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TAXATION OF COSTS IN UNITED STATES DISTRICT COURTS

Richard C. Peck*

I. INTRODUCTION

It logically seems that any problems involved in taxation of costs should be primarily mechanical in nature and ought not be of such significance as to warrant consideration beyond mere recognition of their existence. This is a false premise, however, for it is a common experience that the mechanics of a procedure can often be as troublesome to the practitioner as is a substantive issue.

In any event, to those whose business it is to nurture the orderly administration of the federal judicial processes, it has become increasingly apparent that for many litigants the course to be followed in the resolution of this phase of the lawsuit is often fraught with aggravating uncertainty. Some confusion exists because the procedure for determining the issue of costs taxable and recoverable in federal litigation differs considerably from that to which practitioners are accustomed in state court proceedings. Beyond this, there is always a temptation not to become sufficiently knowledgeable of and to anticipate the impact of the ultimate issue of costs during that time in which the litigation is grinding its fitful but inexorable way toward an ultimate conclusion. Costs thus, oftentimes at the twilight hour of the lawsuit, become a surprise issue, consuming too much time in their resolution, and possessing a pesky tendency to invite conflict well out of proportion to the main issues of the original controversy.

In some instances, a still more cogent reason to be alert to the issue of costs is that the ever increasing costliness of today's litigation has caused the "incidental" of yesterday to become a matter of some consequence. Fair witness to this point is a case in the Eighth Circuit, tried before the District Court for the Western District of Missouri,[1] in which taxation of ordinary costs in the total sum of $13,981.76 was sought and in which an allowance of

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[1] Brookside Theatre Corp. v. Twentieth Century-Fox Film Corp., 11 F.R.D. 259 (W.D. Mo. 1951), *aff'd & modified*, 194 F.2d 846 (8th Cir.), *cert. denied*, 343 U.S. 942 (1952).

$7,987.09 was eventually made. In addition attorney's fees in the amount of $150,000 were taxed as costs in the trial court, but on appeal they were reduced to $100,000.

A consideration of some of the practical aspects of this "incidental" item may, therefore, be of some value to all practitioners, be they so-called regulars in the federal forum, or be they among those who are concerned only occasionally with such litigation.

II. THE PROCEDURES INVOLVED

The first sentence of Rule 54(d) of the Federal Rules of Civil Procedure provides:[2]

> Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law.

The following direction appears in Rule 58: "The entry of the judgment shall not be delayed for the taxing of costs."[3]

Accordingly, in the ordinary circumstance when judgment is entered it will be silent as to the exact amount of costs to be recovered by the prevailing party. It may simply direct that the prevailing party recover judgment in a specific amount plus "costs" or "costs to be taxed" or "costs taxable" or some similar recitation. Thus, the latent issue of costs to be ultimately included in the judgment usually remains for disposition after entry of judgment.

The procedural starting point for resolution of this issue is the second sentence of Rule 54(d) stating: "Costs may be taxed by the clerk on one day's notice."[4]

While this is permissive language which in no way withdraws the court's inherent power to tax costs,[5] customarily, and pursuant to the rule, costs are taxed in the first instance by the clerk rather than by the judge.[6] In the District of Nebraska the practice is fixed by Local Rule 28(a) as follows:[7]

> The party entitled to recover costs shall file a verified bill of costs upon forms provided by the Clerk. The date on which the party

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[2] FED. R. CIV. P. 54(d).

[3] FED. R. CIV. P. 58.

[4] FED. R. CIV. P. 54(d).

[5] Deering, Milliken & Co. v. Temp-Resisto Corp., 169 F. Supp. 453 (S.D.N.Y. 1959).

[6] Kehaya v. Axton, 32 F. Supp. 273 (S.D.N.Y. 1940).

[7] LOCAL CT. R., NEB. DIST. 28(a).

> will appear before the Clerk for taxation of the costs, and proof of service of a copy upon the party liable for the costs, shall be endorsed thereon. The Clerk's action may be reviewed by the court if motion to retax the costs is filed within five days after taxation by the Clerk.

The statutory "bill of costs" referred to in the local rule is made mandatory by the last sentence of 28 U.S.C. § 1920 which provides that "A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree."[8]

A particular form of verification is required by the provisions of 28 U.S.C. § 1924:[9]

> Before any bill of costs is taxed, the party claiming any item of cost or disbursement shall attach thereto an affidavit, made by himself or by his duly authorized attorney or agent having knowledge of the facts, that such item is correct and has been necessarily incurred in the case and that the services for which fees have been charged were actually and necessarily performed.

The mechanics by which the statutory procedure is implemented in the District of Nebraska are essentially quite simple. Upon the entry of a judgment which permits taxation of costs to the prevailing party, the clerk of the court promptly forwards to counsel for that party a sufficient number of printed Bill of Costs forms (See appendix A) to permit filing of the original when prepared and the service of a copy thereof upon opposing counsel. The form contains blanks in which may be detailed the more prevalent items of taxable costs, includes the statutory affidavit together with a notice which may be used to set the bill for hearing, and includes a certificate of service. In unusual cases it may be necessary to use the form only as a guide for preparation of a more detailed bill of costs pleading.

