

1940

Jesse Smith and Ella May Smith v. Arrowhead  
Freight Lines Limited; Joseph E. Nelson and Mary  
Jane Nelson v. Arrowhead Freight Lines Limited :  
Brief of Appellants

Utah Supreme Court

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Judd, Ray, Quinney and Nebeker; Attorneys for Respondent;

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#### Recommended Citation

Brief of Appellant, *Smith v. Arrowhead Freight Lines and Nelson v. Arrowhead Freight Lines*, No. 6213 (Utah Supreme Court, 1940).  
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**JESSE SMITH and ELLA MAY  
SMITH, his wife,**

**Plaintiffs and Appellants,**

**-vs-**

**No. 6213**

**ARROWHEAD FREIGHT LINES  
LIMITED, a corporation,**

**Defendant and Respondent,**

**----**

**JOSEPH E. NELSON and MARY  
JANE NELSON, his wife,**

**Plaintiffs and Appellants,**

**-vs-**

**No. 6212**

**ARROWHEAD FREIGHT LINES  
LIMITED, a corporation,**

**Defendant and Respondent,**

**APPELLANTS' BRIEF**

**APPEAL FROM THE FOURTH JUDICIAL DISTRICT  
COURT IN AND FOR UTAH COUNTY, STATE OF UTAH**

**HON. ABE W. TURNER, Presiding**

**FILED**

**FEB 8 1946**  
**Attorneys for Plaintiffs  
and Appellants**

**CLERK SUPREME COURT UTAH**

**JUDD, RAY, QUINNEY & NEBEKER,**

**Attorneys for Defendant and  
Respondent**

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It Was Prejudicial Error For the Trial Court to Refuse, Upon Request, to Instruct the Jury as to the Law Applicable to the Facts in These Cases in the Event the Jury Should Find that the Ford Coupe was Overpowered Contrary to the Provisions of Compiled Laws of Feb. 1933, 57-7-30..... 15

The Trial Court Erred in Refusing to Instruct the Jury as Requested by Plaintiffs Touching the Degree of Care Required of the Smith Girl and the Nelson Boy..... 22

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### Statutes and Cases Cited

- . S. U. 1933, 104-30-4
  - . S. U. 1933, 104-24-13, Subsection 4.
  - . S. U. 1933, 57-7-30
  - . S. U. 1933, 104-44-14
  - Blackfield Cyclopaedia of Automobile Law and Practice, Vol. 4, pp 445, Sec. 2633.
- 70 C. J. 74




A. Heston vs. Johnstone, 101 N. W. 2d; 196 S.W.  
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1. 111.

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174 P. 471.

1. Personnel      2. Training      3. Equipment      4. Logistics      5. Medical      6. Communications      7. Transportation      8. Food      9. Water      10. Sanitation      11. Security      12. Weather      13. Geography      14. History      15. Culture      16. Language      17. Religion      18. Politics      19. Economy      20. Society      21. Environment      22. Climate      23. Vegetation      24. Wildlife      25. Minerals      26. Energy      27. Transportation      28. Communication      29. Health      30. Education      31. Government      32. Law      33. Justice      34. Police      35. Fire      36. Emergency      37. Disaster      38. Recovery      39. Reconstruction      40. Development      41. Planning      42. Design      43. Construction      44. Maintenance      45. Operation      46. Management      47. Leadership      48. Teamwork      49. Coordination      50. Collaboration      51. Partnership      52. Cooperation      53. Support      54. Assistance      55. Help      56. Aid      57. Relief      58. Rescue      59. Salvage      60. Recovery      61. Restoration      62. Revival      63. Renewal      64. Rejuvenation      65. Regeneration      66. Reconstruction      67. Rebuilding      68. Recreation      69. Recreation      70. Recreation      71. Recreation      72. Recreation      73. Recreation      74. Recreation      75. Recreation      76. Recreation      77. Recreation      78. Recreation      79. Recreation      80. Recreation      81. Recreation      82. Recreation      83. Recreation      84. Recreation      85. Recreation      86. Recreation      87. Recreation      88. Recreation      89. Recreation      90. Recreation      91. Recreation      92. Recreation      93. Recreation      94. Recreation      95. Recreation      96. Recreation      97. Recreation      98. Recreation      99. Recreation      100. Recreation

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App. 581.

