

## New Jersey Court of Errors and Appeals

THEODORE KOLANKIEWICZ, BY	} On Appeal	
PETER KOLANKIEWICZ, HIS		from the
NEXT FRIEND,		Supreme
Plaintiff-Respondent,		Court.
vs.		
MARY A. BURKE,		
Defendant-Appellant.		

### BRIEF OF RESPONDENT.

#### ABSTRACT OF CASE.

The infant plaintiff was struck by the defendant's automobile while he was crossing from the south side to the north side of South Orange avenue, Newark, New Jersey, a public highway in said city, running east and west. The accident happened at the corner of Prince street and South Orange avenue, and opposite the corner of Boston street and South Orange avenue (both Prince street and Boston street terminating at South Orange avenue, the westerly line of Prince street being opposite the easterly line of Boston street).

At the time of the accident, an *eastbound* trolley car of the South Orange avenue line was discharging passengers at the southwest corner of Prince street about five feet west of the South Orange avenue cross-walk. Plaintiff walked in front of the trolley car, and had reached a point midway between the *westbound* trolley tracks when he was struck by the defendant's automobile which was proceeding *east* on South Orange avenue on the *westbound* tracks. Defendant had been following

the trolley car for some distance, and when the trolley car stopped, she turned to the left of the car, passing it by proceeding *east* on the *westbound* tracks. South Orange avenue at the point of collision was so narrow that it was impossible for an automobile to pass a trolley car to the right at a distance of four feet from the righthand running board or lowest step of said car. (Case, page 16, lines 21 to 35.)

Plaintiff offered in evidence the Traffic Ordinance of the City of Newark, Part IV, Section 4, of which provided:

“Any driver or operator of any vehicle on the street car tracks preceding or following a street car shall keep at least fifteen feet from said car, and when following a street car, shall turn off the track when the car stops, and proceed as provided for in Part II, Section 13.”

Part II, Section 13, provides:

“Every driver or operator of any vehicle following any street car when passing such street car while it is stopping to take on or discharge passengers, shall keep at least four feet from the righthand running board or lowest step of said car, shall give audible indication of approach to said car, and shall exercise due precaution not to interfere with or injure the passengers getting on or off the car; if by reason of the presence of other vehicles at the place where such car is stopped, *or by reason of the narrowness of the street*, or for any other reason, it is not possible to preserve such distance of four feet, then such driver or operator shall bring his vehicle to a full stop until the car shall have taken on or discharged its passengers, and again started.”

Objection was made to the acceptance of this ordinance in evidence on the ground that it was not relevant to the issue, and that there was no statute which authorized it or made it evidential. The Court accepted the evidence, and defendant's exception was noted as a ground of appeal.

The accident happened on January 15, 1915, before the passage of the Traffic Act of 1915 (P. L. 1915, page 285, approved April 6, 1915).

**This ground of appeal and the Court's charge relative to the effect of the ordinance (Case, page 23, line 12, to page 25, line 18), are the only points argued on this appeal. Appellant makes no claim that plaintiff was guilty of contributory negligence.**

## POINT I.

### THE ORDINANCE WAS PROPERLY ADMITTED IN EVIDENCE.

The Ordinance and By-Laws of the City of Newark as contained in the printed books of such Ordinance and By-Laws issued by the City of Newark are public laws.

P. L. 1874, page 198.

Boggs' "Newark Charter and General Laws relating to Newark," page 93.

Furthermore, defendant did not object to the method of proof, but merely to the fact that the ordinance was not material to the issue, which objection is hereafter answered.

Appellant now raises two objections to the ordinance.

- a. That there was no statute authorizing it.
- b. That it conflicts with the statute.

As to the first objection

### THE ORDINANCE WAS VALID

The ordinance in question was adopted by the Board of Street and Water Commissioners of the City of Newark, under the powers conferred upon it by the city charter, general statutes and general police powers of municipalities.

*Boggs Newark City Charter*, page 717, C. S. 1910, Vol. 1, p. 975, Sec. 12, 28 Cyc., 705.

