INDEX

SUMMONS.

ATLANTIC COUNTY: *ss.*

THE STATE OF NEW JERSEY TO COMMONWEALTH CASUALTY COMPANY, A CORPORATION OF THE STATE OF PENNSYLVANIA:

(Seal)

You are summoned to answer the annexed complaint of Ida Zelber and Harry Zelber in an action at law in the Atlantic County Circuit Court. And take notice that unless you file your answer to said complaint with the Clerk of the Atlantic County Circuit Court, at Mays Landing, within twenty days after service upon you of this writ and the annexed complaint, plaintiffs may proceed in the suit and judgment may be entered against you.

Witness W. FRANK SOOY, Judge of the Atlantic County Circuit Court at Mays Landing, this twenty-fifth day of February, 1929.

WILLIAM A. BLAIR,
Clerk.

BENJAMIN AUERBACH,
PAUL M. SALSBURG,
Attorneys.

COMPLAINT.

ATLANTIC COUNTY CIRCUIT COURT.

IDA ZELBER and HARRY ZELBER,
Plaintiffs,
v.
THE COMMONWEALTH CASUALTY COMPANY, a corporation of the State of Pennsylvania,
Defendant.

Action at Law.
Complaint.

Plaintiffs, residing in the City of Philadelphia and State of Pennsylvania, say that:

1. On May 16th, 1928, defendant was, and still is, a corporation duly incorporated under the laws of the State of Pennsylvania with power to contract to insure persons against loss from the liability imposed by law growing out of the operation of motor vehicles and duly registered and authorized to transact business in the State of New Jersey.

2. On that day, in consideration of the sum of One hundred fifty dollars ($150.00) to it paid, it executed to one, Bernard Coplin, its policy or contract of insurance numbered AB68193, thereby agreeing to insure him against loss from liability

imposed by law for damages on account of bodily injuries suffered by any person as the result of an accident occurring by reason of the ownership, maintenance or use of the auto bus described therein upon the public streets of the City of Atlantic City, New Jersey, a copy of which is annexed hereto and made a part hereof.

3. The policy or contract of insurance referred to in paragraph 2 hereof also contains the following provision:

> "This policy is issued to be filed with the chief fiscal officer of the City of Atlantic City, N. J., under the provisions of 'An Act concerning auto buses commonly called jitneys, and their operation in cities, approved March 17, 1916, constituting chapter 136 of the Session Laws of New Jersey of the year 1916, and amendments thereof and Acts supplementary thereto, and said Commonwealth Casualty Company hereby assumes any and all liability imposed by the aforesaid Act and its amendments and supplements upon the above named insured, and upon the said company by reason of the issuance of the policy to said Bernard Coplin under the requirements of the aforesaid Act."

4. On that day said Bernard Coplin owned and operated a certain motor vehicle, commonly called a "jitney" and described in said policy.

5. On August 24th, 1928, while said policy still remained in full force and effect, plaintiff, Ida Zelber, suffered bodily injury caused by said automobile vehicle so described, owned and operated at the intersection of Mississippi Avenue and Pacific Ave-

nue, both public streets of the City of Atlantic City, New Jersey, and thereafter on February 21st, 1929, recovered against said Bernard Coplin by the final judgment of the Atlantic County Circuit Court as damages on account thereof the sum of Four hundred dollars ($400.00) and the said Harry Zelber, her husband, in the same action recovered against said Bernard Coplin by the final judgment of the Atlantic County Circuit Court as damages on account thereof the sum of One hundred dollars ($100.00) and said plaintiffs also recovered the sum of fifty-two dollars and ninety-seven cents ($52.97) for their costs of suit.

6. It was part of said agreement on the part of the defendant that:

> The company will pay any final judgment recover*d* by any person on account of the ownership, maintenance and use of such auto bus or any fault in respect thereto, and this policy is for the benefit of every person suffering loss, damage or injury as aforesaid.

7. The limits of said policy as stipulated therein is Five thousand dollars ($5,000.00) and said final judgment of the plaintiffs, Ida Zelber and Harry Zelber, are within said limits, and said judgment has not been paid.

8. Said Bernard Coplin complied with all the terms and performed all the conditions of said policy on his part.

9. Plaintiffs aver that by reason of the terms of said Act of the Legislature and the stipulations of said policy said contract was for their benefit and an action has accrued to them to sue for and recover

the amount of said judgment of defendant. Plaintiff Ida Zelber demands as damages the sum of Four hundred dollars ($400.00) and plaintiff Harry Zelber demands as damages the sum of One hundred dollars ($100.00) besides their costs of suit amounting to Fifty-two dollars and ninety-seven cents ($52.97), making in all the sum of Five hundred fifty-two dollars and ninety-seven cents, with interest from February 21st, 1929, besides costs of this suit.

BENJAMIN AUERBACH,
PAUL M. SALSBURG,
Attorneys of Plaintiffs.

JITNEY LIABILITY POLICY.

No. AB 68193 Limit $5,000.00
COMMONWEALTH CASUALTY COMPANY
Philadelphia, Pa.
(hereinafter called the Company)

In consideration of the payment of a premium of One hundred fifty dollars, the receipt whereof is hereby acknowledged, hereby insures Bernard Coplin, who resides at 1129 Arctic Avenue, New Jersey, and who proposes to operate a jitney in Atlantic City, New Jersey, for a term of Twelve months from the 16th day of May, 1928, at noon, to the 16th day of May, 1929, at noon, in the sum of $5,000.00 against loss from the liability imposed by law upon the auto bus owner for damages on account of bodily injuries or death suffered by any person or persons as the result of an accident occurring by reason of the ownership, maintenance or use of the auto bus herein described upon the public streets of the said City of Atlantic City, New Jersey.

