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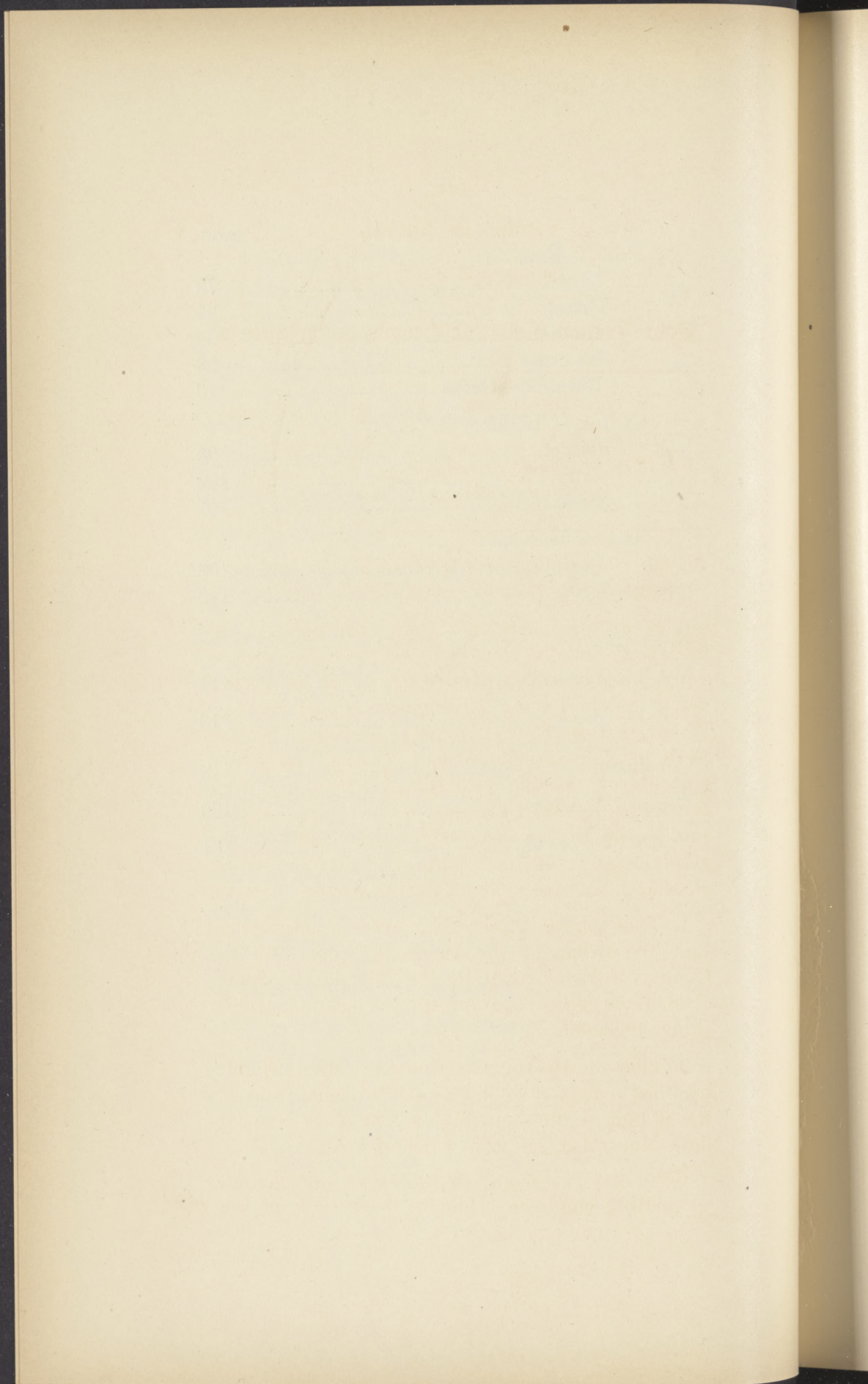
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Petition of Appeal.

(Filed July 19, 1929.)

New Jersey Court of Errors and Appeals

IN THE MATTER
of
The Estate of GERTRUDE KOSS,
Deceased.

On Appeal from
the Prerogative
Court.
Petition of
Appeal.

10

To the Honorable, the Court of Errors and Appeals in the Last Resort in All Causes:

The petition of Bessie Koss, the appellant in the above entitled cause, respectfully shows that your petitioner finds herself aggrieved by a final decree made in the Prerogative Court by his Honor, Edwin Robert Walker, Ordinary of the State of New Jersey, on the advice of Vice Ordinary Berry, bearing date June 24, 1929, in a certain cause in said Prerogative Court wherein the said Bessie Koss was appellant and Esther Grobe administratrix of the Estate of Gertrude Koss, Deceased, was respondent, in this respect, to wit:

20

1. That the said decree is in error in adjudging that the order of the Orphans' Court of the County of Essex made on the 26th day of June, 1928, from which the appeal was had, be in all things affirmed.

30

2. That the Prerogative Court erred in adjudging that that part of the Stock Purchase Plan of the Standard Oil Company of New York bearing date November 1, 1923, which provides

“(D) In case of the death of any participating employee while in the service of the

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Petition of Appeal.

10 Company, or of any subsidiary company, the trust in respect to such employee shall then terminate, and thereupon the full amount of cash, stock and other securities standing to the credit of such employee in the account of such employee with the trustees, shall be paid, transferred and delivered to such beneficiary or beneficiaries as such employee may have designated in writing and cause to be filed with the Company, * * *."

is invalid in that it attempts to effect testamentary dispositions of property in violation of the Statute of Wills.

20 3. That the said decree is in error in adjudging that the Petition of Appeal of Bessie Koss be dismissed with costs, and that a counsel fee of Two Hundred Dollars be allowed Messrs. Kalisch and Kalisch, proctors of the respondent.

30 4. That the said Prerogative Court is in error in adjudging that the said Bessie Koss deliver and transfer 32 shares of stock in the Standard Oil Company of New York to the said Esther Grobe, Administratrix of the Estate of the said Gertrude Koss, Deceased, and that the said Esther Grobe take possession thereof to the end that the said Stock may be administered as part of the estate of said Gertrude Koss, deceased.

5. That the Prerogative Court erred in not decreeing and adjudging that the said 32 shares of stock of the Standard Oil Company of New York are the property of said Bessie Koss.

40 6. That the Prerogative Court erred in not decreeing and adjudging that the participation of Gertrude Koss, deceased, in said Stock Purchase Plan of the Standard Oil Company of New York from its inception until her death on June 17, 1927, and the designation by the said Gertrude Koss,

Petition of Appeal.

deceased, of the said Bessie Koss as beneficiary thereunder, constituted a valid contract by and between the said Gertrude Koss, deceased and the said Standard Oil Company of New York for the benefit of the said Bessie Koss.

7. That the Prerogative Court erred in not decreeing and adjudging that the participation of Gertrude Koss, deceased, in said Stock Purchase Plan of the Standard Oil Company of New York from its inception until her death on June 17, 1927, and the designation by the said Gertrude Koss, deceased, of the said Bessie Koss as beneficiary thereunder, created a valid *inter vivos* trust for the benefit of said Bessie Koss. 10

8. That the Prerogative Court erred in not decreeing and adjudging that the participation of Gertrude Koss, deceased, in said Stock Purchase Plan of the Standard Oil Company of New York from its inception until her death on June 17, 1927, and the designation by the said Gertrude Koss, deceased, of the said Bessie Koss as beneficiary thereunder, constituted a valid *inter vivos* gift to the said Bessie Koss of the sums of money deposited under said Plan and of the said 32 shares of stock of the Standard Oil Company of New York into which said deposits were subsequently converted. 20 30

Your petitioner, therefore, prays that the said decree of the said Ordinary may be wholly reversed, set aside and for nothing holden, and that the petitioner may have such other relief in the premises as to this court shall seem proper.

PRECKER & PRECKER,
Solicitors of Bessie Koss,
Appellant.

MICHAEL S. PRECKER,
Of Counsel.

Answer to Petition of Appeal.

(Filed July 22, 1929.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

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IN THE MATTER
of
The Estate of GERTRUDE KOSS,
Deceased.

On Appeal
from the
Prerogative
Court.

Answer to
Petition of
Appeal.

20

The answer of Esther Grobe, Administratrix-Appellee of the Estate of Gertrude Koss, deceased, to the petition of appeal of Bessie Koss, appellant, in the above entitled cause; the Appellee admits it to be true that a final decree was made and entered in the above stated cause in the Prerogative Court on June 24, 1929, as in the petition of appeal is stated, but as to the substance and form thereof they pray to refer thereto when the same shall be produced. And said appellee is advised and believes that the said decree is agreeable to law and equity and prays that the same may be affirmed, with costs.

30

KALISCH & KALISCH,
Proctors for and of counsel
with Appellee.

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Order Granting Administration.

Filed October 28, 1927.

ESSEX COUNTY SURROGATE'S COURT.

IN THE MATTER <i>of</i> The Estate of GERTRUDE KOSS, Deceased.

On Petition for
Letters of
Administration.
Order Granting
Administration.

10

It appearing by the petition of Esther Grobe that Gertrude Koss, late of the County of Essex and State of New Jersey, died on the 17th day of July, nineteen hundred and twenty-seven, intestate, and it further appearing that the said intestate died possessed of goods, chattels, rights and credits of the value of one thousand dollars and that all of the next of kin and parties first entitled to administration upon the estate of the said intestate have duly renounced their said right of administration and have requested that letters of administration upon said estate be granted to the said petitioner.

20

It is thereupon on this 28th day of October, nineteen hundred and twenty-seven, ordered, adjudged and decreed that letters of administration upon the goods, chattels, rights and credits of the said Gertrude Koss be granted to the said Esther Grobe upon her giving bond to the Ordinary according to law in the sum of two thousand dollars with sureties to be approved by the Surrogate.

30

E. GARFIELD GIFFORD,
Surrogate.

40

Petition for Discovery.

Filed November 30, 1927.

ESSEX COUNTY ORPHANS' COURT.