The statute provides:

“That said board of street and water commissioners of such city shall also have the sole power, in the place and stead of any common council, board of aldermen or other corporate authority of such city to pass, alter or repeal ordinances to take effect within the said city for the following purposes. \* \* \*

“II. To regulate and control the use of streets and public places by foot passengers, vehicles, railways and engines.”

By this statute the right to control the usage of the city streets was vested in the Board of Street and Water Commissioners. That right could not be taken away from them, except by subsequent enactment.

But the appellant urges, as her second objection, that the right to limit or control the use or speed of motor vehicles was expressly taken away from municipalities by the Motor Vehicle Act, adopted in 1906 (C. S. 1910, Vol. 3, pages 34-36).

**The Board of Street and Water Commissioners still retains its power to pass such ordinances relating to traffic on the city streets, as do not conflict with the Motor Vehicle Act.**

*Wyse vs. Jersey City*, 39 Vr. (68 N. J. L.), page 127, Sup Ct., 1902.

*Passaic vs. Paterson Bill Posting Co.*, 42 Vr. (71 N. J. L.), 75, Sup. Ct., 1904.

*Morristown, etc. Auto Bus Co. vs. Madison*, 55 Vr. (85 N. J. L.), 59, Sup. Ct., 1913.

*Terron vs. Harrison*, 2 Gumm. (87 N. J. L.), 541 (Appeals, 1915), 28 Cyc., 701.

*Irwin vs. Atlantic City*, 100 Atl. Rep., 565, Sup. Ct., 1917.

In *Wyse vs. Jersey City* (*supra*), the question before the Court was whether a city could pass ordinances relative to the removal of dead bodies, a subject matter then also covered by statute. The Court held (at page 131):

“In interpreting these rules we must look at them from the standpoint of the Board of Commissioners, not as formulating a matter of legal procedure, but as making regulations, general in their character, to promote the health, comfort and convenience of a crowded city. Such a power is held to arise from authority to make police regulations, citing 1 Dill Mun. Corp. (4th Ed.), 372; *Weil vs. Ricord*, 9 C. E. Green, 169.

“We must also have regard to the rule that enactments of this character are given a reasonable construction, and to the further rule that where such enactments are made by a municipal body having jurisdiction over the subject matter every intendment and presumption will be made in favor of their validity. 17 Am. & Eng. Encyl., 264; *Road Commission vs. Harrington*, 26 Vr., 237; *Atlantic City vs. Water Co.*, 17 Stew., 427.”

In *Passaic vs. Paterson Bill Posting Co.* (*supra*), the Court construed the effect of state statutes and city ordinances relating to the erection of bill boards. At page 78, the Court held:

"I think the true rule to be extracted from the cases, and one abundantly supported by them, is that when statutes are obviously intended to provide for the public safety, and the ordinances prescribed under them are reasonable, and in compliance with their purposes, both the statutes and the ordinances are lawful and must be given due effect."

In *Morristown etc., Auto Bus Co. vs. Madison*, (*supra*), the Supreme Court discussed the effect of the Motor Vehicle Act herein referred to, and the right of a municipality to impose license fees for operating business buses. In that case Mr. Justice Swayze discussed the purpose of the act in question. At page 830 he said:

"We think the object of the Motor Vehicle Act was to secure the right of the road to that new method of travel free from interference by *conflicting* regulation of municipalities through which the motor vehicle might run, but that it was not intended to prevent municipalities from regulating the conduct of business by means of licenses in the long accustomed way."

In *Terrone vs. Harrison* (*supra*), the Court discussed the effect of subsequent legislation on statutes covering the same subject matters. It was held:

"Implied repealers are not favored in the law. When the later statute is not necessarily repugnant to the former, but, in a fair construction may be treated as cumulative, or supplementary, so that both acts may stand together, the intent to repeal is not implied from the fact that the later legislative provision differs from the earlier."

The latest adjudication on this point is that of our Supreme Court in *Irwin vs. Atlantic City*, 100 Atl., 565.