With the printed Bill of Costs form, the clerk also forwards an informational statement showing those items of costs which have been entered on the dockets during the course of the litigation (See appendix B). This statement is supplied solely as a convenient reference for counsel in his task of assembling the information necessary for the preparation of a complete Bill of Costs. Under no circumstances is this informational statement to be considered as a request for payment of any item to the court. On the statement will be found an itemization of known costs which have been incurred by each party, such as filing fees, marshal's service fees, deposition fees (which have been endorsed on the file copies prior

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[8] 28 U.S.C. § 1920 (1958).

[9] 28 U.S.C. § 1924 (1958).

to filing), names of the witnesses who testified, and depositions read at the trial. The statement will be far from complete as to all costs taxable and allowable for the obvious reason that only counsel will have at hand in his records the information pertaining to many items which may be recoverable, but which do not appear of record; for example, the cost of preparing special exhibits, miles traveled by witnesses, necessary days of attendance of witnesses, and costs incurred in obtaining certification of documents.

The original copy of the prepared Bill of Costs with its notice of the time set for appearance before the clerk for taxation thereof should, when completed, be filed with the clerk and a copy served upon opposing counsel. Opposing counsel may then file and serve written objections to the taxation of any or all items claimed, or he may await the time set for taxation and then submit objections orally or in writing or by both means. There is then devolved upon the clerk the duty to make a determination of the costs allowable and taxable.

At this point, however, it should be remembered that lest the clerk be "carried away" by this one of his few opportunities to flee from the role of an administrator and momentarily play the role of a judge, there is adequate procedure available to dampen his zeal. Counsel may quickly resort to the explicit provision of Rule 54(d) which states that: "On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court."[10] Timely filing of the motion has been held to be jurisdictional.[11]

If the trial court should be carried away in its final opportunity to do "justice" between the parties, it appears that the normal processes of appeal lie only if the issue presented is one of the power of the court to act, as distinguished from the issue of an abuse of discretion.[12]

The costs which are finally allowed and taxed belong to the prevailing party. They are payable directly to that party and not through the office of the clerk. In the District of Nebraska the procedure is specified by Local Rule 28(b):[13]

> Unless otherwise ordered by the court, except in criminal cases, suits for civil penalties for violations of criminal statutes, and Government cases not handled by the Department of Justice, all costs

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[10] *Supra* note 2.

[11] Delaware Valley Marine Supply Co. v. American Tobacco Co., 199 F. Supp. 560 (E.D. Pa. 1960).

[12] A.B.C. Packard Inc. v. General Motors Corp., 275 F.2d 63 (9th Cir. 1960); Intertype Corp. v. Clark-Congress Corp., 249 F.2d 626 (7th Cir. 1957).

[13] *Supra* note 7.

taxed are payable directly to the party entitled thereto and not to the Clerk.

The record, as to the fact of payment of the costs, is made by filing a written "Satisfaction" therefor.[14]

III. WHAT IS TAXABLE OR NON-TAXABLE

Five categories of taxable costs are defined in 28 U.S.C.A. § 1920.[15] A glance at the multitude of annotations following the text of this section and those following the text of Rule 54 reveals that the brevity of the statutory definitions conceals a promiscuity of controversy which has arisen from their interpretation. Only a few salient points can be noted in each category.

A. Fees of the Clerk and Marshal.

The amounts includable in this category are governed by the provisions of 28 U.S.C. §§ 1914 and 1917,[16] which respectively fix the filing fee for a civil proceeding at $15 and the fee for filing a notice of appeal at $5; and, also, the provisions of 28 U.S.C. § 1921[17] which set forth the fees chargeable by marshals for various services rendered.

Some observations should be made concerning government cases. Rule 54(d)[18] provides that costs against the United States shall be imposed only to the extent permitted by law. But to be simply aware that Congress, in particular classes of cases, has waived the general immunity of the government from liability for costs is not sufficient. Some of these special statutes, and the interpretive decisions made thereunder, specifically limit the extent of costs made recoverable. An example in point is a taxpayer's suit for refund of taxes paid. By the provisions of 28 U.S.C. § 2412(b),[19] costs may be allowed to the prevailing party in this type of litigation if the United States puts in issue plaintiff's right to recover. This statutory waiver of immunity, however, is specifically restricted to those costs incurred from the time of the joining of such issue, and it is further limited to costs actually incurred for witnesses and for fees paid to the clerk. It has been held that

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[14] See Local Ct. R., Neb. Dist. 27 dealing generally with satisfaction of judgments.

[15] 28 U.S.C. § 1920 (1958).

[16] 28 U.S.C. §§ 1914, 1917 (1958).

[17] 28 U.S.C. § 1921 (1958).

[18] Fed. R. Civ. P. 54(d).

[19] 28 U.S.C. § 2412(b) (1958).

under these restrictions the filing fee paid at the commencement of the suit is not taxable,[20] and that the attorney docket fee, which will be discussed more fully later, is also not allowable.[21]

B. FEES OF THE COURT REPORTER FOR ALL OR ANY PART OF THE STENOGRAPHIC TRANSCRIPT NECESSARILY OBTAINED FOR USE IN THE CASE.