The Company will pay any final judgment recovered by any person on account of the ownership, maintenance and use of such auto bus or any fault in respect thereto, and this policy is for the benefit of every person suffering loss, damage or injury as aforesaid.

Number and description of Motor Vehicle referred to herein and insured.

Descriptive Trade Name	Factory Number of Engine or Motor	Kind of Power	Year Built
Studebaker	E.#44237 S.#3163410	Gas	1928.

Type of Body	Seating Capacity
Phaeton	

This policy is issued to be filed with the chief fiscal officer of the City of Atlantic City, N. J., under the provisions of "An Act concerning auto buses, commonly called jitneys, and their operation in cities," approved March 17, 1916, constituting chapter 136 of the Session Laws of New Jersey of the year 1916 and amendments thereof and Acts supplementary thereto, and said Commonwealth Casualty Company hereby assumes any and all liability imposed by the aforesaid Act and its amendments and supplements upon the above named insured, and upon the said company by reason of the issuance of the policy to said Bernard Coplin under the requirements of the aforesaid Act.

IN WITNESS WHEREOF the Commonwealth Casualty Company of Philadelphia, Pennsylvania, has caused these presents to be signed by its President and its Secretary this 16th day of May, 1928;

but the same shall not be binding upon the Company until countersigned by a duly authorized agent.

Henry C. Stewart, President. C. Wm. Freed, Secretary.

Countersigned at Atlantic City, N. J., on the 16th day of May, 1928. Agent.

RIDER:

COMMONWEALTH CASUALTY COMPANY

Endorsement.

It is understood and agreed that this policy is written on the basis of an annual premium of $150.00 payable in four payments as follows:

First payment	due May 16, 1928	$45.00
Second payment	" August 16, 1928	35.00
Third payment	" November 16, 1928	35.00
Fourth payment	" February 16, 1929	35.00

The premium payments being adjusted to comply with the foregoing conditions. This endorsement effective as of even date with the policy.

Nothing herein contained shall be held to vary, alter, waive or extend any of the stipulations, provisions or conditions of the undermentioned policy other than as above set forth.

Attached to and forms part of (Policy No. AB 68193 (Issued to Bernard Coplin

Dated at Atlantic City, N. J., this 16th day of May, 1928.

Countersigned Henry C. Stewart, President. C. Wm. Freed, Secretary.

SECOND RIDER.

COMMONWEALTH CASUALTY COMPANY.

Endorsement.

In consideration of the mutual promises and agreements contained in Policy to which this endorsement is attached, it is hereby understood and agreed that in the event of the cancellation of this

policy, either by the Company or by the insured, the Company shall immediately return to the insured, either in cash or in securities at face value that have been delivered to the Company in lieu of cash, at the option of the Company, the Unearned Premium upon this policy.

This endorsement shall be effective as of even date with the policy.

Nothing herein contained shall be held to vary, alter, waive or extend any of the stipulations, provisions or conditions of the undermentioned policy other than as above set forth.

(Policy No. 68193
Attached to and forms (
part of (Issued to Bernard Coplin

Dated at Atlantic City, N. J., this 16th day of May, 1928.

Countersigned. Henry C. Stewart, President.
C. Wm. Freed, Secretary.

[Endorsed.]

Service of the within summons and complaint is hereby acknowledged this 25th day of February, 1929.

Cole & Cole,
Attorneys for Defendant.

Filed Feb. 27, 1929, at 9 A. M.
William A. Blair,
Clerk.

ANSWER.

ATLANTIC COUNTY CIRCUIT COURT.

IDA ZELBER and HARRY ZELBER,
Plaintiffs,
v.
THE COMMONWEALTH CASUALTY COMPANY, a corp.,
Defendant.

Action at Law.
Answer.

Defendant, a corporation of the State of Pennsylvania, answering the complaint says:

1. Paragraph one is admitted.

2. Paragraph two is admitted.

3. Paragraph three is admitted, subject to the production of the policy to show its exact provisions.

4. Paragraph four is denied.

5. Paragraph five is admitted.

6. Paragraph six is admitted, subject to the production of the policy to show its exact provisions.

7. Paragraph seven is admitted.

8. Paragraph eight is admitted.

9. Paragraph nine is denied.

DEFENSE.

Defendant says that at the time of the alleged accident Bernard Coplin was driving his automobile on a private enterprise with his wife, intending to go from Atlantic City to a point outside of Atlantic County, New Jersey; the automobile was not then being operated as a jitney, pursuant to the provisions of what is commonly called the "Jitney Act," nor under the terms of defendant's policy; at no time during the alleged accident nor at the time thereof was the automobile being used as a jitney or in the transportation of passengers for hire, or otherwise; said Coplin left his home with said automobile with the jitney sign and jitney license removed, and on a purely private errand with his wife for a pleasure ride from his home to a point outside of the limits of Atlantic City; he was not exercising at the time of the alleged accident any rights under the so-called "Jitney Act," nor under his license or permit from Atlantic City to operate as a jitney.