In that case a writ of *certiorari* issued to determine the validity of an ordinance of the City of Atlantic City, relating to the use of automobile jitney buses. Under the Atlantic City charter, the common council was given power to regulate the use of streets. By the act of 1916, page 283, the legislature passed an act relating to the operation of automobile buses. That act was approved March 17, 1916. In August following, Atlantic City passed an ordinance further regulating automobile buses. The validity of that ordinance was questioned by *certiorari*, it being urged that the legislature having by the 1916 act dealt with the subject matter and regulated it from the viewpoint of a new state policy, it was *ultra vires* for the municipality to add other and further restrictions.

Mr. Justice Minturn in his opinion in that suit held that the power of Atlantic City to regulate its streets and its charter was settled by numerous adjudications. These cases determined not only the legal right of the city to so legislate, but also emphasized the reasonableness of provisions of ordinances passed in pursuance of the same general powers. The Court further said:

“The act of 1916, page 283, imposed a state-wide policy of regulation upon all subordinate governing bodies in the use and regulation of this method of transportation, but it contains nothing in its provisions to indicate that it was the legislative purpose to repeal powers of regulation theretofore conceded to municipalities by their respective charters. The requirements contained in the act of 1916 were manifestly super added to the exercise of such power as the municipality may legally exercise for the best interests of reasonable, local self government in the management, conduct and regulation of municipal highways and the safety and protection of inhabitants thereon.

"In the absence of an express intent to repeal, or of a legislative intent to deal *de novo* with the entire subject, evinced by the existence of incongruous enactments, demonstrating *ex necessitate* the legislative purpose to supersede existing legislation by the latter law, a repeal by implication will not be favored.

State—Morris R. R. *vs.* Commissioners, 37 L., 288.

State *vs.* Blake, 35 L., 208; 36 L., 442.

"It was competent for the commissioners of Atlantic City to impose reasonable conditions upon the exercise of the right conferred if deemed expedient in the public interest."

The Court affirmed the ordinance.

On March 10, 1914, the Attorney-General of this State advised the Commissioner of Motor Vehicles concerning the validity of an ordinance then about to be passed by the Town of Montclair, relating to the regulations of motor vehicles in that municipality. The proposed ordinance contained clauses relative to the method by which motor vehicles should pass street cars, which clauses are almost identical with the city ordinances in this case. The Attorney-General in his opinion said:

"There is nothing in the motor vehicle act, as far as I know, which bears upon the subject matter referred to in the act, and this being so, I have no doubt that the Town of Montclair has the right to adopt an ordinance of the character suggested."

(See opinions of Attorney-General on file in Office of Department of Motor Vehicles.)

The Newark ordinance was before the Court of Errors in *Erwin, Adm. vs. Traud* (March, 1917, Term), but its validity was not even questioned. We may assume therefore, that that court regarded it as valid.

## POINT II.

**THE ORDINANCE DOES NOT CONFLICT WITH THE STATUTE. IT IS CUMULATIVE AND SUPPLEMENTAL THERETO.**

*At no place in the statute, is there found any provision for the passing of street cars by motor vehicles, under circumstances, such as arose in the case at bar, and as were provided for by Section 13 of the ordinance.*

It is true that the statute prohibits municipalities from passing ordinances limiting and restricting the "use or speed" of motor vehicles. (Sec. 22, subd. 2.) But this prohibition must be construed in connection with the remaining portions of the act. With these provisions clearly in our mind, it is fair to assert that a proper construction of this clause is that it prohibits ordinances relating to matters *covered by the statute*. The statute relates to registration and licensing of motor cars, lights, chains, speed, violations, &c. There is only one clause in the entire act, relating to the method by which motor vehicles should pass each other. That clause is Section 22, sub division 1, which requires motor vehicles to keep to the right, when meeting other motor vehicles, and when being passed by other motor vehicles. But, Section 1 of the act states that "motor vehicles" as used in the act, "includes all vehicles, propelled otherwise than by muscular power, *excepting such vehicles as run only upon rails and tracks.*" Plainly, therefore, the act has nothing to do with the method of the passing of trolley cars by motor vehicles. The act is entirely silent on this important point. There being nothing in the act concerning it, the municipality had power to legislate on the subject, and this legislation is not in any conflict with the act. That the Motor Vehicle Act of 1906 was de-

fective was recognized by the legislature, when it passed the act of 1915. That the Newark ordinance relating to the passing of trolley cars by motor vehicles, was reasonable, was recognized by the legislature by embodying it in the 1915 act. (See Part II, Section 10 of 1915 act.)