Liberty Bldg. 7th St. and 1st St. N. W. Wash. D. C. 20004

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147.

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103.

F. B. Barrett and Co. vs. Ford, S. R. 700;  
148 Va. 874.

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JESSE SMITH and ELLA  
MAY SMITH, his wife,

Plaintiffs and Appellants.

-vs-

No. 6213

ARMOURHEAD FREIGHT LINES  
LIMITED, a corporation,

Defendant and Respondent.

---

JOSEPH E. NELSON and MARY  
JANE NELSON, his wife,

Plaintiffs and Appellants.

-vs-

No. 6212

ARMOURHEAD FREIGHT LINES  
LIMITED, a corporation,

Defendant and Respondent.

APPELLANTS' BRIEF

STATEMENT OF CASE

On November 17, 1937, a collision occurred between a Ford Coupe owned and operated by one Vaughn Sheffield and a Truck owned by the Defendant Armourhead Freight Lines and operated by its servant, Alvin A. Samuels. The place of



the collision was between Lombard and Spring Lake on U. S. Highway No. 91 in Utah County, Utah. Emma Smith, age sixteen years, the daughter of Plaintiff Jesse Smith and Ella May Smith, was killed in the collision. Paul L. Nelson, age twenty years, the son of Plaintiff Joseph K. Nelson and Mary Jane Nelson, was also killed in the collision. Jesse Smith and Ella May Smith brought an action for the death of their daughter Emma against the defendant Arrowhead Freight Lines. Plaintiff Joseph K. Nelson and Mary Jane Nelson also brought an action for the death of their minor son Paul against the defendant Arrowhead Freight Lines. In each case plaintiffs claimed that the defendant at and just prior to the collision was negligent in that its servant Alvin A. Samuelson was driving the truck at an excessive rate of speed on the wrong side of the highway. In their answer in each case the defendant denied any negligence on its part and alleged that the driver of the Ford coupe in which Emma Smith and

collision was driven at an excessive rate of speed on the wrong side of the highway and that Benson Smith and Paul J. Nelson were guilty of contributory negligence in taking up a dangerous position in the Ford coupe, and in failing and neglecting to keep a proper or any lookout.

The two cases were consolidated for trial. Thus the evidence touching the question of whether the defendant was or was not liable is the same in both cases. The jury found the issues in each case in favor of the defendant and against plaintiffs, no cause of action, and judgment was entered accordingly. Plaintiffs in each case prosecute this appeal from the judgment thus entered.

#### APPELLANTS' ASSIGNMENTS OF ERROR

The appellants in each case have assigned errors which are substantially the same, and present identical questions of law. The following are the assignments of error in the Smith case:

1. The refusal of the trial court to include in its instructions to the jury the following



**requested instruction:**

"You are instructed, members of the jury, that the defendant has alleged that Emma Smith was guilty of contributory negligence. The burden is on the defendant to establish by a preponderance of the evidence that Emma Smith was guilty of contributory negligence. That is, negligence which directly contributed to her death. In this connection you are instructed that if the fact that five persons were riding in the Ford coupe at the time of the collision did not directly cause or directly contribute to the collision in which Emma Smith was killed, then, and in that case, the mere fact that Emma Smith was riding in a Ford coupe with four other persons would not defeat any right that Plaintiff Jesse Smith and Ella May Smith may have to recover in this action." J. R. 36, App. 181.

II. The refusal of the trial court to include in its instructions to the jury the following requested instruction:

"You are instructed, members of the jury, that contributory negligence is the want of ordinary care and prudence on the part of a person injured, contributing directly and proximately to the injury complained of. In this connection you are instructed that Emma Smith was required to exercise only that degree of care and caution which persons of like age, celerity and experience might be reasonably expected to naturally and ordinarily use in the same and under like circumstances." J. R. 37, App. 181.