10	IN THE MATTER <i>of</i> The Estate of GERTRUDE KOSS, Deceased.	} On Petition of Administratrix for Discovery of Assets. Petition.
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The petition of Esther Grobe, of the City of Newark, County of Essex and State of New Jersey, respectfully shows that:

20 1. Your petitioner is the administratrix of the estate of Gertrude Koss, late of the County of Essex, deceased. During her lifetime the said Gertrude Koss did purchase thirty-two (32) shares of stock of the Standard Oil Company of New York, a corporation of New York, which said stock was in the possession of the Standard Oil Company of New York and has been turned over, after the death of said Gertrude Koss, to Bessie Koss, a sister of the deceased.

30 2. The said Gertrude Koss left a watch and diamond ring, which the said Bessie Koss has taken possession of and has refused to turn over to the Administratrix.

40 3. Under the plan of the Standard Oil Company of New York, in whose employ the said Gertrude Koss was just prior to her death, the said Standard Oil Company of New York pays one year's salary of the deceased in monthly payments of one hundred sixty-nine dollars and seventy (\$169.70) cents per month; and Bessie Koss has been receiving said payments for the months of July, August, September, October and November

Petition for Discovery.

and which said payments properly are part of the Estate of said Gertrude Koss.

4. Said Bessie Koss has withdrawn from the Fidelity Union Trust Company the sum of one hundred fifty-three dollars and thirty-six (\$153.36) cents, which was deposited in the name of Gertrude Koss at the time of her death, and said Bessie Koss has refused to pay over said sum to the Administratrix. 10

Your petitioner therefore prays that the said Bessie Koss may be required to appear before this court and make discovery as to her possession of any personal property of the Estate of the said Gertrude Koss, deceased, and that the said Bessie Koss may be required to appear before this court and make discovery as to her knowledge of the circumstances under which she obtained possession of the aforesaid stock, watch, ring, money from the Standard Oil Company of New York and from the Fidelity Union Trust Company. 20

ESTHER GROBE,
Petitioner.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss.:

ESTHER GROBE; of full age, being duly sworn upon her oath, according to law, deposes and says: 30

That she is the petitioner named in the foregoing petition and that she has read the same and that the statements therein contained are true to the best of her knowledge, information and belief.

ESTHER GROBE.

Sworn and subscribed to before me, }
this 28th day of November, 1927. } 40

MORRIS WOSNITZER,
An Attorney at Law of New Jersey.

Order for Discovery.

(Filed November 30, 1927.)

ESSEX COUNTY ORPHANS' COURT.

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IN THE MATTER

of

The Estate of GERTRUDE KOSS,
Deceased.

On Petition of
Administratrix
for the Discovery
of Assets.

Order for
Discovery.

20

Esther Grobe, of the City of Newark, County of Essex and State of New Jersey, Administratrix of the Estate of Gertrude Koss, deceased, having filed her petition herein, whereby it appears that she believes that Bessie Koss has in her possession personal property of the Estate of the said Gertrude Koss, deceased, and that Bessie Koss has knowledge of the existence or whereabouts of personal property of the Estate of said Gertrude Koss, deceased.

30

It is thereupon on this 30th day of November, 1927, ordered that the said Bessie Koss, appear before this court on the 16th day of December, 1927, and make discovery of her possession of any personal property of the said Gertrude Koss, deceased.

It is further ordered that a true but uncertified copy of the aforesaid order and of the petition herein be served upon Bessie Koss personally or by leaving the same at her residence or usual place of abode, with some person over the age of fourteen years, within five days from the date hereof.

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DALLAS FLANNAGAN,
Judge of Essex County Orphans' Court.

Answer of Respondent.

(Filed December 15, 1927.)

ESSEX COUNTY ORPHANS' COURT.

IN THE MATTER of The Estate of GERTRUDE KOSS, Deceased.	On Petition of Administratrix for Discovery. Answer of Respondent. 10
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The respondent, Bessie Koss, residing in the City of Newark, County of Essex and State of New Jersey, respectfully says that:

1. She denies that the stock which was delivered to her by the Standard Oil Company of New York after the death of the said Gertrude Koss was the property of the said Gertrude Koss or of her estate at the time of such delivery of said stock. 20
2. She denies the allegation contained in paragraph 2 of the petition that she has refused to turn a watch and diamond ring over to the administratrix. 30
3. She denies the allegations contained in paragraph 3 of the petition that any money which she has been receiving from the Standard Oil Company of New York is properly a part of the Estate of the said Gertrude Koss.
4. She admits the allegation contained in paragraph 4 of the petition that she has withdrawn from the Fidelity Union Trust Company the sum 40

Answer of Respondent.

10 of money mentioned therein, but denies that she has failed to pay over same to the administratrix and alleges in fact that said moneys were used for the benefit of the administratrix and the said estate by employing them for the payment of bills for medical attendance and medicines for decedent.

Your respondent further answering the petition filed herein says that she is ready to place herself before this Honorable Court to present proofs of the matters relating to the assets of the Estate of the said Gertrude Koss.

PRECKER & PRECKER,
Attorneys for Respondent.

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Order of Reference.

(Filed January 6, 1928.)

ESSEX COUNTY ORPHANS' COURT.

IN THE MATTER
of
The Estate of GERTRUDE KOSS,
Deceased.

Discovery.
Order of
Reference.

10

On motion of Precker & Precker, it is on this 6th day of January, 1928, by the Orphans' Court of the County of Essex, Ordered, that the above entitled matter be and the same hereby is referred to Edward L. Stasse, an Advisory Master of this Court, to hear the same for the Court and report thereon to it and advise what Order of decree should be made therein.

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WALTER D. VAN RIPER,
Judge of the Orphans' Court of
the County of Essex.

30

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Notice of Hearing.

(Filed January 17, 1928.)

ORPHANS' COURT OF THE COUNTY
OF ESSEX.

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IN THE MATTER
of
The Estate of GERTRUDE KOSS,
Deceased.

} Notice of Hearing.

To Bernard Mindes, Esq., Attorney for Petitioner:

20

Sir:

TAKE NOTICE, that Edward L. Stasse, Esq., to whom the above matter has been referred for the taking of testimony has fixed Thursday, January 26th, 1928, at 2:30 o'clock in the afternoon as the time and the office of the Deputy Surrogate, Court House, Newark, New Jersey, as the place of said hearing.

PRECKER & PRECKER,
Attorneys for Respondent.

30

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Testimony.

ESSEX COUNTY ORPHANS' COURT.

IN THE MATTER
of
The Estate of GERTRUDE KOSS,
Deceased.

On Order for
Discovery.

10

Testimony taken pursuant to an order of reference made in the above-entitled matter by Hon. Walter D. Van Riper, Judge, on the 6th day of January, 1928, before Hon. Edward L. Stasse, Advisory Master, on Thursday, January 26, 1928, at 2:30 o'clock P. M., in the presence of Bernard 20
Mindes (by Harry Kalisch), counsel for petitioner and Precker & Precker (by Michael S. Precker) counsel for the respondent.

Mr. Kalisch: The order is for discovery, isn't it?

The Advisory Master: Yes. Who is your first witness.

BESSIE KOSS, being duly sworn, testifies as follows: 30

Direct examination by Mr. Kalisch:

Q. Miss Koss, you are the sister of Gertrude Koss? A. Yes.

Q. The deceased? A. Yes, sir.

Q. And how many sisters and brothers did she have? A. Living at the time of her death? 40

Bessie Koss, for Petitioner—Direct.

Q. Yes. A. Two sisters and one brother.

Q. Just let me have their names? A. Mrs. Esther Grove, Samuel Koss and myself.

Q. Bessie Koss? A. Yes.

Q. There are no deceased sisters? A. Yes, Anna Kline.

10 Q. Did she leave any children? A. Yes; Jean Kline, age six and a half years.

Q. And that is all she left? A. Of the immediate family.

Q. I mean, her children? A. Yes.

Q. Who else was there; any deceased sisters or brothers? A. No.

20 Q. Now, do you know where the deceased, Gertrude Koss, was employed at the time of her death? A. Yes, the Standard Oil Company of New York.

Q. And about how long had she been employed there? A. According to their records, about thirteen years.

Q. Well, you remember she was employed there thirteen years, yourself, don't you? A. Yes.

Q. And where did she live? A. With me.

Q. Well, who else? A. And her brother.

Q. Which, Sam? A. Yes, and her other sister came in temporarily.

30 Q. Now, at the time that she died, did you know what she possessed? A. Not at all; outside of what we possessed in common.

Mr. Kalisch: Now, I move that that be stricken out as not responsive.

The Witness: Of course, we had property.

The Advisory Master: You must not volunteer any information; just answer yes or no if possible.

40

The Witness: Well, if I can.

Bessie Koss, for Petitioner—Direct.

Q. My question to you was, whether you know what she possessed. Now, if you don't know, you can say so. A. No.

Q. When she died, did you endeavor to get any of the property? A. No.

Q. Into your possession? A. No.

Q. Did you draw any money from the bank that was in her name? A. By request. 10

Q. Did you draw any money from the bank which stood in her name?

The Advisory Master: You can answer that yes or no. You are represented by counsel and he will take care of you.

The Witness: Yes.

Q. Which bank did you draw it from? A. Citizens' Trust. 20

Q. And where is that located? A. On Clinton Avenue and Chadwick. It is now a branch of the Fidelity.

Q. When did you draw that money? A. The date was on the check; sometime in August. You have the checks right there, I think.

Q. When did your sister die? A. July 17th.

Q. This was the checking account in that bank? A. Yes.

Q. And when you drew this money, did you do it with a check which you had; did you have a check to draw this money? A. No. 30

Q. How did you proceed to get that money? A. I took the—I was urged——

Q. No, no; just how did you get the money; what procedure did you go through to get this money from the bank; not what you were told? A. I went there and told them that I was requested to settle the estate—— 40

Bessie Koss, for Petitioner—Direct.

10 Q. Go ahead. You told who? A. I told the head of the bank that I was requested to settle the estate. I showed him two letters and told him there was no will. I showed him the two letters that had come to me in the meantime where my sister had designated me as the sole beneficiary. I told him I was the heir to the estate; I wanted him—and I gave him the report to my sister; I didn't talk to my brother—I gave the report to my sister. There was a neighbor in the house and she said, "Have you got it?" and I said, "I have not got it"; and he told me to come back tomorrow.

Q. Have you got those letters? A. Yes.

20 Q. From your sister? A. Yes. They are not from my sister; they are from the estate.

Q. Who wrote the letters? A. The Standard Oil Company.

Q. And you took these two letters from the Standard Oil Company and presented them to the Citizens' Trust Company? A. Yes.