The cost of a transcript of the testimony obtained for purposes of appeal may be allowed.[22] The allowability of the cost of a transcript prepared in connection with the disposition of the case in the trial court, however, has been the subject of considerable controversy. The determinative criteria is the court's need for the transcript in resolving the issues of the case.[23] The existence of this circumstance depends largely upon the facts and complexities of the particular controversy.[24] To be certain as to its taxability, it is advisable to obtain a prior order directing preparation of the transcript.[25] In one reported case, however, the order was entered nunc pro tunc,[26] and on appeal it was held that the phrase "nunc pro tunc" was of no significance because the trial court possessed the power to make the order at the conclusion of the proceedings as well as at the beginning.[27]

The cost of copies is generally not taxable;[28] nor is the cost of daily copy procured solely for the convenience of counsel.[29]

The transcript of a pre-trial conference has been held to be taxable where its availability was necessary for the preparation of the pre-trial order,[30] and also where it was necessary to a proper understanding of the matters covered at the conference.[31]

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[20] United States v. Mohr, 274 F.2d 803 (4th Cir. 1960).

[21] Jensen v. United States, 185 F. Supp. 251 (S.D.N.Y. 1960).

[22] Knickerbocker Plastic Co. v. Allied Molding Corp., 96 F. Supp. 358 (S.D.N.Y. 1949).

[23] Prashker v. Beech Aircraft Corp., 24 F.R.D. 305 (D. Del. 1959).

[24] Kowalewski v. Pennsylvania R.R., 21 F.R.D. 244 (D. Del. 1957).

[25] Firtag v. Gendleman, 152 F. Supp. 226 (D.D.C. 1957).

[26] Anderson v. General Motors Corp., 161 F. Supp. 668 (W.D. Wash. 1958).

[27] A.B.C. Packard v. General Motors Corp., 275 F.2d 63 (9th Cir. 1960).

[28] Kenyon v. Automatic Instrument Co., 10 F.R.D. 248 (W.D. Mich. 1950).

[29] Delaware Valley Marine Supply Co. v. American Tobacco Co., 199 F. Supp. 560 (E.D. Pa. 1960); Bennett Chemical Co. v. Atlantic Commodities, Ltd., 24 F.R.D. 200 (S.D.N.Y. 1959).

[30] Bank of America v. Loew's Int'l Corp., 163 F. Supp. 924 (S.D.N.Y. 1958).

[31] Brookside Theatre Corp. v. Twentieth Century-Fox Film Corp., 11 F.R.D. 259 (W.D. Mo. 1951), *aff'd & modified,* 194 F.2d 846 (8th Cir.), *cert. denied,* 343 U.S. 942 (1952).

Expenses incurred for transcripts of depositions come within this category of taxable costs.[32] The fact that a deposition is not received in evidence at the trial does not necessarily prevent taxation of its cost.[33] So also, a deposition which receives only minimal use as evidence at the trial may, nevertheless, be taxable if its taking can be shown to have been reasonably necessary to a party's case in the light of a particular situation existing at the time of the taking.[34] However, the costs incurred for depositions taken exploratorily and merely for pre-trial preparation, or only for the benefit and convenience of counsel in marshaling his case as distinguished from a necessity for use in solution of the issues of the case, are generally not allowable.[35]

Extra copies of depositions obtained for the convenience of counsel are not ordinarily taxable.[36] In one case, however, the cost was allowed after a showing that the copy was necessary in order to hold an attempt at impeachment within proper limits;[37] in another, where it was shown that the party taking the deposition withheld filing of it until the day of trial, thus preventing prior reference to the original by the prevailing party.[38]

C. FEES AND DISBURSEMENTS FOR PRINTING AND WITNESSES.

Printing costs are rarely involved in trial court proceedings except to the extent that the ultimate total of costs recoverable may be affected as the result of an appeal. Any allowance of costs made to the prevailing party in the Court of Appeals for the Eighth Circuit will be inserted in the mandate.[39] The allowance so made

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[32] Cooke v. Universal Pictures Co., 135 F. Supp. 480 (S.D.N.Y. 1955); Perlman v. Feldman, 116 F. Supp. 102 (D. Conn. 1953).

[33] 4 MOORE, FEDERAL PRACTICE, ¶ 26.36 (2d ed. 1962).

[34] Bank of America v. Loew's Int'l Corp., 163 F. Supp. 924 (S.D.N.Y. 1958).

[35] Bowman v. West Distrib. Co., 25 F.R.D. 280 (E.D.N.Y. 1960); Emerson v. National Cylinder Gas Co., 147 F. Supp. 543 (D. Mass. 1957), *aff'd*, 251 F.2d 152 (1st Cir. 1958); Wagner v. Aetna Ins. Co., 16 F.R.D. 528 (D. Neb. 1954); Hansen v. Bradley, 114 F. Supp. 382 (D. Md. 1953); Andresen v. Clear Ridge Aviation, 9 F.R.D. 50 (D. Neb. 1949); Burnham Chem. Co. v. Borax Consol., 7 F.R.D. 341 (N.D. Cal. 1947); Republic Mach. Tool Corp. v. Federal Cartridge Corp., 5 F.R.D. 388 (D. Minn. 1946).