COLE & COLE,
Attorneys of Defendant.

Filed February 28, 1929, at 9 A. M.

WILLIAM A. BLAIR,
Clerk.

REPLY.

ATLANTIC COUNTY CIRCUIT COURT.

IDA ZELBER and HARRY ZELBER, *Plaintiffs,* v. THE COMMONWEALTH CASUALTY COMPANY, a corporation of the State of Pennsylvania, *Defendant.*	Action at Law. Reply.

Plaintiffs replying to defendant's answer say:

1. They deny each and every allegation set forth in the defendant's answer under paragraph designated as defense and hereby join issue with the defendant.

PAUL M. SALSBURG,
Attorney for Plaintiffs.

Filed March 5, 1929, at 9 A. M.
WILLIAM A. BLAIR,
Clerk.

STIPULATION.

ATLANTIC COUNTY CIRCUIT COURT.

IDA ZELBER and HARRY ZELBER,
Plaintiffs,
v.
THE COMMONWEALTH CASUALTY COMPANY, a corporation of the State of Pennsylvania,
Defendant.

Action at Law.
Stipulation.

For the purpose of determination of the issues of this cause it is stipulated and agreed between the parties hereto as follows:

All paragraphs in the plaintiffs' complaint are admitted with the exception of paragraphs 4 and 9 and 8.

In respect to paragraph 4, it is agreed that Bernard Coplin was the owner of the motor vehicle commonly called a "jitney" and described in the policy at the time the policy was issued to him, and furthermore was operated by him on August 24th, 1928, at the time the plaintiff, Ida Zelber, received her injuries and for which she, together with her husband, recovered a judgment against him.

Paragraph 9 is a matter of law and the gist of the suit. Defendant Bernard Coplin at the time of

the accident referred to in plaintiffs' complaint, to wit: August 24th, 1928, was driving his automobile attired in a bathing suit, with a lady friend, who was also dressed in a bathing suit. Defendant Coplin and his friend had come from the beach, where they had been bathing, and were on their way uptown in an easterly direction on Pacific Avenue, a public highway in Atlantic City, New Jersey, for the purpose of making certain purchases, after which said Coplin and his friend intended to return to the beach to bathe.

The jitney sign of defendant Coplin had been taken off the car by him and was placed in the side pocket of his said car. From the time when defendant Coplin started from the beach until the time of the accident in question, he had not accepted or discharged any passengers, nor did he intend to accept or discharge any passengers. He was on a private errand of his own and a private enterprise, and did not intend, and in fact was not accepting or carrying any passengers for hire or otherwise.

The automobile of defendant Coplin did carry, between the headlights and in front of the hood, an immovable, attached sign marked "jitney," which sign was not illuminated, and the headlights of the said automobile bore a jitney number. Both the jitney sign and the jitney number on the headlights are required to be placed upon all jitneys, pursuant to the provisions of an ordinance of the City of Atlantic City.

BENJAMIN AUERBACH,
PAUL M. SALSBURG,
Attorneys for Plaintiffs;
COLE & COLE,
Attorneys for Defendant.

Filed March 21, 1929, at 9 A. M.
WILLIAM A. BLAIR,
Clerk.

MEMORANDUM.

ATLANTIC COUNTY CIRCUIT COURT.

IDA ZELBER and HARRY ZELBER,
v.
THE COMMONWEALTH CASUALTY CO.
Memo.

PAUL M. SALSBURG, ESQ., for plaintiff;
COLE & COLE, ESQS., for defendant.

SOOY, J.:

For the purpose of a determination of the issues in this case the parties, by their respective attorneys, have filed a stipulation of facts.

By the stipulation so as aforesaid filed, it is undisputed that at the time of the accident Caplin was operating his auto bus on Pacific Avenue in Atlantic City, but that he was not then actually engaged in receiving and discharging passengers, but that he was on an errand of his own.

Defendant says that under the Kates Act, Chapter 136, P. L. 1916, it cannot be contended that Cap-

lan was, at the time of the accident, operating a jitney bus as defined by said Act, and that, therefore, defendant is not liable on its insurance policy which it had issued to Caplan.

A decision of this case requires a construction of the policy in question, and that construction should be, in case of doubt, favorable to the assured (in this case the public).

In the first and second paragraphs of the policy the defendant has not limited the coverage by providing that the public should only be indemnified while the auto bus was being operated as a jitney and actually engaged in receiving and discharging passengers, but

> "against loss from liability imposed by law upon the auto bus owner or damages on account of bodily injuries or death suffered by any person or persons, as a result of an accident occurring by reason of the ownership, maintenance or use of the auto bus"

upon the public streets of Atlantic City, and then, in paragraph 2:

> "The Company will pay any final judgment recovered by any person on account of the ownership, maintenance and use of such auto bus," &c.

Of course, it is quite apparent that the terms of the policy as contained in these two paragraphs are taken verbatim from the Kates Act.

It is quite true that at the time the accident actually happened Coplin was not carrying passengers, but the characteristics of an auto bus, as defined by the Kates Act, were not lost thereby.