Q. And upon those two letters and upon what you told them, they gave you the money? A. No, I have not finished with my explanation. He said, "I have the waiver ready for you."

30 Q. What waiver? A. The waiver that he had me sign the next day. He said as long as this money is less than \$300, I will give it to you, and he released the money—

Q. One moment. Just answer the questions I put to you. Is that all the money that was in her account in that bank? A. Yes.

Q. You drew out all the money that was there? A. Yes, I drew it out.

Q. You have that money in your possession? A. No.

40 Q. Where is that? A. I gave it to my attorney.

Bessie Koss, for Petitioner—Direct.

Q. How much was it? A. Have you the figures there?

Mr. Precker: You need not have the exact figures; do you know the approximate amount?

The Witness: I prefer to be exact. The amount on that issue is not exact. \$153.36. 10

Q. This money has been turned over, I believe, to the estate?

Mr. Precker: The money is no longer the subject of dispute.

Mr. Kalisch: All right.

Q. Your sister had a gold wrist watch, did she not? A. Yes. 20

Q. And you turned that over to the estate? A. My attorney has it now.

Q. Have you been asked to turn it over? A. Yes.

Q. Under advice, you turned it over to your attorney? A. Yes.

Q. Now, there was a box of trinkets, odds and ends. Have you those in your possession? A. No.

Q. Did you ever have them? A. Never.

Q. Are they in your room? A. They are in my sister's drawer, as she left them; my deceased sister, as she left them. 30

Q. Are you prepared to turn them over? A. I have not them.

Q. Are you prepared to permit the administrator to go up there and take them? A. I never objected.

Mr. Kalisch: Is there any objection to turning them over? 40

Bessie Koss, for Petitioner—Direct.

Mr. Precker: We don't claim any property right in them.

Mr. Kalisch: I mean is there any objection to turning them over.

10 By Mr. Precker:

Q. You have the room, have you? Did you and your sister occupy the same room? A. Exactly.

Q. And you used the same piece of furniture in which this drawer is located? A. She had her drawer, and I had mine.

Q. And you have not touched her drawers in any way? A. Yes, I have.

Q. But haven't taken her trinkets? A. No.

20 Q. You are perfectly willing to have them have access to your drawer for the purpose of removing the trinkets? A. Yes.

By Mr. Kalisch:

Q. There is a family picture, is there not, in your room of two deceased sisters? A. (No answer.)

Q. Are there family pictures in your room? A. Yes. They are mine, all of them; the pictures on my sister's dresser are all mine.

30 Q. Well, from whom did you get them? A. I made them; they are of my nieces.

Q. How do you mean, you made them? A. With my own camera.

Q. Those that are in the drawer, do they belong to you? A. Yes.

Q. In her drawer? A. Yes.

40 Q. Why did you put them in her drawer, you say you never had access to or went into her drawer? A. I didn't say that. I did have access to her drawers.

Bessie Koss, for Petitioner—Direct.

Q. Yes, I know, but her drawer contained things that belonged to her and yours contained things that belonged to you. Now how is it these pictures were in her drawer, if they belonged to you?

A. Only they were pictures I had taken and given to her, and I claim them as my right.

Q. All you did was to take them to her? A. 10
They are six cent pictures.

Q. I am not talking about the monetary value. You say you originally had them and gave them to her, and now you claim them; is that right? A. I don't claim them.

Q. You did claim them—you claim them now, don't you? A. I never knew they were demanded.

Q. Are you willing to give them over? A. Why, yes. I said they had access to those drawers. I have never objected. 20

(Discussion.)

By Mr. Kalisch:

Q. You are willing to give them up? A. Yes; I never took them.

Q. I didn't ask you that. I am now asking you concerning these pictures that were in your room. You are willing to give them up? A. Yes.

Q. Now the pictures of your parents, who did 30
they belong to? A. What pictures do you mean?

Q. What about those pictures? A. Which ones?

Q. Are you willing to—

Mr. Precker The pictures of your father and mother.

A. Those pictures of my father and mother are not in my room.

Q. Were they in your living room when your sister died? A. They were always in the living 40
room.

Bessie Koss, for Petitioner—Direct.

Q. What about those? A. They are in the drawer.

Q. In her drawer? A. I guess so.

Q. Will you deliver those over to the administrator? A. Yes.

10 Q. Is there a victrola that belongs to your sister? A. Yes, sir.

Q. Will you deliver that over? A. To the estate.

Q. To the administrator? A. I am unable to deliver everything over to the estate. I don't think we have to go over that.

Q. There is some dispute as to what belongs to the estate, that is the reason for these questions. Now, the victrola, you are willing to deliver over? A. Yes.

20 Q. Now, what else, the books? A. The books were owned in common, most of them were.

Q. How about the books? A. The books fill the library. On some of them her name is written.

Q. Well, those that her name is on, you will deliver over? A. Yes.

Q. You have the vouchers and the bank deposit book of this account where you drew the money out? A. The what?

Q. The deposit book and the vouchers, of your sister's deposit in the Citizens' Trust Company.

30 Mr. Precker: Returned checks.

A. They are in the drawer; I have not them.

Q. Well, you have no objection to the estate getting them? A. I will deliver them.

Q. What about the chiffonier, bed and bedding, that belonged to your sister? A. Yes.

Q. We can have that too? A. Yes.

Q. How about her wearing apparel? A. Yes.

40 Q. Have that also. Now, we come down to the stock. You had some stock which was issued by the Standard Oil Company? A. Yes, sir.

Bessie Koss, for Petitioner—Direct.

Q. How many shares? A. Thirty-two.

Q. Common stock? A. Yes.

Q. Have you got the number of the certificate?

A. Yes.

Q. Is it in one certificate? A. Yes.

Q. Have you got the number of it? A. Yes.

Q. What is the number? 10

Mr. Precker: The number of the certificate is NY-L1125050.

Mr. Kalisch: And what is it called, common stock, or is it designated at all what class stock it is; preferred or common?

Mr. Precker: It was designated as capital stock.

Mr. Kalisch: And issued when?

Mr. Precker: It is dated July 26, 1927. 20

Mr. Kalisch: Don't you think we ought to offer this in evidence?

Mr. Precker: I have a great deal of stuff to offer in evidence. I think, if you will permit a change of practice for a few moments I can give you the information I have here and then perfect the record.

The Advisory Master: You have certain things there you are willing to offer in evidence?

Mr. Precker: Oh, yes, we have got things we are willing to offer if you will reverse the order of procedure. 30

The Advisory Master: All right.

Mr. Precker: Let me examine her for a few minutes and I will offer these things and we will have the record complete.

Mr. Kalisch: All right. It is on direct examination, so you go ahead and offer those which you want to. 40

Bessie Koss, for Petitioner—Direct.

10 Mr. Precker: Before doing that I am going to take three or five minutes in examining on these few things that we have had up to now and then I will offer the few things we have, and when I get through I think you will have the entire situation in mind sufficiently well to cover it yourself.

By Mr. Precker:

Q. Miss Koss, you and your deceased sister, Gertrude, occupied the same room of the home in which you lived? A. Yes.

Q. During your sister's lifetime you were very close to her? A. Yes.

20 Q. And you were familiar with the properties and things which she owned? A. Yes.

Q. Did you at any time make any purchase in common with your sister? A. Yes.

Q. You testified that you went to the bank in this city and withdrew certain moneys which were on account in your sister's name. What entitled you to withdraw that money?

(Discussion.)

By Mr. Precker:

30 Q. The wrist watch which you were questioned about; has that been returned to the estate? A. You have it.

Q. No; was that one of the two pieces which were delivered to me to return to the estate? A. Yes, the watch and the ring.

Q. Did you deliver the ring and the watch to me for my delivery to the estate? A. Yes.

40 Q. Do you know whether they were delivered to the estate or not? A. I don't know.

Bessie Koss, for Petitioner—Direct.

Mr. Precker: Will you admit on the record that you got the watch and the ring?

Mr. Kalisch: It is admitted on the record that the watch and the ring was received by the attorney for the estate.

Q. The pictures of your deceased parents, which you testified you were willing to deliver up; were they the property of your deceased sister? 10

(Discussion.)

By Mr. Precker:

Q. Do the pictures of your deceased parents, referred to in your direct examination, belong to you?

Mr. Kalisch: I object to that. That is another way of asking the same question. 20

Objection overruled.

Exception noted as ground of appeal.

A. The pictures do not belong to me.

Q. You testified that some of the books in your possession were owned by you together with your decedent sister, Gertrude. It is your intention and desire to deliver to the estate, in addition to Gertrude's own books, also the books which you owned in common with her? A. If they demand them, they may have them. 30

The Advisory Master: Just a minute. Didn't she say she was going to turn over, as I understand it, the books that were marked with the name of this sister?

Mr. Kalisch: Well, she has added that she would turn over all the books.

Mr. Precker: We can say on the record 40

Bessie Koss, for Petitioner—Direct.

that we will give them such books as they desire.

The Witness: No, that they desire that belonged to my deceased sister.

10 Q. Well, how about those that you owned together with her; are there many of those? A. I can't remember.

Q. Well, are you willing that they have those?
A. When you say that "they have those" you mean the estate?

Q. The estate, of which you are a party, as a matter of fact? A. That depends on how the estate is going to handle me.

20 Mr. Kalisch: Well, you have a legal representative, your attorney is looking out for you.

Q. Do you wish to retain your interest in the books which you owned with her? A. Positively.

Q. And you will deliver up her interest in those books? A. To the estate.

Q. Did you at any time after the death of your sister, receive any correspondence from the Standard Oil Company of New York? A. After; yes.

30 Q. Do you recall when you received the correspondence? A. The date is on the letters. The end of July.

Q. The end of July? A. Yes.

Q. I show you a letter on the stationery of the Standard Oil Company of New York, dated July 28, 1927, and ask you whether that letter was at or about that time received by you (showing witness letter)? A. Yes.

40 Mr. Precker: I wish to offer that in evidence, letter addressed to Miss Bessie Koss,

Bessie Koss, for Petitioner—Direct.

153 Clinton Avenue, Newark, New Jersey,
which reads as follows—

(Discussion.)

Mr. Kalisch: I think—all right, we will
let this in. No objection.

(The letter is received in evidence and
marked Respondent's Exhibit 2.)