[36] General Cas. Co. v. Stanchfield, 23 F.R.D. 58 (D. Mont. 1959); Penner v. Balfe Printing Corp., 21 F.R.D. 299 (D. Mass. 1958); Firtag v. Gendleman, 152 F. Supp. 226 (D.D.C. 1957); Ryan v. Arabian Am. Oil Co., 18 F.R.D. 206 (S.D.N.Y. 1955); Hope Basket Co. v. Product Advancement Corp., 104 F. Supp. 444 (W.D. Mich. 1952).

[37] Hancock v. Albee, 11 F.R.D. 139 (D. Conn. 1951).

[38] Cooke v. Universal Pictures Co., 135 F. Supp. 480 (S.D.N.Y. 1955).

[39] 8TH CIR. R. 17.

may then be added to the costs recoverable in the trial court. Such costs generally include the expense incurred for printing the record on appeal but, contrary to a prevalent notion, they do not include the cost of printing briefs.

Witness fees and allowances are fixed by the provisions of 28 U.S.C. § 1821 in substance as follows:[40] $4 for each day's attendance and for the time necessarily occupied in going to and returning from the place of attendance; $8 per day for expenses of subsistence, including the time necessary for going to and returning from the place of attendance, if the place of residence is so far removed as to prohibit return thereto from day to day; and 8 cents per mile for going from and returning to the place of residence.

Taxation may be made for the cost of each day the witness is necessarily in attendance, and is not limited only to those costs incurred for the actual day upon which the witness testified.[41] Fees will be limited, however, to the days of actual testimony and the days required for travel if no showing is made that the witness necessarily attended for a longer time.[42] These expenses are taxable even though the witness attends voluntarily.[43] The same is true even though the witness is not actually called to testify if it can be shown that the attendance was necessary;[44] but if a witness is not used, the presumption is that his attendance was unnecessary.[45] An order of the court or concessions made by a party in open court during the course of the trial may make it unnecessary for the opposing party to call to the stand some of those witnesses who were in attendance, and in that case the presumption that witnesses not testifying are unnecessarily called will likely be overcome.[46]

An exception to the general rule for recovery of witness expenses is that a party to an action who testifies cannot tax fees and allowances for himself.[47] It appears, however, that stockholders, directors, officers, and employees who testify on behalf of a corporate litigant may be treated with respect to witness fees and mileage

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[40] 28 U.S.C. § 1821 (1958).

[41] Bennett Chem. Co. v. Atlantic Commodities, Ltd., 24 F.R.D. 200 (S.D.N.Y. 1959).

[42] Commerce Oil Ref. Co. v. Miner, 198 F. Supp. 895 (D.R.I. 1961).

[43] Spiritwood Grain Co. v. Northern Pac. Ry., 179 F.2d 338 (8th Cir. 1960); Gallagher v. Union Pac. Ry., 7 F.R.D. 208 (S.D.N.Y. 1947).

[44] Hansen v. Bradley, 114 F. Supp. 382 (D. Md. 1953).

[45] Clark v. Gifford-Hill & Co., 95 F. Supp. 975 (W.D. La. 1951).

[46] Mueller v. Powell, 115 F. Supp. 744 (W.D. Mo. 1953).

[47] Ryan v. Arabian Am. Oil Co., 18 F.R.D. 206 (S.D.N.Y. 1955); Picking v. Pennsylvania Ry., 11 F.R.D. 71 (M.D. Pa. 1951).

the same as any other witness, so long as their interest in the litigation is no more than a natural concern for the welfare of the corporation, as opposed to actual participation in litigation to an extent that they become thus identifiable as parties in interest.[48]

Of particular interest is the circumstance of a witness residing outside the territorial limits of the district. The general rule is that mileage recoverable for such a witness is limited to 100 miles from the place of trial, which is the limit imposed by Rule 45(e)(1)[49] for service of a subpoena outside the district unless a statute provides otherwise.[50] Apparently, however, strict application of the rule is no longer universal. The Ninth Circuit Court of Appeals has determined that mileage allowable should be that which was traveled within the district, or actual mileage traveled in and out of the district up to 100 miles, whichever is the greater. Thus, mileage was allowed a non-resident witness from the point of entering the district to the place of trial, a distance of 250 miles.[51]

In an absolute refusal to follow the rule, the District Court for the Southern District of New York allowed recovery of the lowest first-class rate of transportation ($783) for each of three witnesses residing in England. The court simply observed that the limitation imposed by the numerous prior decisions on the point was no longer realistic.[52] This departure was again confirmed in *Bennett Chemical Co. v. Atlantic Commodities, Ltd.*[53] The Eastern District of New York subsequently took the same position and allowed $333.60 for transportation of a witness from Bogota, Columbia, and $114.40 for transportation of a witness from Portland, Oregon.[54]

Expenses incurred in the calling of expert witnesses are a constant source of contention though the general principle applicable is that only the regular statutory fees and allowances are taxable.[55] The actual fees and expenses paid to such witnesses are

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[48] Kemart Corp. v. Printing Arts Research Lab., 232 F.2d 897 (9th Cir. 1956); Perlman v. Feldmann, 116 F. Supp. 102 (D. Conn. 1953).

[49] FED. R. CIV. P. 45(e)(1).

[50] Spirtwood Grain Co. v. Northern Pac. Ry., 179 F.2d 338 (8th Cir. 1950); Friedman v. Washburn Co., 155 F.2d 959 (7th Cir. 1946).

