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## Procedure in Federal Courts—Assessment of Penalty for Appeal Taken Only for Delay

In an appeal<sup>1</sup> from a federal district court verdict and judgment in a wrongful death action, appellees requested that damages be assessed against the appellant because the appeal to the court of appeals was sued out merely for delay. The appellees' request was made under a rule of court<sup>2</sup> which is common to all 11 circuit courts of appeals<sup>3</sup> and is found in the rules of the United States Supreme Court<sup>4</sup> and many state appellate court rules.<sup>5</sup>

<sup>1</sup> American Hardware Ins. Co. v. Van Vick, 268 F.2d 183 (5th Cir. 1959).

<sup>2</sup> "In all cases where an appeal shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding 10 per cent shall be awarded on the amount of the judgment." 5th CIR. R. 30.

<sup>3</sup> D.C. CIR. R. 23.  
1st CIR. R. 32.  
2nd CIR. R. 26.  
3rd CIR. R. 33.  
4th CIR. R. 20.  
5th CIR. R. 30.  
6th CIR. R. 25.  
7th CIR. R. 26.  
8th CIR. R. 21.  
9th CIR. R. 24.  
10th CIR. R. 25.

<sup>4</sup> Supreme Court Rule 56.

<sup>5</sup> ALA. CODE tit. 7, § 814 (1940).  
CAL. CIV. PROC. CODE § 957, R. 26.  
GA. CODE § 6-1801 (1933).  
ILL. REV. STAT. ch. 110 § 57 (50) (1957).  
MASS. GEN. LAWS ANN. ch. 211, § 10 (1931).  
MISS. CODE ANN. §§ 1971, 1972 (1942).  
MO. REV. STAT. § 512, 80 (1949).  
New Mexico—Supreme Court Rules, R. 17-3.  
OHIO REV. CODE § 2505.35 (Anderson 1953).  
ORE. CIV. LAWS ANN. § 19.160 (1953).  
TEX. R. CIV. P. 438 (1948).  
WASH. REV. CODE § 251.23(3) (1953).

The Nebraska Supreme Court declared a rule similar to the one under discussion to be unconstitutional in *Moore v. Herron*, 17 Neb. 697, 24 N.W. 425 (1885). In addition, note 28 U.S.C. § 1912 (1925) which provides for assessment of damages for delay after an appeal to a higher court has been denied. This section also punishes appeals made for vexatious and frivolous reasons. See *Lowe v. Willacy*, 239 F.2d 179 (9th Cir. 1956). Also there is a provision in the patent laws, 25 U.S.C. § 285 (1952), which provides that in exceptional cases, the court may award reasonable attorney's fees to the injured

The Federal Judiciary Act of 1789<sup>6</sup> contained a provision penalizing appeals taken only for purposes of delay, and the uniform rules for circuit courts of appeal<sup>7</sup> adopted in 1891 also contained a section providing for assessment of damages against the appellant in cases of appeals sued out only to delay proceedings on the judgment in the lower court.

In the instant case, a wrongful death action, the court held that the appeal was not sued out merely for purposes of delay although the court did find that there was little question but what the verdict and the judgment below should be affirmed. The court expressed a reluctance to award damages for delay largely because of the "cogently put and earnestly argued brief of the appellant."<sup>8</sup>

There would seem to be some reluctance on the part of courts of appeal to impose the penalty for delay. Only three times since 1940 have damages for delay been awarded, although the issue has been brought up many times.<sup>9</sup>

The Court of Appeal for the Fifth Circuit in *Traders & General Ins. Co. v. McClary*<sup>10</sup> found that the appellants' main basis for appeal was "purely factual" and the court further found that the appeal was "so clearly without foundation on the present record as to call for no discussion." Yet, the court said without further explanation that it was not satisfied that the appeal was sued out merely for delay.

What then will satisfy the courts of appeal that an appeal is made out only for purpose of delay? The Court of Appeal for the Eighth Circuit in *May Department Stores v. Reynolds*<sup>11</sup> said that since the opinion of the court in a prior case had, for all practical purposes, settled the law in that particular area, an award of damages for delay was warranted. Only \$250 was granted,

party in cases of delay or of vexatious or frivolous appeal. See *Day-Brite Lighting Co. v. Ruby Lighting Co.*, 191 F.2d 521 (9th Cir. 1951), and also a more recent case, *Kemart v. Printing Arts Research Lab. Inc.*, 269 F.2d 375 (9th Cir. 1959).