III. The trial court erred in refusing to grant Plaintiff's motion to strike defendant's

IV. The trial court erred in refusing to apportion the costs so that only one-half thereof be taxed against the plaintiffs in this action.

No useful purpose can be served by setting out in this brief the assignments of error in the Wilson case, because identically the same questions are presented by such assignments.

QUESTIONS PRESENTED FOR DETERMINATION

The following questions are presented for determination in each of the cases brought here for review:

-I-

The trial court having instructed the jury "that it shall be unlawful for any passenger in any automobile to ride in such position as to interfere with the driver's view ahead or to the sides, or to interfere with the driver's control over the driving mechanism of the automobile" (Instruction 7, (Ex. 16), was it error for the court to refuse to instruct the jury "that if the fact that five persons were riding in the Ford coupe at the time of the collision did not directly cause or directly contribute to the

collision in which Lemons Smith (in the one case) and Paul L. Nelson in the other case) was killed, and in that case, the mere fact that Lemons Smith (in the one case and Paul L. Nelson in the other case) was riding in a Ford coupe with four other persons would not defeat any right that Plaintiffs (Jesse Smith and Ella May Smith in the one case and Joseph F. Nelson and Mary Jane Nelson in the other case) may have to recover in this case.

In light of the fact that Lemons Smith was sixteen years of age and Paul L. Nelson was twenty years of age at the time they were killed, was it error for the trial court upon request of plaintiffs in each case to refuse to instruct the jury that the degree of care required of each minor was "to exercise only that degree of care and caution which persons of like age, capacity and experience might be reasonably expected to naturally and ordinarily use in the same and under like circumstances."



-III-

Should a cost bill which is served upon the attorney for the plaintiffs on the fifth day after verdict and entry of judgment and filed on the sixth day thereafter be stricken upon being attacked by plaintiffs on the ground that it was not filed within time.

-IV-

When two cases involving substantially the same facts are, upon stipulation of counsel, consolidated and tried together and a verdict rendered for defendant in each case, is the prevailing defendant entitled to a judgment for all of his costs in each case against the plaintiffs in each case.

ASSIGNMENTS

It will be noted from what we have said that by two of the assignments of error in each case Plaintiff seeks reversal of the judgments because of the failure of the trial court to include in its instructions to the jury two of plaintiffs' requests for instructions. By the other two assignments plaintiffs attack the

ruling of the court upon the matter of costs. We shall discuss the questions presented for determination in the order in which they are above stated. Before beginning our argument touching the refusal of the court to give the requested instructions, we shall briefly outline the evidence so that the court may be in a better position to determine whether or not the refusal of the trial court to give the requested instructions was prejudicial error. The following facts are established without any conflict in the evidence: On the night of November 17, 1937 Vaughn Sheffield left Santaquin with the intention of going to Payson. Upon leaving Santaquin four young people besides himself got into his one-seater Ford coupe. The other people who got into the car were Alva Howell, who sat on the seat to the right of Sheffield, she drove the car. To the right of Alva Howell on the seat sat Donald E. Simmons. On the lap of Alva Howell sat Eugene Smith, and on the lap of Simmons sat Paul C. Nelson. The road leading from Santaquin to Payson goes in an easterly and northerly direction.



sion, and had a strip of cement pavement eighteen feet wide. At a point some three or four hundred feet south of where the collision occurred the road in coming from Santaquin toward Payson turns from an Easterly to a Northerly direction. The road where the accident occurred has an eighteen foot strip of pavement. On each side of the strip of pavement was a gravelled shoulder about four and one-half feet wide. On the outside of each shoulder the road sloped downward on a slope of one and one-half to one. On the East side the slope went down at places three feet, but the average is two and one-half feet. On the West the fall was about two feet downward and at a distance of sixteen feet from the West side of the shoulder the ground was five feet below the surface of the road. Truss. 50, 52, lbs. 24 and 25. On the evening of the night of the accident Alvin A. Samuelson left Salt Lake City on his way to Los Angeles driving a G.M.C. truck for the defendant. The truck weighed nine thousand pounds. It was loaded in the front end with freight weighing four thousand pounds and a