It is therefore, urged that the ordinance in question was properly enacted.

### POINT III.

#### PLAINTIFF WAS ENTITLED TO ASSUME THAT DEFENDANT WOULD OBEY THE PROVISIONS OF THE ORDINANCE.

*New Jersey Express Co. vs. Nichols*, 4 Vr. (33, N. J. L.), 434, Court of Appeals, 1867.

*Kathmeyer vs. Mehl*, 60 Atl. 40, Sup. Court, 1905. (Not reported in New Jersey Reports.)

*Pesin vs. Jugovich*, 56 Vr. (85 N. J. L.), 256, at 259; Court of Appeals, 1913.

*Pool vs. Brown*, 98 Atl., 262, Court of Appeals, 1916.

In *Pool vs. Brown* (*supra*), Mr. Justice Kalisch said (at page 263, third paragraph):

“He had a right to rely on the driver of the automobile respecting his (the appellant’s) right in the street, and that the driver would control his car accordingly, and would use reasonable care to avoid running it against the appellant.”

## POINT IV.

### DEFENDANT VIOLATED THE ORDINANCE.

The defendant had been following the trolley car for some distance. The trolley car stopped at Prince street and South Orange avenue to discharge passengers. South Orange avenue at the point of collision was so narrow that it was impossible for defendant to pass the trolley at a distance of four feet from the righthand running board or lowest step of the trolley car. She did not bring her automobile to a full stop until the car had taken in and discharged its passengers and again started, as required by ordinance. (Case, page 16, lines 27 to 34.) On the contrary, she turned to the left of the trolley and passed it by proceeding *east* on the *westbound* track, and while passing the trolley, struck the plaintiff who was crossing South Orange avenue in front of the trolley. (Case, page 15, line 33 to page 16, line 2.) The Court charged the jury (Case, page 23, line 12 to page 24, line 22) :

“At that time there was in force in the City of Newark an ordinance known as the traffic ordinance, the third section of Part 2 of which provides that a vehicle overtaking another shall pass on the left side of the overtaken vehicle, and not pull over to the right until entirely clear of it. But Part I of this same ordinance defines what a vehicle is, and excludes street railway cars, which are, therefore, not comprehended in Section 3 of Part 2 which I first read, as a vehicle which is to be passed on the left. Section 13 of Part 2 relates to street railway cars, and is as follows: ‘Every driver or operator of any vehicle following any street car, when passing such street car while it is stopping to take on or discharge passengers, shall keep at least four feet

from the righthand running board or lowest step of said car.' While this does not say in the plainest language, perhaps, that street railway cars must be passed on the right, it is quite clear that that is what is meant by what follows, which is, 'If by reason of the presence of other vehicles at the place where such car is stopping, or by reason of the narrowness of the street, or for any other reason, it is not possible to preserve such distance of four feet, then such driver or operator shall bring his vehicle to a full stop until the car shall have taken on or discharged its passengers, and again started.' That this section means that vehicles which are following trolley cars must pass to the right, is further corroborated by Section 4 of Part 4, which is, 'Any driver or operator of any vehicle on the street car tracks, preceding or following a street car, shall keep at least fifteen feet from said car, and when following a street car shall turn off the track when the car stops, and proceed as provided for in Part 2 of Section 13,' which is the one I last read. While Section 13 of Part 2 does not use the word 'shall,' this section does use it, and says, 'Shall turn off the track when the car stops, and proceed as provided for in Section 13 of Part 2'; and Section 13 of Part 2 provides that they shall proceed to the right of the car when there is room for them to do so, leaving four feet between the running board or step of the car; and when they cannot do that they must stop until the trolley car proceeds, and then the vehicle may proceed."

Respondent agrees with the Court's construction of the ordinance. This construction required defendant to stop her automobile until the trolley car had again started. This she did not do, and hence violated the provisions of the ordinance.