In the case of *Connely v. Commonwealth,* 96 L. 510, the vehicle at the time of the accident was not

actually engaged in the carrying of passengers, but, when it completed its trip, it was to re-engage in carrying them, and in the instant case there was a mere temporary use of the auto buss for other purposes than carrying passengers "without such an abandonment of the general scope of the purpose for which the jitney car was insured" as to deprive the public of the benefit of the policy. It must also be observed in the instant case (unlike the Connelly case, *ibid*) that the policy itself does not limit the liability of the defendant company to such times as the auto bus shall be in "passenger service," no*t* does the policy before me limit the liability (in so far as the public is concerned) to such times as it (jitney) shall be actually operating as an auto bus, but "on account of the ownership, maintenance or use." It would seem to me, therefore, that under a proper construction of the terms of the policy in question, that the plaintiffs are entitled to recover. Judgment may be entered in favor of the plaintiffs.

Filed April 19, 1929, at 9 A. M.

WILLIAM A. BLAIR,
Clerk.

SUPPLEMENTAL MEMORANDUM AND ORDER.

ATLANTIC COUNTY CIRCUIT COURT.

IDA ZELBER and HARRY ZELBER,
Plaintiffs,
v.
THE COMMONWEALTH CASUALTY CO.,
Defendant.

Supplemental Memo. Order Allowing and Sealing Exceptions.

This cause was tried before me without a jury upon a stipulation of the facts. Defendant moved for a non-suit upon the stipulation of facts as presented on the ground that under a proper construction of the policy of insurance under review the policy did not cover ~~plaintiff~~ Zelber, the assured, because at the time of the accident in question the automobile of defendants insured ~~plaintiff~~ was not owned, operated or maintained as a jitney bus within the scope and provisions of the Kates Act, and that said automobile had lost its identity as such. I denied the non-suit. Due exception was taken thereto by the defendant, which said exception was allowed by me. The defendant moved for a direction of a verdict in its behalf upon the determination of the whole case on the ground that defendant had agreed to insure a jitney bus and that at the time of the accident in question the automobile of ~~plaintiff~~ had lost its

defendants insured

identity as such, was being operated as a privately owned vehicle and that the policy of insurance under review did not legally bind the defendant under the facts stipulated and agreed upon. I denied the motion for a direction of a verdict in favor of the defendant. Due exception was taken by the defendant on this ruling, and said exception was allowed by me. I found in favor of the plaintiff and against the defendant for the amount claimed. Due exception was taken by the defendant to this ruling on the ground that the car that defendant had, by the terms of its policy of insurance, agreed to insure was a jitney bus as defined by the Kates Act, and that at the time of the accident in question the automobile of the ~~plaintiff~~ defendant was not owned, operated or maintained as a jitney, bus within the meaning and scope of the Kates Act, and therefore the policy of insurance was not binding upon the defendant.

Said exception was granted. The exceptions hereinabove set forth were duly allowed and sealed by me upon my determination of this cause. Let this supplemental memo and order allowing and sealing exceptions be entered in the minutes of this Court *nunc pro tunc* as of April 19, 1929, the date of filing of my original memorandum.

W. F. Sooy,
C. C. J.

Filed and entered April 19, 1929, at 9 A. M.
William A. Blair,
Clerk.

RULE FOR JUDGMENT.

ATLANTIC COUNTY CIRCUIT COURT.

IDA ZELBER and HARRY ZELBER, *Plaintiffs,* v. THE COMMONWEALTH CASUALTY COMPANY, a corporation of the State of Pennsylvania, *Defendant.*	Action at Law. Rule for Judgment.

This action was tried before Judge W. Frank Sooy, on stipulation and without a jury, the same being waived, at the Atlantic County Circuit Court on March 29th, 1929.

The Court, having heard the parties, finds the issues for the plaintiffs on the said complaint and that the sum of Five hundred fifty-eight dollars and twenty-two cents ($558.22) is due them thereon.

Whereupon it is adjudged that the plaintiffs recover of the defendant the sum of Five hundred fifty-eight dollars and twenty-two cents ($558.22) and their costs to be taxed.

Judgment entered April 29th, 1929.

W. F. SOOY,
Judge of the Atlantic County Circuit Court.

Filed and entered April 29th, 1929, at 9 A. M.
WILLIAM A. BLAIR,
Clerk.

JUDGMENT.

ATLANTIC COUNTY CIRCUIT COURT.

IDA ZELBER and HARRY ZELBER,
Plaintiffs,
v.
THE COMMONWEALTH CASUALTY COMPANY, a corporation of the State of Pennsylvania,
Defendant.

Action at Law.
Judgment.
Paul M. Salsburg,
Atty.

Judgment entered April 29, 1929, at 9 A. M.

Damages	$558.22
Costs	47.75
Total	$605.97

This action was tried before Judge W. Frank Sooy, on stipulation and without a jury, the same being waived on March 29th, 1929. The Court, having heard the parties, finds the issues for the plaintiffs and against the defendant.

Whereupon it is ordered that the plaintiffs, Ida Zelber and Harry Zelber, recover of the defendant,

the Commonwealth Casualty Company, a corporation of the State of Pennsylvania, the sum of Five hundred fifty-eight dollars and twenty-two cents damages and forty-seven dollars and seventy-five cents costs of suit.

WILLIAM A. BLAIR,
Clerk.

Circuit Court Judgment Book No. 15, page 438.

NOTICE AND GROUND OF APPEAL.

ATLANTIC COUNTY CIRCUIT COURT.