10

Q. Did you understand, Miss Koss, that by this
letter the Standard Oil Company were advising
you that you were to receive—

Mr. Kalisch: I don't like to interrupt—

The Advisory Master: Yes, the letter
speaks for itself.

20

Q. What did you do when you received this let-
ter, Miss Koss? A. Shared it with my sister. I
think that is the one she opened first.

Q. By your sister you mean the administratrix?
A. Miss Koss, yes, she knew it. She saw it and
all I did to it.

Mr. Kalisch: Of course, it is not respon-
sive. You say what did you do when you
received this letter.

Mr. Precker: We will come to it in a mo- 30
ment.

Mr. Kalisch: I ask that that answer be
stricken out. I don't think that that is re-
sponsive, that she shared the proceeds of it.
I don't think you want it.

Mr. Precker: No.

(The answer was stricken out by con-
sent.)

Q. Did you receive any of the moneys from the
Standard Oil, referred to in this letter? A. Yes.

40

Bessie Koss, for Petitioner—Direct.

Mr. Kalisch: Well, now, just what did she receive?

Mr. Precker: Just a moment, please.

Q. When did you first receive some of those moneys? A. August 30th.

10 Q. At that time you received how much money? A. \$169.

Q. And thereafter did you receive any more of this money? A. Every 30th of the month following, the same amount.

Q. Every 30th of each month, you received \$169? A. Yes.

Q. And that \$169 was paid in what form? A. Checks, to me.

Q. Addressed to—— A. To me.

20 Q. And what does this \$169 which you received each month from the Standard Oil Company, represent?

Mr. Kalisch: I object to that. There is the letter.

Mr. Precker: I will reframe the question to save time.

Q. Did you accept these checks of \$169 per month as a result of the information which you
30 received in the form of the letter referred to?

Mr. Kalisch: I object to that.
(Discussion.)

Mr. Kalisch: Have you got now on the record what she received?

Mr. Precker: She has received, she testified, \$169 on the 30th of August and on the 30th of each and every month thereafter.

Mr. Kalisch: All right; that is what I
40 want.

Bessie Koss, for Petitioner—Direct.

Q. Did you at or about the same time, receive another letter from the Standard Oil Company of New York? A. Yes.

Q. I show you a letter dated July 28, 1927, on the stationery of the Standard Oil Company of New York, addressed to "Miss Bessie Koss," and I ask you whether that is a letter which you received at or about July 28, 1927? A. Yes. 10

Q. That is a letter you received without the portion beneath the signature of Frank Platz? A. Yes.

Mr. Precker: I ask that that be marked. (The letter referred to is received and marked Respondent's Exhibit 3 of this date.)

Mr. Kalisch: We have no objection to this going in. 20

Q. Together with that letter you received also a certificate of stock, covering thirty-two shares of the Standard Oil Company of New York, which certificate is referred to in the letter? A. Yes.

Mr. Kalisch: And the account, I believe, isn't there an account that goes with it?

Mr. Precker: And the item, amounting to \$21.80. 30

Mr. Kalisch: No, no; I don't mean that. Doesn't it say a statement of account in that letter?

Mr. Precker: Yes.

Mr. Kalisch: Where is that?

Q. Did you, in addition to this letter and the stock, receive a statement of account, showing some figures pertaining to the purchase of the stock? A. Yes. 40

Bessie Koss, for Petitioner—Direct.

Q. Where is that statement now, do you know?

A. I don't know; I may have it. I may not. I didn't think it mattered much.

Mr. Kalisch: Can you produce it?

10 The Witness: I don't know whether I can produce it.

Q. If you have it, will you produce it? A. Yes.

Mr. Kalisch: You can get a copy of it.

The Witness: Yes.

Mr. Kalisch: Well, then, you will produce that. All right. Do you want to offer the stock; I have no objection to that.

20 Mr. Precker: I offer in evidence the certificate of stock covering thirty-two shares of the Standard Oil Company of New York, numbered as indicated in the record earlier in the day.

(The certificate of stock is received in evidence and marked Respondent's Exhibit 4 of this date.)

Q. Did you ever receive any other stock certificate except this one issued in your name, which has just been offered in evidence? A. No.

30 Q. Did you at any time after the receipt of this stock, go to the offices of the Standard Oil Company of New York? A. Yes.

Q. When did you go? A. After I got the petition.

Q. After you got the petition for discovery in this matter? A. Yes.

Q. Why did you go? A. I wanted to know how they made up—why, they issued it to me.

40 Q. You wanted to know why the stock was issued in your name? A. Yes.

Bessie Koss, for Petitioner—Cross.

Q. And did you receive a notation in the form of a letter affixed to the letter dated July 28th?

A. Yes.

Q. From some person in the Standard Oil Company? A. Yes.

Q. And is that what was written there? A. Yes. 10

Mr. Precker: Have you any objection to this being entered on the record?

Mr. Kalisch: Let me look at it again.

(Paper handed to counsel.)

(Discussion.)

The Advisory Master: Haven't you sufficient on the record on that?

Mr. Precker: Yes. You take the witness. 20

Cross-examination by Mr. Kalisch:

Q. Now, Miss Koss, did you pay any money to the Standard Oil Company for this stock? A. No.

Q. Did you ever pay them any money before you received or after you received it? A. No.

Q. Do you know whether your sister received any dividends in her lifetime from this stock?

Mr. Precker: I object, on the ground we are not interested in what her sister received. The only thing we are concerned with is as to whether she properly received this stock from the Standard Oil Company. 30

The Advisory Master: I will admit the question and give you an exception.

(Further discussion.)

Mr. Kalisch: Now, what was the question?

(Question read.) 40

Bessie Koss, for Petitioner—Cross.

Q. Do you know whether your sister—— A. No, I never knew whether she owned any stock.

Q. You never knew she owned any stock? A. This stock.

Q. Didn't she ever tell you? A. No.

Q. And you didn't know she owned any stock until after she died? A. I didn't know what it was.

Q. Didn't you know, before your sister died, that she owned this stock in the Standard Oil? A. No.

Q. You weren't made aware of that until after her death? A. Until I got the letter.

Q. And you didn't know that you were a beneficiary? A. No.

Q. (Continued.) Until after she died? A. Until I got the letter.

Q. Well, that is after your sister died? A. Yes, after I got the letter.

Q. Was there any paper that you received from the Standard Oil besides the stock and the letter—and the two letters? A. There was a receipt for this.

Q. Well, those that you offered in evidence. I want to know whether there were any other papers that you received? A. There was a receipt that I had to return before the receiving of the stock.

Q. That is, when you got the stock you had to sign a receipt and return it with the receipt to show that you got the stock? A. Yes; signed by witnesses.

Q. Now, have you received any dividends from this stock since you owned it? A. Yes.

Q. How much have you received? Don't you recollect; if you don't know now, you would have a way of finding out, wouldn't you? A. In Sep-

Bessie Koss, for Petitioner—Cross.

tember and December I received some dividends.

Q. How much were they? A. I think it was \$12.40 each time.

Q. \$12.40 each time? A. Yes.

Q. Your sister, the deceased, was employed with the Standard Oil Company at the time of her death? A. Yes. 10

Q. And had been employed there for how long? A. About thirteen years.

Q. Do you know whether the Standard Oil Company took anything from her salary in order to pay for this stock?

Mr. Precker: I object.

A. I don't know how they issued it.

The Advisory Master: I will admit the question. 20

Mr. Precker: You may answer it.

Q. Do you know that? A. I don't know how they issued it.

Q. Do you know how she paid for it? A. No.

Q. Do you know whether she did pay for it? A. I don't know how she paid for it.

Q. Well, was it paid for? A. I don't know.

Q. You don't know whether that stock is paid for? A. That is all I got from the Standard Oil Company. 30

Q. Well, do you know that she did buy it in her lifetime? A. I think she bought it.

Q. Of course, you learned this after she died? A. When I got the letter.

Q. You didn't know this before? A. No.

Mr. Kalisch: Now, there is no further cross-examination at this time—or, direct examination. 40

Bessie Koss, for Petitioner—Cross.

Mr. Precker: I have another question.

Mr. Kalisch: Is there anything else that you have in your possession that belonged to your sister, the deceased, in her lifetime, besides what you have already testified to?

10 The Witness: Not that I know of, other than the claim that I have and some household things.

By Mr. Kalisch:

Q. I didn't ask you that. You say not that you know of; that answers it? A. Yes.

By Mr. Precker:

20 Q. Do you know, of your own knowledge, as to whether your deceased sister paid any money for the stock? A. I don't know how they issued it.

Q. No, the question is, do you know whether Gertrude paid for the stock? A. I don't know.

Q. You have no knowledge as to that? A. No.

Mr. Kalisch: But you are sure you didn't pay for it?

The Witness: No.

Mr. Precker: That is all.

30 Mr. Kalisch: Have you any further evidence?

Mr. Precker: Yes.

Isidore B. Glucksman, for Respondent—Direct.

ISIDORE B. GLUCKSMAN, being duly sworn, testifies as follows:

Direct examination by Mr. Precker:

Q. Mr. Glucksman, you are a counsellor at law of this state? A. Yes. 10

Q. And did you, since July 28, 1927, visit the offices of the Standard Oil Company of New York? A. I did.

Q. When did you make your visit? A. I made two visits; one to the general office on Seventh Avenue, near 34th Street, and one to the office of the general solicitor of the Standard Oil Company at, downtown, 26 Broadway.

Q. And you conferred with the general solicitor of the Standard Oil Company of New York? A. I did. 20

Q. And what was his name? A. Peter Speer; he had a middle initial, which I don't recall.

Q. Did you discuss with him the matter of the Standard Oil stock purchase plan for the employees of the company? A. I discussed both that and also the plan of insurance.

Q. As regards the stock purchase plan, did you obtain any literature from Mr. Speer pertaining to the nature of that plan? A. Mr. Speer gave me a booklet which explained the operation of the stock purchase plan; and also enclosed sample copies of the application for stock purchases and the designation of beneficiaries, which were correct reproductions of the originals of those which were made out to Gertrude Koss, deceased, lacking, of course, the information that was filled in. 30

Q. I show you a booklet, on the cover of which appears the words "Stock Purchase Plan for the Employees of the Standard Oil Company of New 40

Isidore B. Glucksman, for Respondent—Cross.

York,” and ask you whether that is the booklet which you received from Judge Speer (handing booklet to witness)? A. Yes.