## POINT V.

## DEFENDANT'S VIOLATION OF THE ORDINANCE WAS EVIDENCE OF NEGLIGENCE.

It has been repeatedly held in this and in other jurisdictions, that the failure to comply with the terms of a statute or ordinance passed for the purpose of safeguarding the public, is evidence of negligence.

The failure to comply with the terms of a tenement house act relating to the lighting of hallways and the building of fire escapes has been held in this jurisdiction to be evidence of negligence in actions brought to recover damages resulting from the failure to comply with the provisions of this act.

*Cittandino vs. Shackter*, 54 Vr. (83 N. J. L.), 593, Court of Appeals, 1912.

*Pesin vs. Jugovich (Supra)*.

*Kargman vs. Carlo*, 56 Vr. (85 N. J. L.), 632, Court of Appeals, 1913.

*Evers vs. Davis*, 1 Gum. (86 N. J. L.) 196, Court of Appeals, 1913.

*State vs. Schuppe*, 96 Atl., 659, Court of Appeals, 1916.

To the same general effect are:

*Beaver vs. Mason-Ehrman Co.*, 143 P., 1000 (Ore., 1914).

*Connell vs. Harris*, 138 P., 149 (Cal., 1913).

No lights on rear of wagon.

*Hill vs. Condon*, 70 S. 208 (Ala., 1915).

Allowing horse to remain unhitched in public street.

*Linder vs. Southern R. R.*, 66 S. E., 995 (S. Car., 1915).

Allowing train to stand on tracks in middle of public street and discharge steam.

*Foley vs. Northrup*, 105 S. W., 229 (Tex., 1907).

Exceeding automobile speed limit.

*Boume vs. Whitman*, 95 N. E., 405 (Mass., 1911).

Violating ordinance relating to use of road.

*Campbell vs. Walker*, 78 Atl., 601 (Del., 1910).

Violating statute relating to use of road.

*Sharkey vs. Skelton*, 77 Atl., 950 (Conn., 1910).

Violation of statute relating to use of road.

*United States Brewing Co. vs. Stoltenberg*, 71 N. E., 1081 (Ill., 1904).

Exceeding speed limit.

*Harris vs. Johnson*, 161 Pac., 1155 (Cal., 1916).

A case in which accident arose in same manner as the case at bar.

In *Evers vs. Daris* (*Supra*), Mr. Justice Garrison speaking for the Court of Appeals, said (at page 204) :

“Upon common law principles, therefore, when the legislature has by public statute established a certain standard of conduct in order to prevent a danger that it foresaw, it has in this regard forewarned the ‘ordinary prudent man’ and through him the defendant in a civil action, whose conduct must always coincide with this common law criterion. Such danger, therefore, does not have to be proved by the plaintiff, since there is no longer room for a reasonable difference of opinion, for by his breach of the statute the defendant, through his common law conscience, is charged with

knowledge that if injury ensues, he will have acted at his peril."

"The court therefore should so instruct the jury, whether such instruction be couched in the terms of the defendant's duty to perform or of his culpability for neglect, or of his liability for the result of his action or inaction, as the case may be; and thus upon common law principles the plaintiff in an action of negligence obtains the benefit of the statute if he be one of the class for whose protection it was enacted and the breach of such statute was the efficient cause of the injury of which he complains."

But the appellant now urges that the plaintiff-respondent was not one of the class for whose protection the ordinance was adopted, and therefore cannot claim that upon its breach he can obtain its benefit.

But to arrive at this conclusion, the appellant begins with the major premise that the ordinance was undoubtedly *intended to protect passengers getting on or off street cars as passengers*, and that, therefore, the legal duty established by the ordinance is owing *only to a person who is getting on or off a street car*.

But what is there in the ordinance which justifies any such conclusion? The charter of the City of Newark, as already quoted, authorizes the Board of Street and Water Commissioners "*to regulate and control the use of streets and public places by foot passengers, vehicles, railways and engines.*" In adopting the ordinance, pursuant to this power, the Board exercised a general police power for the safety of the general public. There is absolutely nothing in the ordinance to indicate that by its adoption the Board had in mind *only* the safety of passengers getting on or off street cars. The most

that might be said is that the safety of this class of the public was its primary concern; but surely there is nothing to indicate that it intended to deprive the rest of the traveling public, while using the streets of the city, of its beneficial operation.