IDA ZELBER and HARRY ZELBER, *Plaintiffs,* v. THE COMMONWEALTH CASUALTY COMPANY, a corp., &c., *Defendant.*	Action at Law. On Appeal to New Jersey Court of Errors and Appeals. Notice and Ground of Appeal.

To Paul Salsburg, Attorney of Plaintiffs:

Take notice that the defendant Commonwealth Casualty Co., a corporation of the State of Pennsylvania, appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause upon the following ground:

1. The Court rendered a verdict in favor of the plaintiffs and against the defendant, when it should

have rendered a verdict in favor of the defendant and against the plaintiffs.

COLE & COLE,
Attorneys of Defendant.

[ENDORSED.]
Due and legal service of the within notice acknowledged this 7th day of May, 1929.

Paul M. Salsburg,
Attorney of Plaintiffs.

Filed May 9, 1929, at 9 A. M.

WILLIAM A. BLAIR,
Clerk.

STATE OF NEW JERSEY.

COUNTY OF ATLANTIC.

I, WILLIAM A. BLAIR, Clerk of the County of Atlantic, and also Clerk of the Circuit Court holden therein, said court being a court of record, having a common seal, do hereby certify, that the foregoing is a true copy of the summons and complaint, answer, reply, stipulation, memo, rule for judgment, judgment record and notice and ground of appeal in the case of Ida Zelber, et al., pltff., v. Common-

wealth Casualty Co., a corp., &c., deft., as the same are filed and entered in my said office.

In testimony whereof, I have hereunto set my hand and affixed my official seal at May's Landing, N. J., this 9th day of May, A. D. 1929.

WILLIAM A. BLAIR,
Clerk.

(Seal) By

Deputy Clerk.

New Jersey Court of Errors and Appeals

IDA ZELBER and HARRY ZELBER,
Plaintiffs-Respondents,

v.

COMMONWEALTH CASUALTY COMPANY, a corporation of the State of Pennsylvania,
Defendant-Appellant.

On Appeal from Atlantic Circuit.

APPELLANT'S BRIEF.

STATEMENT.

This cause was submitted to the Court, sitting without a jury, upon an agreed stipulation as to the facts. On May 16, 1928, appellant issued unto one, Bernard Coplin, its policy of insurance in the sum of $5,000, designated as "Jitney Liability Policy." This policy was issued to said Coplin to fulfill the requirements of "An Act concerning autobuses, commonly called jitneys, and their operation in cities," approved March 17, 1916, constituting Chapter 136 of the Pamphlet Laws of New Jersey for the year 1916, and amendments thereof and acts supple-

mentary thereto. Respondents were injured on August 24, 1928, by appellant's assured, Coplin, while said Coplin was operating the automobile described in the jitney liability policy hereinabove mentioned. Respondents recovered judgment against appellant's assured in the total sum of $500, and thereupon brought this suit against appellant, upon the assumption of its liability to pay such judgment, by virtue of the provisions of appellant's policy of insurance in force with Coplin, its assured, at the time of the accident in question. At said time, and for some time prior thereto, appellant's assured was and had been operating his auto on a personal mission and on a private enterprise, and had no intention of accepting or carrying any passengers for hire or otherwise. The jitney sign on Coplin's car had been removed by him and he was driving his auto, for all intents and purposes, as a private car.

The trial Court found that there was a mere temporary use of the autobus of appellant's assured, for purposes other than those contemplatel by the policy of insurance under review, and by the provisions of the Kates Act, "without such an abandonment of the general scope of the purpose for which the jitney car was insured," as to deprive the public of the benefit of the policy. The Court accordingly entered judgment for the respondents, from which said judgment this appeal is taken.

ARGUMENT.

This appellant issued a jitney liability policy to one, Bernard Coplin, on May 16, 1928, by the terms of which it agreed to "Insure Coplin in the sum of

$5,000 against loss from the liability imposed by law upon the *autobus* owner for damages on account of bodily injuries or death suffered by any person or persons as the result of an accident occurring by reason of the *ownership, maintenance,* or *use* of the *autobus* herein described upon the public streets of the City of Atlantic City, New Jersey." The company agreed to pay any final judgment recovered by any person on account of the ownership, maintenance *and* use of such autobus, or any fault in respect thereto and assumed any and all liability imposed by the Kates Act (Chapter 136, Session Laws of New Jersey 1916).

It will be observed that the terms of the policy under review are taken verbatim from the Kates Act, as the trial Court duly noted, and that the clear intent of the policy is to protect the assured against the liability imposed by the Kates Act, and to shoulder no greater or other liability.

For a determination of the extent of the liability imposed upon the appellant by the issuance of its policy to Coplin we refer to the provisions of the Kates Act under which the policy in question was issued. The Kates Act expressly defines the meaning of the word "autobus" within the contemplation of the Act. It provides:

> "The word 'autobus' as used herein shall mean and include any automobile or motor-bus commonly called jitney engaged in the business of carrying passengers for hire which is held out, announced or advertised to operate or run, or which is operated or run over any of the streets or public places in any city of this State, *and* indiscriminately accepts and discharges such persons as may offer themselves for transportation either at the termini or points along

the way or route on which it is used or operated or may be running."

The Act further provides that the jitneur cannot lawfully operate his autobus until he has properly filed with the fiscal officer of the city "an insurance policy in the sum of $5,000 against liability imposed by law upon the *autobus* owner, for damages on account of bodily injury or death suffered by any person or persons as a result of an accident occurring by reason of the ownership, maintenance or use of such autobus on the public streets of such city, &c."