house in the rear weighing about eleven hundred pounds. Trans. 89, Abs. 99. After the collision in which Vaughn Sheffield, Lawrence Smith and Paul L. Nelson were killed, the truck left the highway on the West side and stopped so that the rear end of the truck was about sixteen feet west of the highway. Trans. 186, Abs. 49. The truck stood at an angle of about forty-five degrees from the course of the highway. The marks left by the wheels of the truck as it left the highway showed that the rear wheels, consisting of dual rollers and dual driving wheels, followed along the marks made by the front wheels. Trans. 4, Abs. 231. Trans. 143, 144, Abs. 33; Trans. 202, Abs. 60; Trans 270, Abs. 62; Trans. 343, 400. Trans. 309 to 311, Abs. 72; Trans. 123 to 125, Abs. 33-34. The Ford coupe was just off the shoulder of the highway on the West. The base of the truck was about thirteen feet two inches the distance from the front wheels to the collision was about seventeen feet four inches. Trans. 103-104, Abs. 41. There was a direct conflict in the evidence as to which side of the highway

the truck and the Ford were being driven on at the time of the collision. There were only two witnesses who testified concerning that question. Alvin A. Samuelson testified that at the time of the collision he was driving the truck as far as the west side of the highway as it could be safely driven and that the Ford darted from the west side of the highway into the truck. Trans. 66, Abs. 65; Donald E. Sierens, one of the occupants of the Ford coupe, testified that at or just before the collision the truck was three feet over the yellow line which extended along the middle of the pavement. Trans. 20, Abs. 17. A great number of witnesses testified to marks on the highway tending to show where on the highway the collision occurred. Mr. Hugo Price testified as to an experiment made with a truck similar to the truck which was in the collision. His testimony is to the effect that in light of the disputed evidence that the rear wheels followed in the marks made by the front wheels as they left the highway, the collision must have occurred on the west side of the highway. In



For view of the questions presented for review these appeals, no useful purpose will be served by a review of the evidence offered at the trial except to call the court's attention to the fact that there was a direct conflict in the evidence touching the place upon the highway where the accident occurred. While each might be said in support of the view that all of the evidence bearing to the effect that the rear wheels of the truck as they left the highway followed the curve made by its front wheels, the collision could have possibly have occurred on the West side of the highway, as contended for by the defendant; that the evidence of defendant's witnesses touching the course the truck took and the marks claimed to have been made on the highway by the wheels of the truck after the collision, are so at variance with the uncontradicted evidence as to the position of the truck after the accident and the marks made by it as it left the highway, as to render it impossible that the wheels of the truck made the marks on the cement pavement concerning which defendant's witnesses testified.

in considerable detail and at great length. It is a rule of universal application that testimony which is contrary to natural law must as a matter of law be disregarded. Defendant's theory at trial was that Mr. Samuelson was, at and just prior to the collision, driving defendant's truck as near the West side of the highway as it could be safely driven. That after the collision the truck proceeded in its course for a distance of eighteen to twenty-four feet with the left front wheel locked and then suddenly without any apparent cause turned to the right at an angle of about forty-five degrees off the highway, and notwithstanding the base of the truck was thirteen feet two inches, the rear wheels went off the shoulder of the highway at the same point as did the front wheels. It is claimed that the truck performed these maneuvers without any side skidding of its wheels. See testimony of defendant's star witness, Leuben Christensen, and the map which he drew and which was received in evidence. Trans. beginning on page 184 and 235, 243-247, and defendant's Exhibit 4. Do not