Mr. Precker: I offer the booklet in evidence.

10

Mr. Kalisch: May I look at it?

Mr. Precker: Yes.

(Discussion.)

Mr. Precker: I will withdraw the booklets. We rest.

RESPONDENT RESTS.

Cross-examination by Mr. Kalisch:

20

Q. Are you connected with Mr. Precker in the practice of law? A. I am in the same office, but I have no official connection.

Q. You represented Mr. Precker in this particular investigation? A. This investigation; I did.

(Discussion.)

30

40

Proceedings.

ESSEX COUNTY ORPHANS' COURT.
SECOND DAY.

IN THE MATTER
of
The Estate of GERTRUDE KOSS,
Deceased.

On Petition
and Order for
Discovery.

10

FURTHER PROCEEDINGS taken before Hon. Edwin L. Stasse, Advisory Master, at the Hall of Records, Newark, New Jersey, on Monday, March 26, 1928, at 10 o'clock A. M., in the presence of Kalisch & Kalisch (by Harry Kalisch) who appeared for petitioner, and Precker & Precker, who appeared for respondent.

20

Mr. Kalisch: I offer a copy of the first set of stipulations entered into by counsel.

(Marked Exhibit R-8.)

Mr. Kalisch: I offer a copy of the second set of stipulations entered into between counsel on both sides.

30

(Marked Exhibit R-9.)

Mr. Kalisch: The evidence is closed, as I understand it.

Mr. Precker: Yes, sir.

The Advisory Master: I think that closes everything.

40

Exhibit R-1.

10

IN THE MATTER
of
GERTRUDE KOSS,
Deceased.

Received of Precker & Precker, Esquires, one watch, ring, and the sum of One Hundred Fifty-three Dollars and Thirty-six (\$153.36) Cents, which is to be turned over to the Administratrix of the Estate of Gertrude Koss, Deceased.

BERNARD MINDES.

20

Dated: January 12, 1926.

30

40

Exhibit R-2.

STANDARD OIL COMPANY OF NEW YORK,
New York City Department.

New York, July 28th, 1927.

Frank Platz, Manager, 10
Penn. Terminal Bldg.,
370 Seventh Ave.

Miss Bessie Koss,
153 Clinton Ave.,
Newark, N. J.

My dear Miss Koss:

In accordance with beneficiary designation made
by your sister, Employees Insurance will be paid 20
to you at the rate of \$169.00 per month, effective
August 1st, 1927 and will terminate on July 31st,
1928, a period of one year. This amount is based
on your sister's services of thirteen years.

Checks will be mailed to you each month at your
home address, and if you should change your
residence, kindly advise us promptly so that your
check will reach you without delay.

Extending to you our sincere sympathy in the
loss you have suffered, we remain, 30

Yours very truly,

FRANK PLATZ.

Exhibit R-3.

STANDARD OIL COMPANY OF NEW YORK
New York City Department

10 Frank Platz,
Manager,
Penn. Terminal Bldg.,
370 Seventh Ave.

New York, July 28, 1927.

In reply refer to File No. 10-J. P. R.-11.

Miss Bessie Koss,
531 Clinton Avenue,
Newark, N. J.

20 Dear Madam:

We are sending to you a statement of your sister's account with the stock purchase plan for employees of this company with check A-8801 in amount \$21.80 dated July 23, 1927 drawn to your order for the cash balance in this account.

I am enclosing herewith stock certificate L 1125050 for 32 shares of the Standard Oil Company of New York stock in your favor.

30 We are also enclosing a receipt to be signed by you, your signature to be witnessed by two other parties, and returned in the attached stamped self-addressed envelope.

Very truly yours,

FRANK PLATZ

Exhibit R-3.

TRUSTEES UNDER THE STOCK PURCHASE PLAN FOR
EMPLOYEES OF THE STANDARD OIL
COMPANY OF NEW YORK

Subscription No. *E-28* *July 22, 1927*

Subscriber *Gertrude Koss, deceased* 10

The Trustees under the Stock Purchase Plan submit herewith a statement of your account, from the beginning of your participation in the Plan to *April 30, 1927* inclusive; the effective date of your Withdrawal.

If there is any question of the correctness of this account, you should notify the Trustees, Room 1919, 26 Broadway, New York City.

Deductions from Pay Roll	\$ 684.00	20
Interest at 6% per annum on above		
Company contribution	342.00	
Dividends on shares purchased under the Plan and Fractional Stock Distribution	80.30	
Total Credits	\$1106.30	
LESS		
29 Shares of Standard Oil Co. of New York Stock purchased under the Plan and 3 shares Stock Distribution.	\$1084.50	30
Uninvested balance.	\$ 21.80	

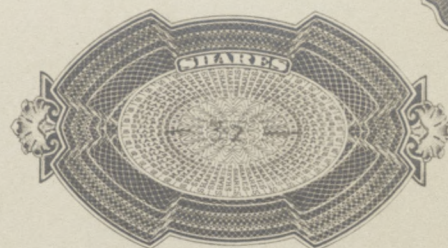
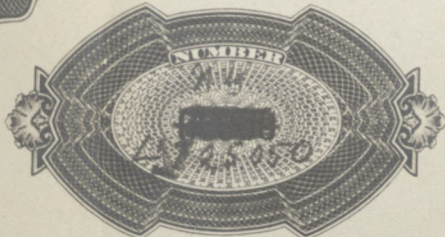
HENRY C. FOLGER }
Herbert L. Pratt } Trustees
Charles F. Meyer }

Exhibit R-4.

(Opposite) 

CERTIFICATE FOR
LESS
THAN 100
SHARES

CERTIFICATE FOR
LESS
THAN 100
SHARES



SHARES \$ 25 EACH

SHARES \$ 25 EACH

STANDARD OIL COMPANY OF NEW YORK.

— INCORPORATED UNDER THE LAWS OF THE STATE OF NEW YORK. —
THIS CERTIFICATE IS TRANSFERABLE IN NEW YORK OR SAN FRANCISCO.

This Certifies that Ressie Kars

is the owner of — Twenty two — full paid and
non-assessable shares of the Capital Stock of the Standard Oil Company of New York;
transferable on the books of the Company in person or by attorney on surrender of
this certificate properly endorsed. This certificate is not valid until countersigned
by the transfer agent and registered by the registrar.

Witness the corporate seal of
of its duly authorized officers

said Company and the signatures
this Jul. 26 1927

SPECIMEN

A. W. Cam
Robinsky
TREASURER



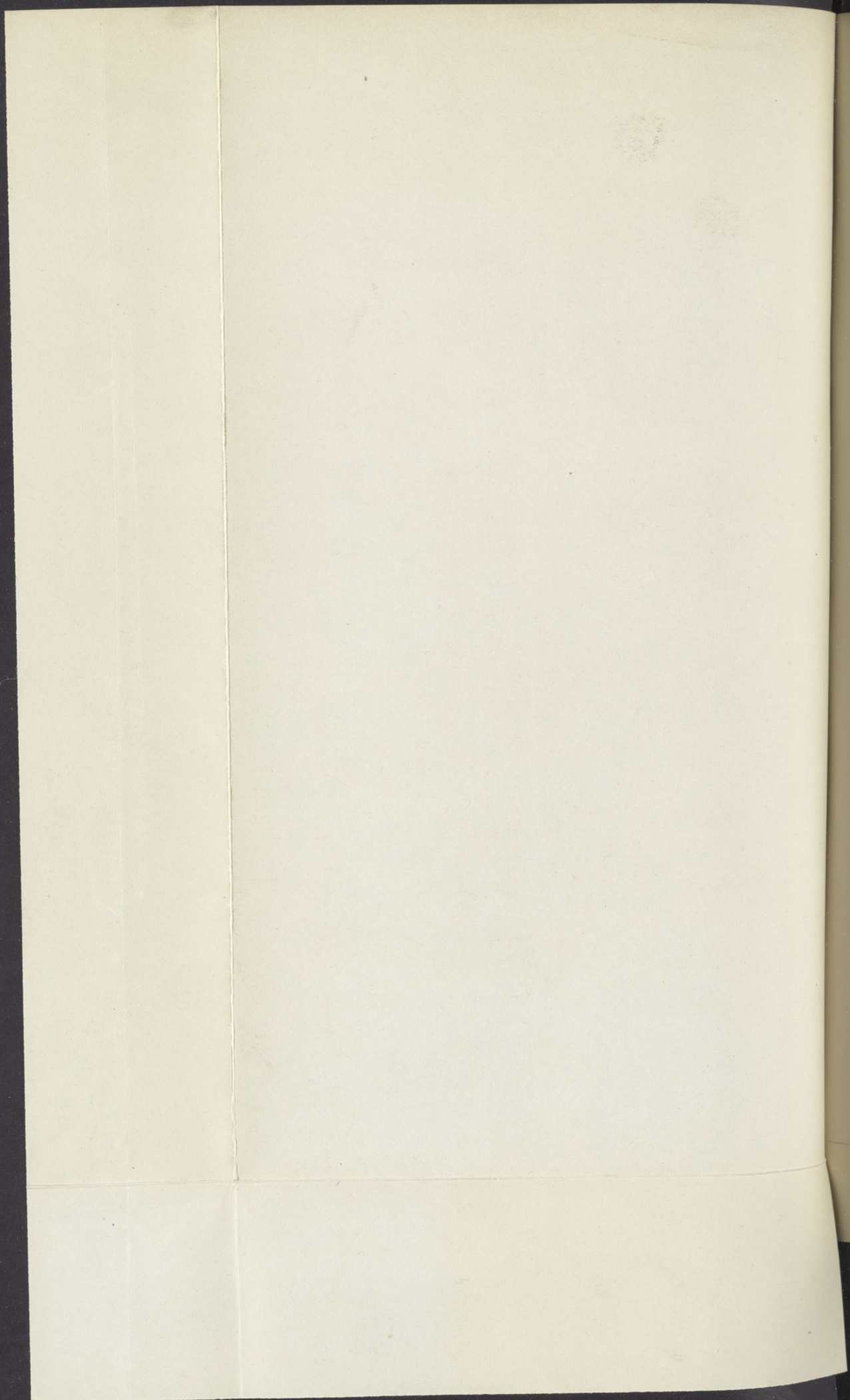
C. F. Meyer
PRESIDENT

ASSISTANT CASHIER

COUNTERSIGNED BY
THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK,
TRANSFER AGENT

TENS	UNITS
1	1
2	2
3	3
4	4
5	5
6	6
7	7
8	8
9	9
0	0

REGISTERED:
BANKERS TRUST COMPANY, REGISTRARS
July 27 1927



11/26/28
9/16/28

For Value received, _____ hereby sell, assign and transfer unto _____

_____ Shares
of the Capital Stock represented by the within Certificate, and do
hereby irrevocably constitute and appoint _____

_____ Attorney
to transfer the said stock on the books of the within named Company
with full power of substitution in the premises.