[51] Kemart Corp. v. Printing Arts Research Lab., 232 F.2d 897 (9th Cir. 1956).

[52] Bank of America v. Loew's Int'l Corp., 163 F. Supp. 924 (S.D.N.Y. 1958).

[53] 24 F.R.D. 200 (S.D.N.Y. 1959).

[54] Maresco v. Flota Mercante Grancolombiana, 167 F. Supp. 845 (E.D.N.Y. 1958).

[55] Kirby Lumber Corp. v. Louisiana, 293 F.2d 82 (5th Cir. 1961); Firtag v. Gendleman, 152 F. Supp. 226 (D.D.C. 1957); Kenny v. United States, 118 F. Supp. 907 (D.N.J. 1954); Hansen v. Bradley, 114 F. Supp. 382 (D. Md.

allowable only in exceptional cases where dominating reasons of justice compel the allowance.[56] Such an allowance generally requires a prior approval of the court.[57]

D. FEES FOR EXEMPLIFICATION AND COPIES OF PAPERS NECESSARILY OBTAINED FOR USE IN THE CASE.

This broad category encompasses the length and breadth of exhibit evidence. From the mass of decisions it is difficult to formulate specific rules for allowance or disallowance of costs thus incurred. Each case must be viewed in the light of its own peculiar problems of proof.

Generally speaking, it can be said that the cost of preparing charts and drawings, the use of which are reasonably necessary to facilitate a complete understanding of the issues of the case, are allowable.[58] Those maps and charts which do more than illustrate the witness' testimony, and are themselves of vital importance to a correct determination of the issues, clearly meet the requirement for taxability;[59] as do those maps and photographs which are themselves received as evidence of facts.[60]

Contrarily, the expense of obtaining charts, models, photographs, and sound movies which are not indispensable to development of the case or are not essential to decision of the issues may not be taxed as costs of the litigation.[61]

Fees paid for exemplifications and copies of file wrappers in

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1953); Banks v. Chicago Mill & Lumber Co., 106 F. Supp. 234 (E.D. Ark. 1950).

[56] Andresen v. Clear Ridge Aviation, 9 F.R.D. 50 (D. Neb. 1949); Swan Carburetor Co. v. Chrysler Corp., 55 F. Supp. 794 (E.D. Mich. 1944), *aff'd in part*, 149 F.2d 476 (6th Cir. 1945).

[57] Department of Highways v. McWilliams Dredging Co., 10 F.R.D. 107 (W.D. La. 1951), *aff'd*, 187 F.2d 61 (5th Cir. 1951); Brookside Theatre Corp. v. Twentieth Century-Fox Film Corp., 11 F.R.D. 259 (W.D. Mo. 1951).

[58] Swan Carburetor Co. v. Chrysler Corp., 149 F.2d 476 (6th Cir. 1945); Hope Basket Co. v. Product Advancement Corp., 104 F. Supp. 444 (W.D. Mich. 1952); Kenyon v. Automatic Instrument Co., 10 F.R.D. 248 (W.D. Mich. 1950).

[59] Freedman v. Philadelphia Terminals Auction Co., 198 F. Supp. 429 (E.D. Pa. 1961); Banks v. Chicago Mill & Lumber Co., 106 F. Supp. 234 (E.D. Ark. 1950).

[60] Stachon v. Hoxie, 190 F. Supp. 185 (W.D. Mich. 1960).

[61] Department of Highways v. McWilliams Dredging Co., 10 F.R.D. 107 (W.D. La.), *aff'd in part*, 187 F.2d 61 (5th Cir. 1951); Prashker v. Beech Aircraft Corp., 24 F.R.D. 305 (D. Del. 1959); Andresen v. Clear Ridge Aviation, 9 F.R.D. 50 (D. Neb. 1949).

patent infringement cases are allowable,[62] but the cost of the construction of expensive models is not ordinarily recoverable unless previously authorized by order of the court.[63]

The cost of photostatic copies of documents necessarily obtained for use in the case may be taxable,[64] and the cost of securing translations necessary for exemplification of matters before the court can also be recovered.[65]

E. DOCKET FEES UNDER SECTION 1923 OF THIS TITLE.

In part, 28 U.S.C. § 1923(a)[66] provides:[67]

> Attorney's and proctor's docket fees in courts of the United States may be taxed as costs as follows:
> "$20 on trial or final hearing (including a default judgment whether entered by the court or by the clerk) in civil, criminal, or admiralty cases, . . . ;
> "$5 on discontinuance of a civil action;
> "$5 on motion for judgment and other proceedings on recognizances;
> "$2.50 for each deposition admitted in evidence.

This item of costs is what is commonly known as the "Attorney's Docket Fee." Though seemingly archaic to twentieth century litigation it is, nevertheless, a statutory "bonanza" to which the prevailing party is entitled. Probably because of its paucity, more than a few attorneys take the position that they know not of what is an attorney's docket fee or why or when it is taxable; and, seemingly yielding to a course of least resistance, they carefully include in the judgment (with this clerk's blessing and encouragement) the recital "attorney's docket fee waived."