contend that the verdict, if any, that should be  
 given the testimony of defendant's witnesses in  
 before this court for review, but we do most ex-  
 pressly contend that in the light of such evi-  
 dence the court below committed prejudicial error in  
 refusing to give plaintiff's requested instruc-  
 tions touching the necessity of the jury finding  
 that any overreaching of the Ford coupe must be  
 caused or contributed to the accident, before a  
 such overreaching can be found to preclude plain-  
 tiff's from a recovery. Before proceeding with  
 our discussion touching the refusal of the court  
 to give plaintiff's requested instructions, an  
 explanation should probably be made as to why  
 there are two transcripts in the record which is  
 here on these appeals. The matter of the two  
 transcripts was prepared at the request of plain-  
 tiff and was by the plaintiff prepared as a  
 bill of exceptions. It was and is plaintiff's  
 position that in light of the fact that plaintiff  
 on these appeals intended to rely solely on the  
 refusal of the court below to give its requested  
 instructions and its orders touching costs, there



division 4. Either party may, before the court has instructed the jury, ask special instruction and the court must either give such instruction as requested or refuse to do so, or give the instructions with modifications.

It will be noted that the court below in its instructions No. 7, Abs. 36 said that it was "unlawful for the driver of any vehicle to drive the same when such vehicle is so loaded, or when there are in the front seat of such vehicle, an number of persons as to obstruct the view of the driver to the front or sides, or to interfere with the driver's control over the mechanism of the vehicle. It is further provided by law that it shall be unlawful for any passenger in any automobile to ride in such position as to interfere with the driver's view ahead or to the sides, or to interfere with the driver's control over the driving mechanism of the automobile." The court then proceeds to instruct the jury touching the question of whether it was negligence for Eugene Smith and Paul L. Nelson to become a passenger in the Ford coupe, and whether



or not such negligence contributed to the collision, etc. Nowhere in the instructions did the trial court inform the jury as to what effect unlawful acts on the part of Lesons Smith or Paul L. Nelson in the particulars indicated in the instructions would have upon the rights of the plaintiffs to recover in these actions. It may well be that the jury believed that if Lesons Smith or Paul L. Nelson were guilty of obstructing the view of the driver of the Ford in front or to either side, or interfered with the driver's control over the mechanism of the Ford, then the plaintiffs are precluded from recovery without regard to whether their presence in the Ford in any sense contributed to the collision. Some of the adjudicated cases tend to support such view. The great weight of authority, including this court, are however to the effect that the mere fact that one may be doing an act condemned by law does not preclude a recovery in the absence of a finding by the fact finding tribunal that the prohibited act caused or contributed to the injury complained of.

Blackfield Cyclopaedia of Automobile Law and Practice, Vol. 4, page 445, Sec. 2623 and the following cases there cited:

Follett vs. Arden, 5 P. (2d) 51; 115 Cal. App. 12

Looker vs. Schule, 250 P. 1027; 45 Idaho 33.

Price vs. Illinois Bell Telephone Co. 229 Ill. App. 321.

Stinson vs. Alford, 180 N. E. 298; 272 Mass. 3

Glessen vs. Love, 206 N. E. 199; 232 Mich. 300.

Arctosted vs. Lounsbury, 151 N. E. 542; 129 Minn 34 N. E. A. 1313, 222.

Erickson v. Duluth & L. E. Co., 25 N. E. 322, 37 Minn. 23.

Glicker vs. Saccumba, 152 N. E. 131; 42 Ohio App 337.

Sims vs. Eikler, 19 Ohio App. 310.

Kates vs. Davis (Civ. App.) 23 N. E. (2d) 30, Off. Comm. App. Davis v. Kates, 44 N. E. (2d) 322.

T. B. Bennett & Co. vs. Reed, 122 N. E. 700, 14 Va. 354.

Boer vs. Galtman, 4 P. (2d) 641, 125 Mich. 10

Boule vs. Leatherby, et al, 39 Utah 330, 112 P. 331.

This court has held in a case which arose before N. E. R. 1933, 37-7-30 was enacted, that the question of whether or not it was negligent for five persons to ride in a one-seated Ford coupe



was a jury question. *Balle vs. Smith*, 81 Utah 179; 17 P. (2d) 224.