Dated, _____ 19____

In Presence of _____

NOTE THE SIGNATURE TO THIS ASSIGNMENT MUST CORRESPOND WITH THE NAME AS WRITTEN UPON THE FACE
OF THE CERTIFICATE IN EVERY PARTICULAR WITHOUT ALTERATION OR ANY CHANGE WHATSOEVER.

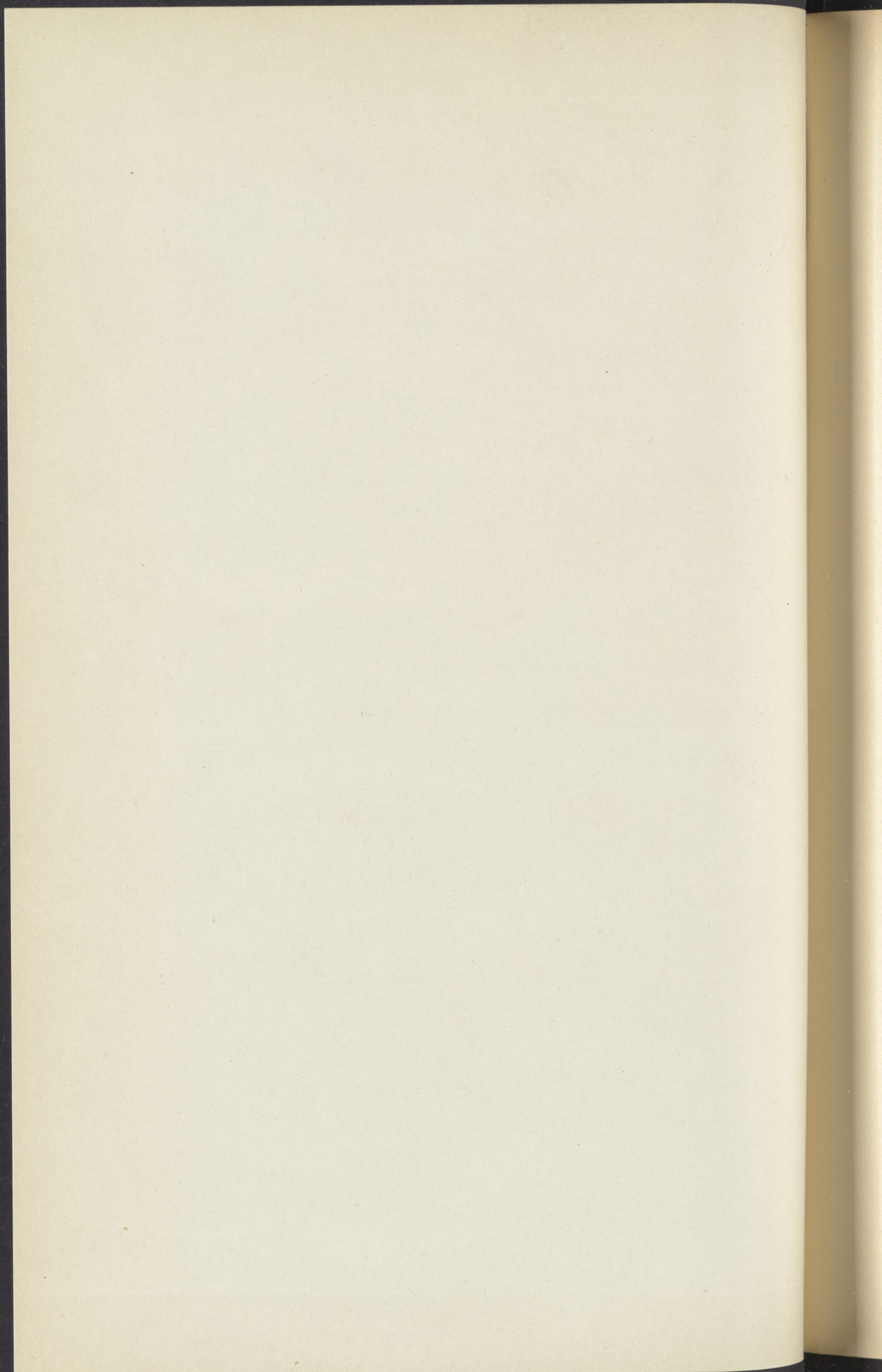


Exhibit R-7.**STOCK PURCHASE PLAN**

For the Employees
of

STANDARD OIL COMPANY OF NEW YORK
(Socony Illustration)

FOREWORD

10

To the Employees:—

The Directors of the STANDARD OIL COMPANY OF NEW YORK present herewith a plan adopted by the Stockholders and Board of Directors, whereby all employees who have been continuously in the service of the Company, or of its subsidiary companies, for the period of one year, may become stockholders of the Company, under the terms and conditions hereinafter set forth.

20

The Directors recommend participation in this plan in the belief that it affords the employees an opportunity to become stockholders in the Company and thus share in its profits, on terms which furnish an incentive to continued loyal service on the part of employees, and which at the same time, offers an investment sufficiently safe and attractive to encourage thrift and saving.

30

Participation in this plan is entirely optional with the employees and no discrimination will be exercised as between participating and non-participating employees.

If, after reading the plan, any of its features are not entirely clear, the employee should seek the advice of the trustees through the medium of his superior officer.

40

The plan will become effective November 1, 1923.

Exhibit R-7.

The trustees appointed by the Board of Directors, as provided by the plan are:

HENRY C. FOLGER, *Chairman of the Board*

HERBERT L. PRATT, *President*

CHARLES F. MEYER, *Vice-President*

STOCK PURCHASE PLAN FOR THE EMPLOYEES OF
STANDARD OIL COMPANY OF NEW YORK

10

Purposes

The purposes of the plan are to enable employees of the Company to become stockholders therein on favorable terms and to assist them in paying for their stock.

Employees' Participation

20

Subject to the limitations prescribed in this plan, every employee, (including officers and directors), who at the time of subscribing has been continuously in the service of the Company and/or of any of its subsidiary Companies, one year or more immediately prior thereto, may become a participant in this plan by authorizing the Company to deduct from the amount due him as current compensation for services, each pay day, whether monthly or otherwise, a sum not to exceed 20 per cent thereof, and credit the same to the account of such employee with the trustees herein provided for, to be used for the purposes of this plan, which deduction and credit shall thereupon be made by the Company.

30

Company's Participation

Concurrently with the making of any such deduction the Company shall, out of its own moneys credit the account of such employee with said trust-

40

Exhibit R-7.

tees, for the purpose of this plan, but subject to the condition hereinafter provided, a further sum equal to 50 per cent of such deduction.

The Trustees

- 10 This plan shall be administered by three trustees to be appointed by the Board of Directors of the Company, and said Board shall have the right to fill vacancies caused by resignation or otherwise and the further right of removal and substitution. Said trustees may act through any one of their number and shall have charge of the administration of the funds so credited and shall hold all stock of the Company acquired under this plan for the benefit of participating employees during
20 the continuance of the plan and in accordance therewith.

The trustees shall not be held personally responsible except for their wilful misconduct or gross neglect and shall not be required to give bond, nor shall they receive any compensation for their services as trustees.

Price of Stock

- 30 The price of such stock to be sold by the Company and issued to said trustees for said participating employees shall be fixed by the Board of Directors, first, as of the day on which the plan shall become operative, and quarterly thereafter as of the first day of January, April, July and October of each year, at substantially the average market price of the stock during the previous quarter, but shall in no case be below the par value of the stock, and the price so fixed shall be the price at which said stock shall be sold and issued to
40 said trustees until the first day of the succeeding quarter.

Exhibit R-7.

All stock sold to employees under this plan shall be purchased from the Company, provided, however, that if the average market price of the stock for any quarter shall have been less than par, the trustees may during the succeeding quarter fulfill the requirements of the trust by purchasing for employees under this plan stock of the Company in the open market out of the funds credited to said employees, but only so far as the same can be obtained at less than par. 10

Investment of Funds

There shall be kept a separate account for each participating employee and when the amounts credited under this plan to any employee are equivalent to the value of one or more whole shares of the Company's stock at the price fixed as herein provided, the Company will issue to said trustees such share or shares of its capital stock and will debit the employee's account with the trustees and reduce the amount of cash credited to the employee in said account accordingly. 20

Dividends and Stock Rights

Cash dividends or dividends equivalent to cash declared on stock held by the trustees shall be credited to the account of each employee for the acquiring of stock hereunder. Any stock dividend, so-called, declared on stock held by trustees shall be issued to the trustees and held for and delivered by them to the employee with the stock purchased for said employee under this plan and without further payment therefor. If during the life of this plan the Company shall offer any subscription rights to its stockholders, each participating employee shall have the right to subscribe through said trustees for the shares of stock for which 30 40

Exhibit R-7.

10 such employee would be entitled to subscribe if
such employee were the owner of the shares of
stock held by the trustees for such employee, upon
paying to the trustees the subscription price there-
for in which case the trustees shall subscribe and
pay for said stock; provided however, that if at
20 said time there is a cash credit in the account of
such employee with the trustees, such credit or
any part thereof, at the request of such employee,
shall be applied to the payment for said stock, and
the cash payment required from the employee re-
duced accordingly. Such additional stock shall
be issued to the trustees and held by them and de-
livered when the stock purchased for such em-
ployee is delivered to said employee. Unless the
employee elects to subscribe and pays for said
30 stock as above provided, the subscription rights
shall be sold by the trustees and the proceeds of
the sale added to the other credits of the employee
for acquiring stock hereunder. No fractional
share of stock shall be issued and in case the em-
ployee shall become entitled to such fractional
share through a stock dividend, or otherwise, the
trustees shall dispose of the same and add the pro-
ceeds to the credit of such employee for the pur-
chase of stock hereunder.