Simply stated, however, the provisions of this sub-section merely entitle the prevailing party to recover as costs an attorney's fee of $20 if trial or final hearing is had or judgment entered, $5 if an action is otherwise discontinued, $5 for proceedings on recognizances, and $2.50 for each deposition admitted in evidence. The application of the statute is not always so simple.

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[62] Criner v. Micro-Westco Inc., 3 F.R.D. 495 (S.D. Iowa 1944).

[63] Special Equip. & Mach. Corp. v. Zell Motor Car Co., 193 F.2d 515 (4th Cir. 1952); Gotz v. Universal Prods. Co., 3 F.R.D. 153 (D. Del. 1943); Goodrich v. Ford Motor Co., 55 F. Supp. 792 (E.D. Mich. 1940)

[64] Anderson v. General Motors Corp., 161 F. Supp. 668 (W.D. Wash. 1958); Burnham Chem. Co. v. Borax Consol., Ltd., 7 F.R.D. 341 (N.D. Cal. 1947).

[65] Bennett Chem. Co. v. Atlantic Commodities, Ltd., 24 F.R.D. 200 (S.D.N.Y. 1958); Gotz v. Universal Prods. Co., 3 F.R.D. 153 (D. Del. 1943).

[66] 28 U.S.C. § 1923(a) (1958).

[67] Other portions of the section pertain to graduated fees applicable in admiralty matters which, because of their understandable lack of prevalence in the Nebraska District, are not relevant to this discussion.

If there are two prevailing parties and each has employed separate counsel, is each party entitled to a $20 attorney's docket fee upon entry of judgment, or can only one fee be taxed in one case which the prevailing parties must then divide? No court decision seems to answer this question, and probably the best disposition is an observation that the sum involved is not sufficiently large to warrant more than an awareness that this is a demonstration of the anomalous character of the item in present day litigation. Then too, if a plaintiff sues two alleged joint tortfeasors and recovers verdict and judgment against one, but the other secures verdict and judgment of dismissal, is not the plaintiff entitled to recover an attorney's docket fee of $20 against one defendant, while the other defendant is likewise entitled to a fee of $20 as against the plaintiff? The answer to this question is probably in the affirmative.

Only brief reference need be made to the $2.50 attorney docket fee allowed for each deposition admitted in evidence. Ordinarily this item is taxable for every deposition read in whole or in part at the trial,[68] and is not taxable for any deposition not so used.[69]

At this point it is appropriate to note the general rule that attorney's fees, other than the docket fees authorized by section 1923, are not taxable as costs in the absence of express statutory authority therefor.[70] Examples of statutory provisions permitting the taxation of attorney fees as costs are patent cases,[71] where the allowance is discretionary; and suits brought pursuant to provisions of the Clayton Act,[72] where taxation appears to be a matter of right. Attorney' fees made recoverable by Nebraska law[73] in suits upon policies of insurance are said not to be costs taxable within the meaning of the federal statutes, but the same result is obtained by holding that they are includable as an integral part of the recoverable judgment.[74] Moreover, such fees are not considered to be costs within the exclusion of the jurisdictional statutes,[75] so

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[68] Perlman v. Feldman, 116 F. Supp. 102 (D. Conn. 1953).

[69] Prashker v. Beech Aircraft Corp., 24 F.R.D. 305 (D. Del. 1959).

[70] Kenny v. United States, 118 F. Supp. 907 (D.N.J. 1954).

[71] 35 U.S.C. § 285 (1958).

[72] 38 Stat. 731 (1914), 15 U.S.C. § 15 (1958).

[73] NEB. REV. STAT. §§ 44-359, -381 (Reissue 1960).

[74] Sioux County v. National Sur. Co., 276 U.S. 238 (1928); Baldwin v. Hartford Acc. & Indem. Co., 168 F. Supp. 86 (D. Neb.), *aff'd*, 262 F.2d 202 (8th Cir. 1958).

[75] 28 U.S.C. §§ 1331, 1441 (1958).

that in determining the required minimal amount in controversy they are to be added to the principal claim.[76]

A particular exception to the general rule against taxation of attorney's fees should be observed; namely, the inherent power of an equity court to tax attorney's fees against the losing party in exceptional cases where such taxation is essential to the doing of justice and there exists no express statutory prohibition to the contrary.[77]

Consistent with the general rule are holdings that there is no authority for allowance of attorney's fees and other expenses incurred by reason of the taking of depositions at a distant place.[78] Pursuant to a local rule empowering the court to order payment of counsel fees and other expenses where a party proposes to take a deposition at a distance more than 150 miles from the courthouse, taxation has been made for attorney's fees thus incurred.[79] Even absent a local rule governing the situation, it would seem that the last sentence of Federal Rule 30(b),[80] relating to orders for the protection of parties and deponents and providing that "the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression," is sufficiently broad to permit the court in a proper case and upon proper showing to make a prior order requiring payment of reasonable expenses incurred in the taking of a deposition at a distant place.

IV. OTHER COSTS.

It has been said that "the allowance or disallowance of items of costs is determined by statute, rule, order, usage, and practice of the instant court."[81] Accordingly, section 1920 is not necessarily the ultimate limit on all allowable costs.