It is the uniform holding of the courts that they, and not the jury, must construe and meaning of a statute. In this case the court instructed the jury that it was unlawful for a person who is a passenger in a vehicle to ride in such a position as to interfere with the view of the driver to the sides or in front or to interfere with the driver in operating the vehicle, and then leaves the jury wholly at sea as to legal results following in case the jury shall find that because of the overreaching the driver's view was obstructed or his operation of the automobile was in some degree interfered with. Under the evidence in this case it is apparent that the view of the driver of the automobile to the right was obstructed by Lemons Smith and Paul J. Nelson, who were sitting on the laps of Miss Beall and Mr. Sinsone. Did such fact preclude the parents from a recovery without regard to whether the inability of the driver of the Ford to see out of the right window has anything to

with the collision. Nothing can be found in the instructions given which sheds any light upon such question. The court did instruct on negligence but nowhere in the instructions is anything said about any relation between an unlawful act and a negligent act. It is not to be expected that a jury will conclude that because the jury was informed that negligence on the part of the Smith girl or the Nelson boy must be a contributed to the collision to defeat recovery, that necessarily follows that an act which is unlawful must likewise contribute to the injury to defeat recovery. The contrary is more likely to be the conclusion reached by the jury. The jury in these cases might well have reasoned that if it was necessary for them to find that the doing of an unlawful act must have caused or contributed to the collision to defeat the recovery, the court would have so instructed them, and the court having failed to so instruct, there was no necessity for them to be concerned with the question of whether the acts, of the Smith girl and the Nelson boy in riding in the Ford with

three other people, if found unlawful, did or a  
 not directly cause or contribute to the collision  
 in which they were killed. We are fully mindful  
 that in this case the fact that there were five  
 young people riding in the Ford coupe at the ti  
 of the collision would tend to cause the jury to  
 conclude that these young people were at fault.  
 In the light of such a state of facts there was  
 all the greater reason for the trial court to g  
 the jury a proper guide as to the necessity for  
 them to consider and determine whether or not t  
 presence of five people in the Ford coupe cause  
 or contributed to the collision. Had the trial  
 court refused to instruct the jury that any neg  
 gence on the part of the Smith girl or the Hel  
 boy which did not cause or contribute to the  
 collision would clearly have been reversible er  
 ror. By the same token the refusal of the cour  
 to instruct the jury to the effect that any un  
 lawful act on the part of the Smith girl and th  
 Helson boy not proximately causing or contribut  
 ing to the collision is reversible error. Had  
 the trial court given the requested instruction



touching the presence of five persons in the Ford coupe, it would have taken care of the law applicable, not only as to any negligent act but also as to any unlawful act that the jury may have found the Smith girl or the Nelson boy were chargeable with by riding in the Ford coupe with the

In the absence of such charge, other persons, the jury was free to speculate upon such matter, contrary to the fundamental purposes of the law requiring the judge to instruct the jury upon the law applicable to the case.

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY AS REQUESTED BY PLAINTIFFS TOUCHING THE NUMBER OF CAR PASSENGERS BY THE SMITH GIRL AND THE NELSON BOY.

In each of the cases here on appeal the plaintiffs requested the court below to instruct the jury "that Benson Smith (in the one case and Paul L. Nelson in the other case) was required to exercise only that degree of care and caution which persons of like age, capacity and experience might be reasonably expected to naturally and ordinarily use in the same and under like circumstances." The trial court refused the requested instructions and failed to instruct upon

the question of the degree of care required by minor. 1. S. 37, Trans. 351, Abs. 121. Plaintiffs excepted to the refusal of the trial court to give the requested instructions and assigned such refusal as error. Abs. 121.