30

Effective Date and Termination of Plan

The operation of the plan shall begin November
1, 1923, and continue to October 31, 1928, both
dates inclusive, unless sooner terminated by the
Board of Directors, who shall have the right to ter-
minate this plan at any time. Except as herein-
after provided, no employee shall be entitled to
receive stock, or other securities, or cash from the
trustees before the termination of the plan, but
40 upon such termination the accounts shall be closed

Exhibit R-7.

by the distribution to each participating employee of all the stock, securities and cash to the credit of such employee in said accounts.

Withdrawals

(A)—Any participating employee who remains in the service of the Company, or of a subsidiary Company, may, if he so elects, withdraw from the plan at any time and shall thereupon be entitled to receive only the amount of money deducted from his compensation with interest thereon at the rate of 6 per cent per annum, and shall thereupon forfeit all rights and interest in this plan and in all stock, securities and credits of every kind appearing in the account of such employee with the trustees, and said stock, securities and credits shall be transferred to the Company. Such withdrawing employees shall not be eligible again to participate in the plan for a period of one year.

(B)—Any participating employee who leaves the service of the Company, or of a subsidiary company, voluntarily, or is discharged for cause, as to either of which in case of dispute, the Board of Directors shall be the sole judges, shall thereupon cease to be a participant in the plan and the account of such employee shall be closed by returning to such employee only the amounts deducted from the compensation of the employee with interest at the rate of 6 per cent per annum. Such employee shall thereupon cease to have any rights or interest in this plan or in any stock, securities or credits appearing in the account of such employee with the trustees, and all such stock, securities and credits shall thereupon be transferred to the Company.

(C)—Any participating employee who is retired under the Company's annuity plan, or

Exhibit R-7.

whose employment is terminated by the Company through no fault of his own, as to which in case of dispute the Board of Directors shall be sole judges, shall cease to be a participant in the plan and shall thereupon receive the full amount of cash, stock and other securities standing to the credit of such employee in the account of such employee with the trustees.

(D)—In case of the death of any participating employee while in the service of the Company, or of any subsidiary company, the trust in respect to such employee shall then terminate, and thereupon the full amount of cash, stock and other securities standing to the credit of such employee in the account of such employee with the trustees, shall be paid, transferred and delivered to such beneficiary or beneficiaries as such employee may have designated in writing and caused to be filed with the Company, or failing such designation to the estate of such employee.

Title to Stock

All stock purchased or acquired by the trustees under this plan shall be issued in the name of the trustees and their successors as "Trustees under the Stock Purchase Plan for Employees of the Standard Oil Company of New York," and the trustees for the time being and the survivor or survivors of them or their successor or successors shall have the title to such stock, and have the right to vote the same at all meetings of stockholders, either in person or by proxy, and to exercise all other rights incident to the ownership thereof. Stock purchased or acquired for any employee shall be credited on the books of the trustees to such employee when purchased or acquired,

Exhibit R-7.

but the rights and interest of any employee in said stock and in other securities and cash credited to the account of such employee with the trustees shall be only as herein declared.

Non-Assignability

The employee's rights under this plan are 10
wholly personal, and no assignment or transfer
of an employee's rights and interest in said plan
or in the stock, securities or cash credited to the
account of such employee will be permitted or
recognized.

*Board of Directors May Formulate Details, Add
to, or Change the Provisions Hereof*

The Board of Directors shall have the power 20
to formulate additional details and regulations
for carrying out this plan, and add additional
restrictions and conditions thereto, and make such
changes therein as, from time to time, they may
deem proper, but no additions or changes incon-
sistent with the provisions hereof as to the con-
sideration for which such stock may be issued,
the extent of the participation of the employees
and the amount of the contribution to be made
by the Company, shall be made.

30

EXPLANATIONS.

1—*Will a participant in this plan have the benefit
of any dividends during the period in which
the stock is held by the Trustees?*

A. Yes. The dividends will be credited to his
account on the Trustees' books, and will be used
for the purchase of additional stock for him.

40

Exhibit R-7.

2—*Who will have charge of the funds paid in by the employee?*

10 The funds will be credited to the Trustees, who will use same for the purchase of the Company's stock for the employee's account.

3—*When may an employee start his account?*

Application may be made at any time after November 1, 1923, providing the employee has completed one year's continuous service with the Company. Deductions from his compensation will begin with the first pay day subsequent to the approval of his application.

20

4—*Can an employee change the amount of deductions from his compensation?*

Yes, providing his reasons for the change are satisfactory. An employee should, however, carefully consider whether he can reasonably expect to continue the deductions he authorizes, so that these changes may be reduced to the minimum.

30 5—*Can an employee withdraw from the plan?*

Yes. An employee who remains in the service of the Company, may withdraw at any time he may desire. He will then receive only the amount of money that has been deducted from his compensation, with interest at the rate of six per cent per annum. All other credits revert to the Company, and the employee shall not be eligible to participate again in the plan for a period of one year.

40

Exhibit R-7.

6—*If an employee retires under the Company's Annuity Plan, may he continue his participation?*

No. When an employee is retired, he ceases to be a participant in the plan and thereupon will receive all stock together with any cash balance standing to his credit on the books of the Trustees. 10

7—*If an employee's services with the Company are terminated, otherwise than through retirement under the Annuity Plan, what will he receive?*

(A)—If the employee leaves the service of the Company, voluntarily or is discharged for cause, he will receive only the amount of money deducted from his compensation, together with interest at the rate of six per cent per annum. 20

(B)—If the employee's services are terminated by the Company through no fault of the employee, he will receive all stock, together with any cash balance standing to his credit on the books of the Trustees.

8—*If an employee dies during the life of the Plan, what disposition will be made of the stock purchased?* 30

His beneficiary will receive all stock together with the cash balance standing to the employee's credit on the books of the Trustees.

9—*Will the employee receive a statement of his account?*

Yes, a statement will be sent to the employee as of the end of each calendar year. 40

Exhibit R-7.

10—*In case an employee receives both salary and commission, or commission only, may deductions be made from the total compensation?*

No. Deductions apply only against salary.

Form S.P. 1

Subscription No.

10

STANDARD OIL COMPANY OF NEW YORK
STOCK PURCHASE PLAN

APPLICATION AND AUTHORIZATION
TO DEDUCT FROM PAYROLL

Date.....192.....

TO STANDARD OIL COMPANY OF NEW YORK:

I am now employed by.....

(Name of Company)

at.....and have been continuously in the service of the company for one year or more immediately prior to the date of this application. I desire to share in the benefits of the Stock Purchase Plan, and hereby authorize you to deduct on each pay day from the amount

20

* due me as current compensation for services, the sum of

| Weekly | Semi-monthly | Monthly |

**

which sum is to be credited in U. S. Dollars, to my account with the Trustees under the provisions of the plan. If, on any pay day, this amount should exceed 20% (one fifth) of the amount of compensation due me, you will please reduce the amount withheld to the nearest amount in even dollars, or other standard unit of local currency which does not exceed said 20%.

I have read the said plan and understand its contents. I hereby accept the terms thereof and agree to be bound thereby and by any changes therein and by any and all rules and regulations now in force or which may hereafter be adopted, as provided in the plan.

30

(Signed).....Number.....

Employee

(Name of employee to be type-written on this line.)

WITNESSES

Name..... Address.....

Name..... Address.....

Correct and approved.

40

.....
Manager or Superintendent

* Put check in square that describes your pay period.

** Amount to be stated in the currency in which employee is paid.

Exhibit R-7.

Form No. S.P. 1

Subscription No.....

STANDARD OIL COMPANY OF NEW YORK
STOCK PURCHASE PLAN

DESIGNATION OF BENEFICIARY

Date.....192..... 10

TO STANDARD OIL COMPANY OF NEW YORK AND TRUSTEES UNDER THE
STOCK PURCHASE PLAN FOR EMPLOYEES OF SAID COMPANY:In the event of my death while a participant in the Stock Purchase Plan
for Employees of Standard Oil Company of New York, I hereby designate
as my beneficiary

*Name

Relationship Age.....

Address: No Street

City State..... 20

I reserve the right to change from time to time the beneficiary named
herein, by giving proper notice in writing.(Signed).....Number.....
Employee

Department

Place

(Name of employee to be type-
written on this line.)

WITNESSES 30

Name Address.....

Name Address.....

* Local managers should make special effort to see that name, address
and relationship of beneficiary are clearly and correctly stated.

Exhibit R-8.

(Filed March 9, 1928.)

ESSEX COUNTY ORPHANS' COURT.

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IN THE MATTER
of
 The Estate of GERTRUDE KOSS,
 Deceased.

On Order for
 Discovery.
 Stipulation.

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It is hereby stipulated and agreed by and between Harry Kalisch, Proctor for the estate of Gertrude Koss, deceased, and Precker & Precker, Proctors for Bessie Koss, respondent, that the following facts in the proceedings for discovery be admitted as true as though proven in court and be incorporated in the testimony taken before Edward L. Stasse, Advisory Master:

30

1. All facts appearing and set forth in the copy of statement of trustees under the Stock Purchase Plan, etc., dated July 22, 1927, and signed by Henry C. Folger, Herbert L. Pratt and Charles C. Meyer. (Case, p. 39.)

2. That the deceased, Gertrude Koss, subscribed under said stock purchase plan in accordance with the provisions contained in booklet Exhibit R-7.

It is further agreed and stipulated by and between the aforesaid proctors that in case the

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Exhibit R-8.

Orphans' Court of Essex County or any court to which an appeal might be taken by either party determines that the shares of stock subscribed for by the said Gertrude Koss, deceased, in her lifetime belongs to the estate of the said Gertrude Koss, that upon such determination the said Bessie Koss will endorse for transfer to said estate the certificate of stock standing in her name and marked Exhibit R-4. 10

HARRY KALISCH,
Proctor for the Estate of Gertrude Koss.

PRECKER & PRECKER,
Proctors for Respondent. 20

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Exhibit R-9.

(Filed April 3, 1928.)

ESSEX COUNTY ORPHANS' COURT.

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IN THE MATTER

*of*The Estate of GERTRUDE KOSS,
Deceased.On Order for
Discovery.
Stipulation.