In the case now before the Court, the appellant-respondent stepped in front of a trolley car which had come to a full stop, and he had a right to rely upon the belief, that the ordinance would not be violated by the defendant-appellant, by passing the car to the left. Was there not just as much justification for such a reliance as a passenger, while either getting on or off a trolley car would have, that a motor vehicle approaching from the rear would come to a full stop, rather than attempt to pass such a car on the right, in defiance of the ordinance and of the rights of such a passenger?

Moreover, it might very well be, and it frequently happens, that a person alighting from a trolley car by the front door would proceed immediately in front of the trolley car to reach the other side of the street. If such a person were injured by a passing automobile, while such passenger was in the act of getting off the car, appellant would concede that a case of negligence had been established; yet if that same person a moment later were to re-receive his injuries because he undertook to cross the street in front of the standing car, receiving his injuries from an automobile passing the trolley car on the left in violation of the ordinance, that then, as to him, the negligence had not been established. *The absurdity of such a conclusion must make it apparent that the ordinance was adopted not merely for the benefit of trolley car passengers, but for the benefit of the public generally while in the lawful use of the city streets.*

There is therefore no weight to appellant's contention that the ordinance was intended to protect persons getting on or off street cars alone. Failure

on the part of appellant to observe traffic regulations was as has been shown, evidence of neglect.

A pedestrian crossing the street under the circumstances of the case at bar, had the right to assume that the auto driver would obey the ordinance, in view of the fact that she was about to pass a trolley car which was discharging passengers. Her failure to stop was evidence of negligence, and inasmuch as the pedestrian was hurt, he is entitled to take advantage of defendant's neglect.

The fact that the ordinance provides a penalty for its violation (Case, page 35, lines 11 to 20), does not affect the foregoing conclusion.

In *Evers vs. Davis (Supra)*, the suit was brought for damages for death attributable to the violation of the Tenement House Act relating to the construction of fire escapes. The act provides a penalty for its violation, and no other remedy or right of action was given by the statute. The court held that the statute established a standard of care, and failure to meet the requirements of the statute was evidence of negligence.

#### POINT VI.

**THERE BEING EVIDENCE OF NEGLIGENCE, THE COURT WAS CORRECT IN DENYING MOTIONS FOR NON-SUIT AND DIRECTION OF VERDICT, AND THE CASE WAS PROPERLY SUBMITTED TO THE JURY.**

*Bennett vs. Busch*, 46 Vr. (57 N. J. L.), 240, Sup. Court, 1907.

*Spargo vs. Central R. R.*, 55 Vr. (84 N. J. L.), 251, Court of Appeals, 1912.

*Rabinowitz vs. Hawthorne*, 98 Atl., 315, Court of Appeals, 1916.

*Pool vs. Brown, Supra.*

## POINT VII.

WHERE THERE IS CONFLICTING TESTIMONY ON BOTH SIDES, IN REGARD TO A DISPUTED FACT, IT IS A PROPER QUESTION FOR THE DECISION OF THE JURY AND THE COURT WILL NOT DISTURB THEIR VERDICT.

*Bank vs. King*, 2 Green (14 N. J. L.), 45, Sup. Court, 1833.

*Knickerbocker Ice Co. vs. Anderson*, 2 Vr. (31 N. J. L.), 333, Sup. Court, 1865.

*Consolidated Traction Co. vs. Reeves*, 29 Vr. (58 N. J. L.), 573, Sup. Court, 1896.

*Bennett vs. Busch*, *Supra*.

*Steterstorn vs. Dietrich Importing Co.*, 49 Vr. (78 N. J. L.), 163, Sup. Court, 1909.

*Garret vs. Driver-Harris Wire Co.*, 41 Vr. (70 N. J. L.), 382, Sup. Court, 1904.