This court in a number of cases has held that a minor is required to exercise only that degree of care and caution which persons of like age, activity and experience might reasonably be expected to exercise under the same or like circumstances. *Belle vs. Smith*, 51 Utah 172, 17 P.(2d) 224; *Lynn vs. Southern Pac. Co.*, 51 Utah 355; 12 P. 2d; *Montague vs. Salt Lake and U. S. Co.*, 5 Utah 362, 174 P. 371. In the *Belle vs. Smith* case the girl was fourteen years of age. In the case of *Montague vs. Salt Lake and U. S. Co.* the plaintiff, a girl, was seventeen years of age at the time of the trial. She must have been about sixteen at the time of the accident, which occurred on July 15, 1914 (See case of *Shertino vs. Salt Lake & U. S. Co.*, 52 Utah 476, which latter case grew out of the same accident and is referred to in the *Montague* case. In none of



the cases above cited was the plaintiff or else the Nelson boy. However, it would seem that the principle of law announced by this court in the cited cases is applicable to all minors, that as long as the plaintiff is a minor, the degree of care required is not measured by that of one who has reached his majority. To say as a matter of law that a boy of twenty years of age or a girl of sixteen years of age is to be held to the same degree of care as one who has reached his majority is bound to lead to confusion and uncertainty. If the court shall say that a boy of twenty is to be held to the degree of care of one who has reached his majority, why not say that a boy a number of years younger should not be held to the same degree of care. In other words, where is the line to be drawn if not at the age fixed by the law making power. Certainly the trial court should not be permitted to give or refuse to instruct the jury on the matter of the degree of care required of a minor as might suit his fancy. The degree of care required of a minor is a jury question and the court below

These cases were by stipulation of counsel consolidated for trial. Nothing was said in an stipulation as to costs. The evidence offered the trial in so far as defendant's witnesses testified was applicable alike to both cases. In their motions attacking the memorandum of costs plaintiffs in each case, in the event the motion to strike the cost bills were denied, moved to apportion the costs one-half thereof to the plaintiffs Smiths and one-half thereof to the plaintiff Malone. De. 111-113. The motions were denied. De. 112. The denial of such motion is assigned as error. De. 122. The rule in such case is discussed in 70 U. J. 74, where the case are collected. While the cases are not in entire accord, it would seem apparent that the defendant in this case was not obligated to pay double mileage and per diem to its witnesses merely because the evidence was made applicable to two cases instead of to merely one. If defendant is not so obligated it is not entitled to a judgment for costs against each set of plaintiffs. The limit of the right of defendant to a recovery is

should have submitted the same to the jury as requested by Plaintiff. Its failure so to do was prejudicial to the rights of plaintiffs.

THE TRIAL COURT WAS IN ERROR IN REFUSING TO STRIKE THE DEFENDANT'S DEMANDS FOR COSTS

Plaintiff: Both of the cases filed a motion to strike the cost bills because not filed within the time required by S. S. U. 1933, 104-44-14. Abs. 110. The motion was by the court denied. Abs. 110. The refusal to grant the motion is assigned as error. Abs. 121. The right to costs is purely a statutory right. It must be filed with the clerk within five days after the verdict. That was not done. It should have been

Owenshaw vs. Owenshaw  
Strickland, 12 P. (2d) 304; 90 Utah 9.

Boughton, et al. vs. Boston, 49 Utah 511; 163 P.

471. Chabotte vs. Collings, 78 Utah 93.

1 P. (2d) 500; 75 A. 2. 1303. The court holds in error in denying the motions to strike the cost bill because not filed within time.

ALTHOUGH THE COURT SHOULD HAVE THAT THE COST BILL SHOULD NOT HAVE BEEN STRUCK, SINCE THE COURT WAS IN ERROR IN ASSIGNING FULL COSTS AGAINST THE PLAINTIFFS BECAUSE THE COURT WAS IN ERROR IN REFUSING TO STRIKE THE DEFENDANT'S DEMANDS FOR COSTS



the amount it is obligated to pay.

Because of the errors complained of the judgments in each of these cases should be reversed and the cause remanded to the district court with directions to grant a new trial.

Respectfully submitted,

F. W. McFALLIN

ELIAS HARRIS

Attorneys for Plaintiffs  
and appellants.