private" civil appeals was

† Associate Judge of the Court of Appeals of the State of New York.

92 in 1848, 80 in 1900, 72 in 1925 and 62 in 1950. The Court of Appeals cannot fully carry out its high function of declaring and settling the law, if, because of conditions which the court does not control, the inflow of private litigation dwindles, and the court's work consists more and more of deciding controversies not between citizen and citizen, but between the citizen and government. And the trend is not special to one court—the appeals handled by the state's four Appellate Divisions fell off from 4024 in 1935-36 to 2575 in 1949-50.

No one will deny that the one principal cause of all this is the modern cost of printing. Rates for printing records and briefs vary in different parts of this state, but the average cost per page has about doubled in the past twenty or twenty-five years. It has now reached a point where the ordinary civil case simply does not warrant the expense involved in printing. When no great principle is involved, when it is not a "test" case but a dollar-and-cents controversy which must pay its own way, the practical client and his careful lawyer just do not take the appeal. For example, in a recent instance, printing 321 pages (a record not over average size) cost \$633.00, not including printing the briefs. This works out to about \$2.00 per page, which, from other data collected, seems about the average in New York State. Only a pretty sizable lawsuit justifies so expensive an appeal.

The requirement for printing records on appeal and appellate briefs goes back, in this state, more than a century, to a day when there was no alternative, except printing, to illegible handwritten papers, and when the cost of printing was negligible. In the intervening years, new, simpler methods of mechanical reproduction have been perfected, but still the courts cling to the most expensive of all methods—printing.¹ What to do about it? If there was to be considered only the convenience of the appellate courts, printing requirements, I suppose, could readily be abolished, and typewritten papers accepted. But the customary elaborate preservation of these records in New York State's extensive system of law libraries uses up several additional copies of each record on appeal.² It seems to me that the time has come for us to give careful thought to modernizing all this, to abolishing the printing of briefs and records and substituting either typewriting or a form of mass reproduction cheaper than printing. As to typing, it will be objected that the cost of typing a number of copies may in the end be as great as that of printing. I suggest, first, that the number of needed copies be reduced by abolishing the requirement that a copy be filed in each of

1. See N. Y. RULES OF CIV. PRAC. 235; RULES OF N. Y. COURT OF APPEALS V.

2. See RULES OF N. Y. COURT OF APPEALS VII; N. Y. APP. DIV. RULES—THIRD DEP'T XII; N. Y. APP. DIV. RULES—FOURTH DEP'T V.

several libraries, and substituting a rule that there be left on file one copy in the clerk's office of the particular court, and one more copy in the State Library at Albany. To the objection of inconvenience, I answer that the records now filed in the several libraries throughout the state are readily accessible to a few lawyers in those cities only, and that the printed records in those libraries are rarely consulted. Requisite under a simpler system would be, say, ten copies of the testimony, which the court stenographer could type out as one set. Then the attorney in his own office could have typed a set of ten copies of the other necessary papers on appeal. Thus there would be available enough copies for an appeal to the Appellate Division, and a further appeal to the Court of Appeals, the former court transferring its set of copies to the latter. Some of the neatness and slick appearance of the present records would be lost, but printing costs would be eliminated entirely, the courts would have all the copies they need, and later researchers could borrow the State Library's copy, or get one from one of the counsel on the appeal. The resulting inconvenience would be matched by a vast saving in litigants' money, and we would come much nearer to the democratic ideal of free courts readily available to every citizen.

An alternative would be to adopt something like the plan used in North Carolina. There the Supreme Court's clerk, at request of counsel, mimeographs briefs and records, using the services of state-paid employees, the cost to counsel being far less than New York printing costs. Service is prompt. Counsel may, under the rule, have the papers printed if they so choose, but no one so chooses. The North Carolina plan has another obvious advantage. In that state the record on appeal is prepared and put together by the clerk, and he is in a position to suggest, or compel, the elimination of much unnecessary matter, a consummation devoutly to be desired in New York, but seemingly impossible of accomplishment under present conditions. Of course, North Carolina has no intermediate appellate courts like our Appellate Divisions, and all important appeals come to one tribunal, that is the Supreme Court of North Carolina. New York has five major appellate courts, and, probably, a mimeographing system would have to be set up in each of them, but the installation and operating costs are low, and the work could be done, at cost, for very much less than present printing rates. And there may be, for all I know, other modern reproduction methods even simpler or cheaper or more satisfactory, than printing.

The New York appellate courts do furnish some relief to needy or impoverished litigants, by ordering, on occasion, that appeals be heard on typed papers or on less than the usually-required number of

printed copies. But those occasional (28 in the Court of Appeals during 1950) permissions are exceptions to the rule, and interfere with the orderly functioning of the present system of filing and preserving appeal records. What we need are not more exceptions to the rules, but new rules to cut down expense in every case.

I have not overlooked some changes in appellate jurisdiction during the years here under survey, but it would be easy to demonstrate that those modifications do not account for any substantial part of the decline in number of appeals. Similarly, I do not attempt any discussion herein of other possible alterations of the jurisdiction of the Court of Appeals, which might change materially the volume of appellate business in the state.³ It should be noted, too, that the Court of Appeals controls its own intake, to a limited extent, by its action on motions for leave to appeal, but those motions are granted or denied because of the presence or absence of seemingly important law questions, and so have no bearing on the problem dealt with herein.

Criminal appeals are not part of our subject matter—they need separate attention. But the printing expense in a criminal case is even greater, since criminal records are usually long. Not only does the printing impose heavy burdens, either on public treasuries, or on the families, often impoverished, of the defendants, but printing procedures result in long delays in disposing of those appeals. Delay is unfortunate in any litigation. In criminal prosecutions it is a serious evil.

Of course, nothing in this article is really new. The problem has been explored many times before, and suggestions made some of which are quite like those herein.⁴ But the bar seems to have paid little attention to those earlier surveys, and meanwhile the situation has steadily worsened, and it is no longer a theory with which we are confronted. Success for our side in the world-wide struggle between free society and dictatorship, requires that every organ of representative government function efficiently, and in the service of every citizen. Our free courts must be accessible. Accessibility requires cutting of costs. Let's do something about it.

3. See Desmond, *Limited Jurisdiction of the New York Court of Appeals—How Does It Work?*, 2 SYRACUSE L. REV. 1 (1950).

4. See THIRD ANNUAL REPORT OF THE NEW YORK JUDICIAL COUNCIL 307 (1937); ELEVENTH ANNUAL REPORT OF THE NEW YORK JUDICIAL COUNCIL 411 *et seq.* (1945); TWELFTH ANNUAL REPORT OF THE NEW YORK JUDICIAL COUNCIL 253 *et seq.* (1946); 36 A. B. A. REP. 605 (1911).