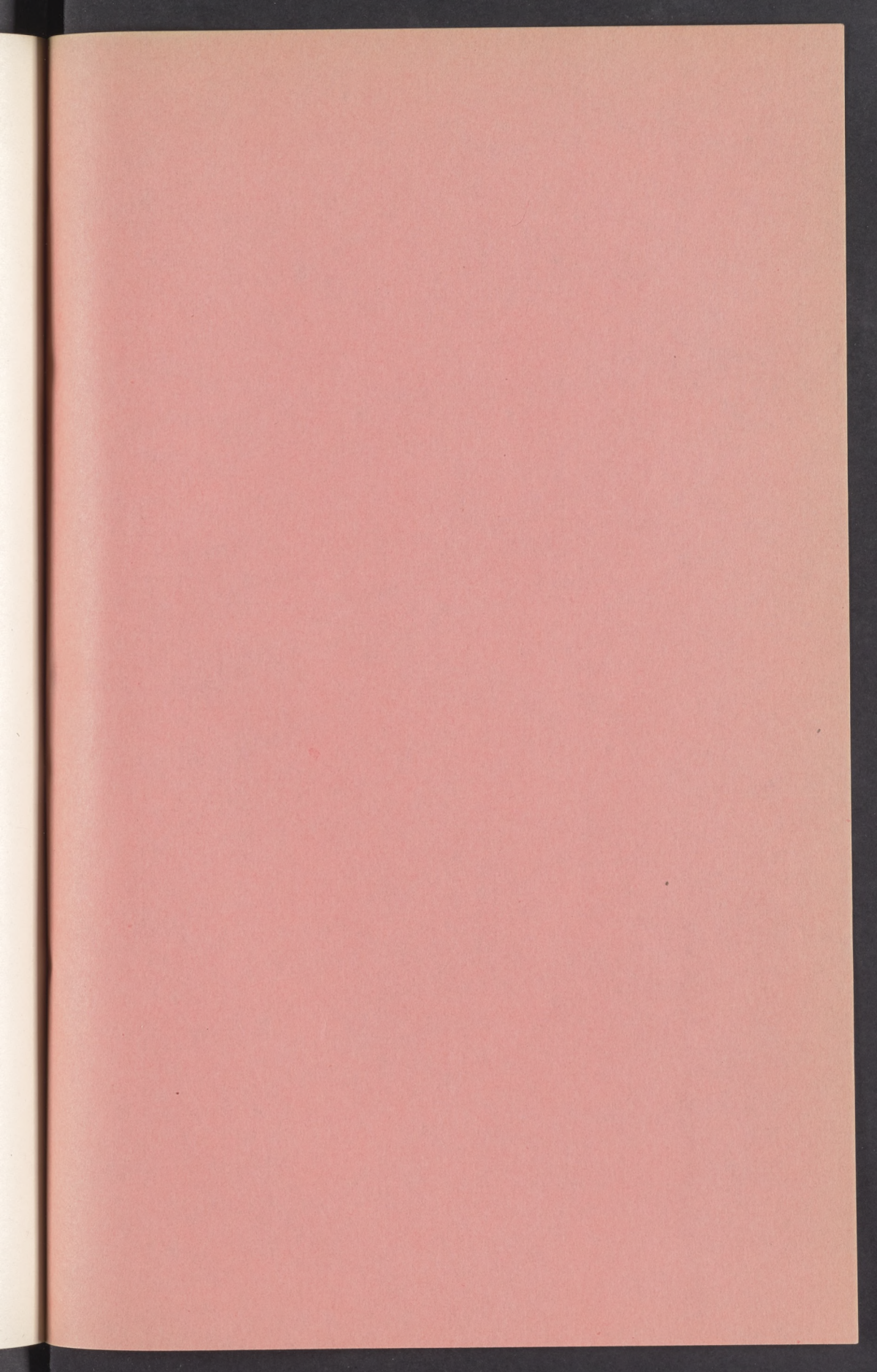
*Spargo vs. Central R. R.*, *Supra*.

*Rabinowitz vs. Hawthorne*, *Supra*.

*Pool vs. Brown*, *Supra*.

We submit that the judgment of the court below should be affirmed.

STEIN, STEIN & HANNOCH,  
*Attorneys of Plaintiff-Respondent.*



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