Most of the reported cases which have dealt with extraordinary costs, other than those cited in the foregoing discussion of particular topics, have been concerned with the question of allowability of

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[76] Missouri State Life Ins. Co. v. Jones, 290 U.S. 199 (1933); Mutual Benefit Health & Acc. Ass'n v. Bowman, 96 F.2d 7 (8th Cir. 1938).

[77] Rolax v. Atlantic Coast Line R.R., 186 F.2d 473 (4th Cir. 1951); Taussig v. Wellington Fund, Inc., 187 F. Supp. 179 (D. Del. 1960).

[78] Anderson v. General Motors Corp., 161 F. Supp. 668 (W.D. Wash. 1958); Hope Basket Co. v. Product Advancement Corp., 104 F. Supp. 444 (W.D. Mich. 1952).

[79] Ryan v. Arabian Am. Oil Co., 18 F.R.D. 206 (S.D.N.Y. 1955).

[80] FED. R. CIV. P. 30(b).

[81] Kemart Corp. v. Printing Arts Research Lab., 232 F.2d 897 (9th Cir. 1956).

premiums paid for various types of bonds filed responsive to requirements of particular statutes or local rules.

In the case of *Swalley v. Addressograph-Multigraph Corp.*,[82] the premium paid on a supersedeas bond was taxed as costs pursuant to a rule of the District Court for the Northern District of Illinois providing that "the reasonable premiums or expense paid on all bonds or stipulations or other security given . . . shall be taxed as a part of the costs of that party."

In *Department of Highways v. McWilliams Dredging Co.*,[83] the premium paid on a removal bond was allowed by the District Court for the Western District of Louisiana as a necessary cost of litigation even though no local rule specifically covered the matter; and the allowance was affirmed on appeal.[84] Also, in *Bennett Chemical Co. v. Atlantic Commodities, Ltd.*,[85] the premium paid on a non-resident cost bond was held by the District Court for the Southern District of New York to be a proper subject for taxation as costs. No further reasons were stated therefor, and no reference was made to any local rule as determinative of the question.

One other case allowing this item of costs bears comment. *In re Northern Indiana Oil Co.*[86] involved a supersedeas bond premium of $1,636.00 which was taxed by the District Court for the Northern District of Indiana. The fact that there was no local rule so authorizing the allowance was noted. This was a bankruptcy matter, however, and the court relied upon the power inherent in its exercise of equity jurisdiction to do complete justice between the parties.

To the contrary is the case of *Nash v. Raun*,[87] in the Western District of Pennsylvania, which held that a premium of $412.50 paid on an appeal bond was not taxable in the absence of a court rule so authorizing the taxation; and, also, the case of *Webster Motor Car Co. v. Packard Motor Car Co.*,[88] where a supersedeas bond premium was disallowed because no local rule or decision of the District Court for the District of Columbia permitted it. The court made the further specific observation that usage in the district had been continually not to allow such an item to be taxed.

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[82] 168 F.2d 585 (7th Cir. 1948).

[83] 10 F.R.D. 107 (W.D. La. 1950), *aff'd*, 187 F.2d 61 (5th Cir. 1951).

[84] 187 F.2d 61 (5th Cir. 1951).

[85] 24 F.R.D. 200 (S.D.N.Y. 1959).

[86] 192 F.2d 139 (7th Cir. 1951).

[87] 67 F. Supp. 212 (W.D. Pa. 1946).

[88] 168 F. Supp. 660 (D.D.C. 1958).

It should be noted that no local rule authorizing the taxation of bond premiums exists in the District of Nebraska and it appears that custom and usage has been not to allow recovery of the item.

Finally, the most practical observation which can be made about the incurrence of extraordinary costs is a reference to the admonition by the Tenth Circuit Court of Appeals in *Euler v. Waller:*[89] "[W]hen costs are sought for items not listed in section 1930 the procedure to be followed is an application to the court in advance of trial for an approving order."

V. COSTS IN CRIMINAL CASES.

By the provisions of 28 U.S.C. § 1918(b)[90] the court *may* order the defendant upon conviction to pay the costs of prosecution for any offense not capital. If the court does order payment of costs, all items previously discussed are apparently taxable with the exception of the clerk's filing fee. By the provisions of 28 U.S.C. § 1914[91] this fee is limited to civil proceedings. However, in proceedings for the violation of an Act of Congress in which a civil fine or forfeiture of property is provided for, the direction of 28 U.S.C. § 1918(a)[92] is that: "Costs *shall* be included in any judgment, order, or decree . . . ." (Emphasis added.)

CONCLUSION

The foregoing is by no means an exhaustive analysis of all reported cases touching upon the multitudinous questions which have arisen in proceedings to tax costs. Some attempt has been made to limit citations to representative cases, but in nearly every opinion so cited there will be found an involvement with several items of costs in addition to that for which citation is made. Thus the reader should be led to a wealth of authority on the various facets of the subject.

Some of the decisions may appear to present inconsistencies, but this is more apparent than real. It must always be remembered that in making a determination as to allowance or disallowance of most items of costs, there lies with the court a considerable range of discretion. A uniform result is, therefore, not always the end product.

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[89] 295 F.2d 765 (10th Cir. 1961).

[90] 28 U.S.C. § 1918(b) (1958).

[91] 28 U.S.C. § 1914 (1958).

[92] 28 U.S.C. § 1918(a) (1958).