It is submitted that Coplin, appellant's assured, at the time of the accident in question, was not operating an *autobus* within the contemplation of the Kates Act. A reading of the stipulation filed herein setting forth the manner of user of assured's car at the time of the accident will bear out and verify such contention. Clearly and unmistakably the vehicle driven by Coplin at the time of the injuries sustained by respondents, possessed none of the characteristics of an autobus as defined by the Kates Act. Coplin was not at the time of the accident engaged in the business of *carrying passengers for hire* nor had he been so engaged for *some time prior thereto.* At said time aforesaid the vehicle of Coplin *was not held out, announced or advertised to operate or run,* and in fact, *was not being operated and run over any of the streets of Atlantic City and indiscriminately accepting and discharging such persons as might offer themselves for transportation either at the termini or points along the way or route on which it was operated.*

All the essential elements necessary to pronounce the automobile of appellant's assured an *autobus,* within the contemplation of the provisions of the

Kates Act, and as defined thereby, were conspicuously absent, as a reading of the stipulation filed herein will verify.

The Legislature of this State anticipated that there might be occasions when the autobus contemplated by the Kates Act would be operated as a private vehicle and not be subject to the liability imposed by the Act. Paragraph four of said Act provides:

> "Nothing herein contained shall exempt any person owning or operating any autobus from complying with existing statutes relating to the ownership, registration and operation of automobiles in this State."

It follows, therefore, that an automobile is an autobus, within the meaning of the Kates Act, or a private vehicle, according to the nature of its user.

In the case of *Boyle v. Manufacturers Liability Insurance Company,* reported in 96 N. J. Law, at page 380, the Court recognized that an autobus or jitney bus might be transformed into a vehicle of a different character, thereby eliminating said auto from the control by and the effect of the Kates Act. In the cited case, Justice Minturn, speaking for the Court, at page 381, said:

> "The change of the motor, in this instance, if it took place as claimed, did not transform the jitney bus into a vehicle of a different character."

He further observed:

> "What legal effect, if any, such changes in detail may work as between insured and insurer can have no legal relation to the obligation which the insurer owes one of the traveling pub-

> lic, who may be damaged by the negligence of the vehicle *while engaged in the designated public use.*"

In the case *sub judice,* it is agreed that appellant's assured at the time of the accident, and for some time prior thereto, was *not* engaged in the designated public use, but on the contrary was engaged in a purely private use.

The undisputed facts are that Coplin's jitney sign was in the side pocket of his car, and that he did not intend to, and in fact did not accept or discharge any passengers for hire from the time when he started from the beach until the time of the accident. Coplin and a girl friend were in bathing suits and had just come from the beach where they had been bathing. They were on their way uptown on Pacific Avenue, a public highway in Atlantic City, New Jersey, in an easterly direction, for the purpose of making certain purchases. They intended to return directly to the beach again to bathe after making said purchases. Coplin was on a personal errand of his own and on a private enterprise. See State of Case, stipulation, page 12, &c.

It is agreed that the Kates Act was passed for the benefit of the traveling public but it is urged that the insurance issued pursuant to such Act was to be in full force and effect *only* so long as the vehicle insured remained an *autobus* within the meaning of this Act. In the case at bar, by reason of the nature of the user of the car at the time of the accident in question, and for some time prior thereto, the vehicle completely lost its identity as an *autobus* and assumed the role of a *private car.* Appellant did not agree to insure a *private car* but only insured an *autobus* while it was owned, maintained

and used as such. To hold otherwise is to write into the policy additional liability not contemplated thereby nor contained therein. The element of risk is necessarily of the greatest concern to all insurance companies. Their schedule of premiums is guided thereby. Instances and cases can readily be conceived where the risk assumed by an insurance company, incident to the operation of a private car, is more hazardous than that assumed upon an *autobus* which at all times follows a prescribed route of travel. In the case at bar, the auto of appellant's assured was certainly being operated as a *private car*. Appellant agreed to insure an *autobus*, not a *private car*. To hold appellant liable in the instant case, is, in effect, to find that appellant agreed to insure the private vehicle of Coplin, all of which is clearly contrary to the express language contained in the policy under consideration.

In the case of *Connell v. The Commonwealth Casualty Co.*, reported in 96 New Jersey Law, at page 510, &c., the policy of insurance was broader and more comprehensive than the one under review here. The question of "passenger service" is not covered by Coplin's policy. The policy sued on in the case *sub judice* was issued in strict conformity with the requirements of the Kates Act as an examination of the policy will disclose. In the cited case Justice Minturn said:

> "But while the policy of insurance remained in full force its legal effect as an indemnity to the traveling public for whose benefit it was executed and exists, cannot be minimized by any extraneous acts or default of the insured *so long as he is conducting the vehicle within the general scope of the purpose for which the jitney car was insured.*"

It is submitted that obviously under the agreed facts Coplin, the assured, was not at the time of the accident conducting the vehicle within the general scope of the purpose for which the jitney car was insured. Justice Minturn in the case *supra,* concludes by saying:

> "Until it has become manifest from the evidence that the vehicle has lost the characteristics of a jitney bus—not by an incidental deviation from its licensed municipal route, but by an entire change in use and occupation, thereby eliminating the vehicle both from the purview of the Jitney Act and the express provisions and conditions of the policy, the liability of the insurer becomes obvious."