<sup>6</sup> Federal Judiciary Act of 1789, ch. 20, § 23, 1 Stat. 85 (1789).

<sup>7</sup> Rule 30, 150 Fed. xxxv (1891).

<sup>8</sup> *American Hardware Ins. Co. v. Van Vick*, *supra* note 1, at 184.

<sup>9</sup> The Court of Appeals for the 8th Circuit has considered the question eight times since 1940 and has awarded damages twice.

<sup>10</sup> 241 F.2d 462 (5th Cir. 1957).

<sup>11</sup> 140 F.2d 799 (8th Cir. 1944).

however, instead of the maximum possible award of ten per cent of the judgment in the lower court.<sup>12</sup>

In 1950, again in the Eighth Circuit, damages for delay were awarded in the case of *Massachusetts Bonding & Ins. Co. v. Feutz*.<sup>13</sup> The court said the contentions of the appellant were wholly without merit and awarded damages of \$2,230 to the appellee — again, however, a sum less than ten per cent of the judgment below.

The court's reasons for assessing the penalty included:

1. The appellant was given every opportunity to present every conceivable defense in the trial court.

2. In deciding against granting a judgment notwithstanding the verdict as requested by appellant, the trial court judge prepared an elaborate opinion covering every contention made by the appellant in the trial court and in the court of appeals.

*Nash v. Nash*<sup>14</sup> in the Fifth Circuit is one of the few cases wherein the court actually considered in the decision the advantageous effect of the delay which had been gained by the appellant. Here the enforcement of a judicial decree regarding a property settlement in a divorce suit was held up pending appeal. The court said the appeal was brought up entirely on technical objections and the appeal had no basis at all in the substantive law. Judgment was affirmed with damages for delay.

Where will the courts draw the line in favor of the appellant? The Court of Appeals for the Eighth Circuit denied damages for delay as requested by the appellee in *National Surety Corp. v. Williams*<sup>15</sup> saying that "upon examining the record we are convinced the appeal was taken in *good faith*." (Italics added)

One reason for denying recovery for the appellee in *Southwestern Gas & Elec. Co. v. Lain*<sup>16</sup> was the submission of a brief by the appellant that was 139 pages long which was said to be one of several "indications of *good faith*" in taking the appeal. (Italics added)

<sup>12</sup> "In any case where an appeal has delayed proceedings on a judgment appealed from and shall appear to have been taken merely for delay, damages not exceeding 10 per cent of the amount of the judgment, in addition to interest, may be awarded and added to the judgment." 8th CIR. R. 21.

<sup>13</sup> 182 F.2d 752 (8th Cir. 1950).

<sup>14</sup> 234 F.2d 821 (5th Cir. 1956).

<sup>15</sup> 110 F.2d 873 (8th Cir. 1940).

<sup>16</sup> 139 F.2d 142 (5th Cir. 1944).

Most courts are very reluctant to invoke the rule.<sup>17</sup> The court in *Mason v. Summer Lake Irrigation Dist.*<sup>18</sup> said the appeal could have warranted assessment of damages for delay, but the court would not do so since it had not assessed damages for delay in the past. The court did give warning that it would not hesitate to invoke the rule in the future, however.<sup>19</sup>

If there is a shield which might protect the appellant in cases in which courts might question the motives and sincerity of the appeal, the armor is composed of earnestness of argument<sup>20</sup> and vigorous and prompt prosecution of the appeal.<sup>21</sup>

Earnestness and vigorous prosecution should not be translated into zeal on the part of counsel solely to win a case. In *Massachusetts Bonding & Insurance Co. v. Feutz*,<sup>22</sup> the court awarded damages for delay saying that the appellees ought not to be required to pay expenses attributable to the excessive zeal of counsel for the appellant.

The reluctance of the courts to invoke the rule does indicate, however, that sincerity and hard work on the part of counsel as manifested in his oral argument and briefs will preclude any award of damages for delay.

*Sam Jensen '61*