APPENDIX A

(Facsimile of Form A.O. 133 Rev. 1-1-52)

Bill of Costs

UNITED STATES DISTRICT COURT

for the

DISTRICT OF NEBRASKA

RICHARD ROE, Plaintiff,
vs.
ABC CORPORATION, Defendant.
} Civil Action File No. 1234

Judgment having been entered in the above entitled action on the 5th day of March, 1963, against ABC Corporation the clerk is requested to tax the following as costs:

BILL OF COSTS

Fees of the clerk	$ 15.00
Fees of the marshal	22.50
Fees of the court reporter for all or any part of the transcript necessarily obtained for use in the case	250.00
Fees and disbursements for printing	
Fees for witnesses (itemized on reverse side)	232.00
Fees for exemplification and copies of papers necessarily obtained for use in case	25.00
Docket fees under 28 U. S. C. 1923	27.50
Costs incident to taking of depositions	135.00
Costs as shown on Mandate of Court of Appeals	257.50
Other Costs (Please itemize)	
Cost of constructing model of patented device as per Order of the Court	300.00
Attorney's fees allowed as per Order of Court	1,000.00
Total	$2,264.50

State of Nebraska }
County of Douglas } ss:

I, John Advocate do hereby swear that the foregoing costs are correct and were necessarily incurred in this action and that the

services for which fees have been charged were actually and necessarily performed. A copy hereof was this day mailed to Frederick Counselor, attorney for defendant, with postage fully prepaid thereon.

Please take notice that I will appear before the Clerk to tax said costs on the 25th day of March, 1963 at Omaha, Nebraska.

/s/ John Advocate

Attorney for Plaintiff

Subscribed and sworn to before me this 16th day of March A. D. 1963 at Omaha, Nebraska

/s/ Mary Oath

Notary Public.

Costs are hereby taxed in the amount of $2,264.50 this 25th day of March, 1963, and that amount included in the judgment.

/s/ John Procedure

Clerk.

By

Deputy Clerk.

REVERSE SIDE

Witness Fees (computation, cf. 28 U. S. C. 1821 for statutory fees)

Name and Residence	Attendance Days	Attendance Total Cost	Subsistence Days	Subsistence Total Cost	Mileage Miles	Mileage Total Cost	Total Cost Each Witness
Robert Gray	2	8.00	2	16.00	200	16.00	$40.00
Wm. White	2	8.00	2	16.00	200	16.00	40.00
Paul Day	2	8.00	2	16.00	200	16.00	40.00
Ralph Night	1	4.00			100	8.00	12.00
Richard Swing	1	4.00			50	4.00	8.00
Sam Steer	3	12.00	3	24.00	300	24.00	60.00
Mae Float	1	4.00			30	2.40	6.40
Sue Rock	1	4.00			50	4.00	8.00
R. Smith (at deposition taking)	1	4.00			30	2.40	6.40
Mary Smith (at deposition taking)	1	4.00			30	2.40	6.40
Ruth Jones (at deposition taking)	1	4.00			10	.80	4.80
					Total		$232.00

NOTICE

Section 1924, Title 28, U. S. Code (effective September 1, 1948) provides:

"Sec. 1924. Verification of bill of costs.

"Before any bill of costs is taxed, the party claiming any item of cost or disbursement shall attach thereto an affidavit, made by himself or by his duly authorized attorney or agent having knowledge of the facts, that such item is correct and has been necessarily incurred in the case and that the services for which fees have been charged were actually and necessarily performed."

See also Section 1920 of Title 28 which reads in part as follows:

"A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree."

The Federal Rules of Civil Procedure contain the following provisions:

Rule 54 (d)

"Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court."

Rule 6 (e)

"Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period."

Rule 58 (In Part)

"The entry of the judgment shall not be delayed for the taxing of costs."

APPENDIX B

UNITED STATES DISTRICT COURT
for the
DISTRICT OF NEBRASKA

RICHARD ROE, Plaintiff, vs. ABC CORPORATION, Defendant. } Case No. 1234 Statement of Costs

March 15 1963

To assist you in disposing of the item of costs the following is supplied as appearing of record on this date. Costs are due directly to the party awarded costs, and to release the judgment for costs a Satisfaction should be filed. *No remittance* is to be made to the Clerk *except* in criminal cases, bond forfeitures in criminal matters, and Government cases *not* handled by the U. S. Attorney's office.

Nature of Fee or Costs	For Plaintiff	For Defendant
Clerk's Fees	$ 15.00	
Marshal's Fees	22.50	$ 7.50
Sheriff's Fees		
Fees Under 28 USC 1923:		
Attorney Docket Fee	20.00	
Reading Depositions	7.50	5.00
Costs From Mandate of Court of Appeals	257.50	
Deposition Costs	R. Smith (Costs not shown)	John Doe 62.50
	Mary Smith 55.00	R. Black 27.50
	Ruth Jones 35.00	Richard Roe 50.00
Witnesses Sworn: (See 28 USC 1821 for fees and allowances)		
	Robert Gray	Joe Block
	Wm. White	Earnest Easy
	Paul Day	Clyde Glibb
	Ralph Night	Ann Hearsay
	Richard Swing	Morris Irrelevant
	Sam Steer	
	Mae Float	
	Sue Rock	