The case at bar clearly comes within the exception cited by the Court in that there was in this case an entire change in use and occupation and the evidence before the Court manifestly demonstrates that the car of Coplin, appellant's assured, did completely lose the characteristics of a jitney bus, thereby eliminating the vehicle both from the purview of the Jitney Act and the express provisions and conditions of the policy.

In the case of *MacClellan v. General Casualty & Surety Company,* reported in 134 Atlantic Reporter, page 911, &c., the policy of insurance had certain riders attached which amplified the liability of the insurer beyond the requirements of the Kates Act and beyond that contained in the policy under review. That case determined upon the legal interpretation of the word "vicinity," not in issue here, and is in no wise analogous to the case at bar.

The appellant in this cause agreed to insure an *autobus* and only so long as it was *owned, main-*

tained and operated as such. Appellant did not insure the private car of Coplin. At the time of the accident and for some time prior thereto the vehicle of the assured had completely lost the characteristics of a *jitney bus* and was being operated by appellant's assured as a *private car,* on a personal errand and a private enterprise.

It is respectfully submitted that the Court erred in rendering judgment for the respondents and that the judgment should be reversed, set aside and for nothing holden.

COLE & COLE,
Attorneys for Appellant.

MacCrellish & Quigley Co., Printers, Trenton, N. J.

NEW JERSEY
Court of Errors and Appeals

IDA ZELBER AND HARRY ZELBER,
Plaintiffs-Respondents,
vs.
THE COMMONWEALTH CASUALTY COMPANY, A CORPORATION OF THE STATE OF PENNSYLVANIA,
Defendant-Appellant.

On Appeal from Atlantic County Circuit Court

RESPONDENTS' BRIEF

GENERAL STATEMENT

The plaintiffs recovered judgment in the Atlantic County Circuit Court against Bernard Coplin for damages on account of personal injuries sustained by the plaintiff, Ida Zelber, in the sum of Five Hundred Dollars ($500.00) together with costs. Plaintiff, Ida Zelber, a pedestrian, was struck by the automobile driven by the defendant, Bernard Coplin, at the corner of Mississippi and Pacific Avenues, both public highways in Atlantic City, New Jersey. The date of the accident was August 24th, 1928. On May 16th, 1928, the Commonwealth Casualty Company issued its policy of insurance in the sum of Five Thousand Dollars ($5,000.00) to Bernard Coplin upon his automobile, known as a jitney bus, for a period of one year. While the policy was in force and while the insured automobile was in operation by its owner, the plaintiff, Ida

Zelber, sustained her injuries for which she and her husband brought suit, resulting in the judgment aforesaid. The judgment not being paid or collected, suit was brought in the Atlantic County Circuit Court against the Commonwealth Casualty Company upon the policy issued by it to Bernard Coplin and filed according to law with the fiscal officer of the City of Atlantic City.

All paragraphs in the complainant's complaint were admitted in defendant's answer with the exception of paragraphs 8 and 9. It was further agreed that Bernard Coplin at the time of the accident was driving his automobile together with a lady friend attired in a bathing suit who had come from the beach where they were bathing and were on their way up town in an easterly direction on Pacific Avenue, a public highway in Atlantic City, New Jersey, for the purpose of making certain purchases, after which they intended to return to the beach to bathe. That the jitney sign on Coplin's car had been removed and placed inside the car; that Coplin had not accepted nor discharged any passengers nor did he intend to accept or discharge any passengers at the time but was on a private errand of his own. Coplin's automobile did carry between the headlights and in front of the hood an immovable attached sign marked "jitney" which sign was not illuminated (the accident occurring during the day) and the headlights of said automobile bore a jitney number.

The judge, Honorable W. Frank Sooy, heard the arguments, examined the policy and rendered a judgment in favor of the plaintiffs, from which judgment this appeal is taken.

COMMENT ON FACTS

Counsel for defendant-appellant has injected in the facts an element which neither appears in the stipulation nor the findings of facts by the Court below. He states throughout his brief that Coplin was not engaged in the business of carrying passengers for hire nor had he been so engaged for some time prior thereto. There

was not a scintilla of evidence in anything connected with this case concerning whether Coplin had not been engaged in carrying passengers for some time prior to the accident. This is a deliberate attempt to inject an element in the case which was not in the case nor in the stipulation. Its purpose is manifest. It is an endeavor to show an abandonment of the general scope for the purpose for which the jitney car was insured. If the defendant-appellant intended to so contend before this case was decided by the lower Court it should have stated the same in the agreed stipulation and not wait until the Court below found in its opinion no abandonment and then endeavor to inject the same into this case before this Court. Whether the result would be different is beside the point, but as this fact is not in the case it cannot be emphasized too strongly that it has no place there.

Law 1

Plaintiffs-respondents contend that the defendant is liable to them, first by virtue of the Kates Act, Chapter 136 of the Pamphlet Laws, 1916 and the amendments thereto and also (2) by virtue of the other terms of the policy.

The facts are stipulated by written stipulation and the defendant seeks to escape liability for the reason that at the time of the accident the defendant, Coplin, was on a private errand of his own and not either engaged in or intending to be engaged in the acceptance or discharge of passengers at the time.

