

ARKANSAS & LOUISIANA RAILWAY COMPANY *v.* LUCK.

Opinion delivered June 22, 1908.

APPEAL—COSTS—LIABILITY OF NEXT FRIEND.—One who prosecutes an action at law as next friend of an infant plaintiff becomes liable for the costs of the appeal, under Kirby's Digest, § 6022, if a judgment in favor of such infant is reversed on appeal.

Appeal from Howard Circuit Court; *James S. Steel*, Judge; reversed in part.

Mehaffy & Williams, for appellant.

Sain & Sain, and *T. D. Crawford*, for appellees.

PER CURIAM. B. D. Luck brought suit in his own behalf and as next friend of Rose Lee Custer, Robert Custer and Mamie Custer. The suit was to recover damages from the railroad company, which operates a line of telegraph, for failure to deliver a telegram, through which failure they suffered mental anguish. B. D. Luck recovered \$50 for himself and \$50 as next friend for each of the parties named in the complaint, and the railway company appealed.

It is stipulated here that the judgment shall be affirmed as to B. D. Luck and "reversed and dismissed as to the three minors, to-wit: Rose Lee Custer, Bob Custer and Mamie Custer, and the question of adjudicating the costs of this court shall be left to the court." The evidence does not show that these three parties are minors, but shows that one is, one is not, and probably the other was when the suit was brought, but she was not when the judgment was taken. But there was no change in the complaint, and the cause proceeded to judgment as if all of the plaintiffs except B. D. Luck were minors.

This stipulation amounts to a confession of error as to the judgment recovered in behalf of said three parties other than B. D. Luck, and the sole question is, how shall the judgment of this court be as to the costs?

B. D. Luck is entitled to recover his costs as plaintiff against the railroad company; but the railroad company is entitled to recover its costs against B. D. Luck as next friend under section 6022 of Kirby's Digest; for unquestionably one of these parties was a minor, and that would render him liable for the costs; and as there are no separable costs incurred on this appeal, the

question of apportioning costs between him and the other appellees does not arise. The railroad company is also entitled to a judgment against Mamie Custer, who the evidence shows was an adult when the suit was brought, and against Rose Lee Custer, who the evidence shows was an adult before the judgment was rendered.

The costs of the circuit court are not involved in this matter, and the costs of this court will be adjudged in favor of B. D. Luck on his appeal, and against B. D. Luck because of said statute and against Mamie Custer and Rose Lee Custer as adults prosecuting an appeal which is reversed.