This situation is covered fully in Connell vs. The Commonwealth Casualty Company, 96 N. J. L. 510; also 115 A. 352. In that case, Justice Minturn, stated as follows:

> "The vehicle lost none of its characteristics as a jitney because it was without passengers at the time, or because its movements were directed to Brooklyn to engage in the passenger service there. Whether at rest or in operation, or in the act of

> undergoing reparation, on the municipal route or apart from it, it still retained its passenger characteristics as a jitney bus under the policy of insurance, so far as the general public were concerned. Any violation of the jitney act was a matter between the operator and the municipality, under whose license he was operating. But, while the policy of insurance remained in force, its legal effect as an indemnity to the traveling public, cannot be minimized by any extraneous act or default of the insured, so long as he is conducting the vehicle within the general scope of the purpose for which the jitney car was insured." Citing Gillard vs. Manufacturer's Insurance Company, 93 N. J. L. 215.

The examination of the insurance policy will disclose as follows:

> "The Company will pay any final judgment, received by any person on account of the ownership, maintenance and use of said auto bus or any fault in respect thereto, and its policy is for the benefit of every person suffering loss, damage or injury as aforesaid."

The only limitation as disclosed by the policy is that the injury must be sustained on the streets of the City of Atlantic City, New Jersey. There is no dispute that the place of injury was at Mississippi and Pacific Avenues, both public streets in Atlantic City, New Jersey.

Subsequently the policy assumes all liability by virtue of the Kates Act and it is obvious therefore that the Company assumes to pay any final judgment obtained for injuries sustained by any person on account of the ownership, maintenance and use of said auto bus in the City of Atlantic City by the language of the policy and by virtue of the liability imposed by the Kates Act and the policy is made for the benefit of every person suffering loss, damage or injury. This

being a contract for the benefit of the third person, the third person has the right to sue and this is substantiated in McClellan et als. vs. General Casualty & Surety Company, 134 A. 911, also 4 Mis. Rep. 926, and affirmed by the Court of Errors and Appeals in 137 A, 917, also 103 N. J. L. 702. The Court stated in 134 A., at page 913, as follows:

> "Moreover, if there could exist the shadow of a doubt as to whether the liability imposed by law on the insurer must be determined solely by the provisions of chapter 136, *supra*, that doubt is dissipated by the express provisions of the second rider attached to the insurance contract, which, among other things, stipulates, 'Notwithstanding anything herein contained to the contrary this company will pay any final judgment within the limits of this policy as stipulated in condition L. recovered by any person or persons on account of the ownership, maintenance and use of the automobile described therein, or any fault in respect thereto, and it is further understood that this contract shall be for the benefit of every person suffering loss, damage or injury as described in this contract or as described in the terms of an act,' referring to chapter 136 of the Laws of 1916, *supra*. So it is quite manifest that it was the express design of the defendant company, as unequivocally stated by it in the rider attached to the policy, not only to obligate itself to pay any judgment recovered by any person suffering loss, damage, or injury against the assured in the circumstances as described in the contract of insurance, but also as described in the terms of the statute. The circumstances that the insurer contracted to obligate itself to a greater extent to the assured and to those for whose benefit the contract was made than was required by the statute is no valid defense. Its defense of nonliability on its contract is in the nature of a plea of ultra vires. It cannot properly abail itself of such a defense.

There is naught in the contract which contravenes the statute or which is against the declared statutory policy of this state. The contract appears to be rather in harmony with the public policy.

"The prime object of the statute was to protect the public by providing a means by which persons injured by automobile vehicles owned and maintained by an irresponsible owner should be enabled to collect a judgment obtained against such owner. The statute therefore ordained compulsory insurance on part of the owner of an automobile vehicle before he shall be permitted to lawfully operate or maintain such vehicle to carry passengers for hire in the public street. The statute fixes the amount of insurance to be carried by the owner for the benefit of those persons, injured, etc. There is nothing in the statute which in any wise bars an insurance company from increasing the statutory sum of insurance or from extending its liability by its contract of insurance."

In Boyle vs. Manufacturers' Liability Insurance Company 96 N. J. L. 380, in speaking of Gillard vs. Manufacturers' Insurance Company, 92 N. J. L. 141, the Court held:

That adjudication demonstrates that the policy of jitney insurance is one of indemnity under the statute for the benefit of the traveling public, and that whatever legal rights or equities may subsist as between the insured and insurer by reason of any violation of the terms of the policy cannot affect the rights of the public who claim under its provisions after such claim has been substantiated by a judgment at law.

Law 2

The grounds of appeal do not state the judicial action complained of with sufficient precision to apprise the

Court and opposing counsel of the injury complained of. An examination of the State of Case, at page 21, appears as the reason for the appeal from the Atlantic County Circuit Court, namely, "that the Court should have rendered a verdict in favor of the defendant and against the plaintiffs." In the case of O'Brien vs. Staiger, 101 N. J. L. 526, the Court stated:

> "That grounds of appeal must state the judicial action complained of with sufficient precision to apprise the Court and opposing counsel of the injury complained of and dismissed the appeal for the defect in said grounds of appeal."

It is respectfully submitted that the judgment of the Atlantic County Circuit Court appealed from should be affirmed, if in the present state of the appeal records, the appeal can be considered, otherwise the appeal should be dismissed.

Respectfully submitted,

BENJAMIN AUERBACH,
Attorney for Plaintiffs-Respondents.

PAUL M. SALSBURG,
Of Counsel with Plaintiffs-Respondents.