20

It is hereby further stipulated and agreed by
and between Harry Kalisch, Proctor for the Es-
tate of Gertrude Koss, deceased, and Precker &
Precker, Proctors for Bessie Koss, respondent,
that

1. The Standard Oil Company of New York,
in issuing said stock to Bessie Koss, intended
thereby to conform with the stock purchase plan
subscribed to by the deceased and contained in
the booklet marked Exhibit R. 7.

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KALISCH & KALISCH,
Proctors for the Estate of
Gertrude Koss, Deceased

PRECKER & PRECKER,
Proctors for Bessie Koss.

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Opinion of Advisory Master.

(Filed April 15, 1928.)

ESSEX COUNTY ORPHANS' COURT.

IN THE MATTER
of
The Estate of GERTRUDE KOSS,
Deceased.

On Petition
and Order for
Discovery.
Opinion.

10

Before Hon. EDWARD L. STASSE, Advisory Master.

For the Petitioner appears KALISCH & KALISCH (by HARRY KALISCH);

For the Respondent appears PRECKER & PRECKER.

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STASSE, Advisory Master.

Esther Grobe, administratrix of the estate of Gertrude Koss, prays for an order directing that one Bessie Koss make delivery to her, as administratrix, of thirty-two shares of stock of the Standard Oil Company of New York issued to Bessie Koss on or about the 26th day of July, 1927.

Gertrude Koss died on the 17th day of July, 1927. Prior thereto, from the evidence introduced, she withdrew from a certain plan for the purchase of stock by employees of the Standard Oil Company of New York, the withdrawal being on or about the 30th day of April, 1927. The stock purchase plan provided that upon the death of the member of the plan, any stock held by the trustees of the said plan would be issued to the beneficiary nominated by such member. The plan

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Opinion of Advisory Master.

10 further provided that in the event of the withdrawal of any member from such plan the trustees would pay over such sum as had been accumulated in the fund, together with interest at six per cent. per annum to such member. There is no evidence of assignment by Gertrude Koss to Bessie Koss. In fact there are but two methods provided in the plan. The evidence shows that the withdrawal was made by Gertrude Koss on or about the 30th day of April, prior to her decease, thereby creating a fund that became an asset of her estate as of April 30th, 1927. The stock was delivered subsequent to the death of Gertrude Koss to Bessie Koss, but not in accordance with either method provided in the plan.

20 An order, therefore, is advised, directing Bessie Koss to assign and deliver to Esther Grobe, administratrix of the Estate of Gertrude Koss, certificate number L-1125050 for thirty-two shares of stock of the Standard Oil Company of New York.

E. L. STASSE,
Advisory Master.

Order.

(Filed April 4, 1928.)

ESSEX COUNTY ORPHANS' COURT.

IN THE MATTER
of
The Estate of GERTRUDE KOSS,
Deceased.

On Petition of
Administrator for
Discovery of
Assets.
Order.

10

Esther Grobe of the City of Newark, in the
County of Essex and State of New Jersey, the
administratrix of the Estate of Gertrude Koss,
late of the County of Essex, deceased, having
filed her petition herein alleging that the said
Gertrude Koss in her lifetime purchased thirty-
two shares of stock of the Standard Oil Company
of New York and it appearing that said stock
was purchased in accordance with a certain plan
known as the stock purchase plan for the em-
ployees of the said Standard Oil Company of New
York and that the said Gertrude Koss prior to her
death withdrew from said stock purchase plan,
which withdrawal became effective April 30, 1927,
and that the said Gertrude Koss died July 17, 1927,
and that the said Standard Oil Company of New
York did issue said thirty-two shares of stock to
one Bessie Koss, formerly of the City of Newark,
County and State aforesaid, and now of the City
of Jersey City, County of Hudson and State afore-
said, and that said stock was issued in her name,
and the rule to show cause made herein having
been duly served and the matter having been re-
ferred to Edward L. Stase, Esquire, an Advisory

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Order.

Master and the Court having taken testimony and considered the same and being satisfied that the said thirty-two shares of stock of the Standard Oil Company of New York is the property of the Estate of the said Gertrude Koss, deceased; it is thereupon, on this fourth day of April, 1928,

10

ORDERED, that the said Bessie Koss deliver and transfer said stock to said Esther Grobe, the administratrix of the estate of the said Gertrude Koss, deceased, within twenty days from the date hereof to the end that the said stock may be administered upon as part of the assets of the estate of the said Gertrude Koss, deceased.

WALTER D. VAN RIPER,
Judge.

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Respectfully advised,
EDWARD L. STASSE,
Advisory Master.

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Notice of Application to Reopen.

(Filed May 11, 1928.)

ESSEX COUNTY ORPHANS' COURT.

IN THE MATTER of The Estate of GERTRUDE KOSS, Deceased.	}	On Petition for Discovery. Notice.	10
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*To Harry Kalisch, Esq., 790 Broad Street,
Newark, N. J.:*

Sir:

PLEASE TAKE NOTICE that on the eleventh day of May, 1928, at ten A. M. or as soon thereafter as counsel may be heard, before Honorable Walter D. Van Riper, Judge of the Orphans' Court, at the Hall of Records, Newark, N. J., we shall apply for an order re-opening the above entitled cause for the purpose of taking further testimony and for a rehearing, especially as to the withdrawal of Gertrude Koss, deceased, from the stock purchase plan for employees of the Standard Oil Company of New York. This notice and proceedings thereunder are without waiver of respondent's right of appeal from the order in the above entitled cause, bearing date April 4, 1928, in the event that the aforesaid application is denied.

PRECKER & PRECKER,
Proctors of Respondent.

Order to Reopen.

(Filed May 18, 1928.)

ESSEX COUNTY ORPHANS' COURT.

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IN THE MATTER

*of*The Estate of GERTRUDE KOSS,
Deceased.On Petition of
Administrator for
Discovery of
Assets.
Order.

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This cause coming on to be heard before
Walter D. Van Riper, Judge of the Essex County
Orphans' Court, in the presence of Precker &
Precker, proctors for the respondent, Bessie Koss,
and Harry Kalisch, Esq., proctor for the peti-
tioner, Esther Grobe, administratrix of the Estate
of Gertrude Koss, deceased, and the arguments of
the respective counsel having been heard and con-
sidered, and it appearing to the Court that the
said cause should be re-opened for the purpose of
taking further testimony and for a re-hearing,
especially as to the withdrawal of Gertrude Koss,
deceased, from the stock purchase plan for em-
ployees of the Standard Oil Company of New
York, it is on this 11th day of May, 1928, on mo-
tion of Precker & Precker,

30

ORDERED that the within cause be and the same
hereby is re-opened for the purpose of taking
further testimony and for a re-hearing, as afore-
said, and it is further

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ORDERED, that the order heretofore entered in
this cause on the fourth day of April, 1928, com-

Transcript of Proceedings.

manding the said Bessie Koss to deliver a certain certificate of stock for shares of the said Standard Oil Company of New York to the said Esther Grobe, administratrix of the said estate, be and the same hereby is stayed pending the further determination and order of this court.

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WALTER D. VAN RIPER,
Judge.

Transcript of Proceedings.

ESSEX COUNTY ORPHANS' COURT.

IN THE MATTER of The Estate of GERTRUDE KOSS, Deceased.	}	On Order for Rehearing.	20
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Transcript of proceedings taken at the Hall of Records, Newark, New Jersey, on Friday, May 18, 1928, at 2:30 o'clock P. M., before Hon. Edward L. Stasse, Advisory Master, in the presence of Kalisch & Kalisch (by Harry Kalisch) who appear for the petitioner and Precker & Precker (by Isadore B. Glucksman) who appear for the respondent.

30

Mr. Kalisch: I object to the taking of any testimony on the ground that the order that was made was made contrary to law, because the application did not show any newly discovered evidence or fraud, and those were the only two grounds upon which the order could be made.

40

Transcript of Proceedings.

Secondly, that the facts which are to be amplified today by further testimony, were stipulated by counsel for the respective parties, and it is, therefore, improper and illegal to permit testimony in contradiction or explanation of that stipulation. Upon those two grounds I object to the further taking of testimony.

(Argument.)

Mr. Kalisch: What counsel is doing now is re-arguing the matter which we have been all through at the first hearing. The purpose of this order, as I take it, was to offer evidence and not a re-argument of the same evidence that is in, and I don't see the purpose of rehashing the same evidence we had at the first hearing.

20 Mr. Glucksman: It is my understanding of the order that the matter was reopened for the purpose of having a rehearing and there was no restriction as to argument or testimony.

Mr. Kalisch: Well, I have objected to the order.

The Advisory Master: You already have your formal objection to the order.

Mr. Kalisch: And I object to this further argument.

(Discussion.)

30 The Advisory Master: I don't feel free to permit any further evidence in view of the stipulation and the facts set forth in the statement.

(TESTIMONY CLOSED.)

Order.

(Filed June 26, 1928.)

ESSEX COUNTY ORPHANS' COURT.

IN THE MATTER <i>of</i> The Estate of GERTRUDE KOSS, Deceased.
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10

Esther Grobe, of the City of Newark, in the
County of Essex and State of New Jersey, the
administratrix of the estate of Gertrude Koss,
late of the County of Essex, deceased, having filed
her petition herein alleging that the said Gertrude
Koss, in her lifetime purchased thirty-two shares
of stock of the Standard Oil Company of New
York, and it appearing that said stock was pur-
chased in accordance with a certain plan known as
the Stock Purchase Plan for the employees of the
said Standard Oil Company of New York, and
that the said Gertrude Koss prior to her death
had terminated her employment with the said
Standard Oil Company because of illness and had
withdrawn from, and had ceased to be a partici-
pant in, the said Stock Purchase Plan, and it ap-
pearing that Harry Kalisch, Proctor for the said
estate, and Precker & Precker, Proctors for said
Bessie Koss, did stipulate and agree that the said
withdrawal from said Stock Purchase Plan be-
came effective April 30, 1927, and it further ap-

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30

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Order.

10 pearing that the said Gertrude Koss died July 17,
1927, and that said Standard Oil Company after
her said death had issued said thirty-two shares
of stock to one Bessie Koss, formerly of the City
of Newark, County of Essex and State aforesaid,
and now of the City of Jersey City, County of
Hudson and State aforesaid, and that said stock
was issued in her name, and the rule to show cause
made herein having been duly served, and the
matter having been referred to Edward L. Stasse,
Esq., an Advisory Master, and the Court having
taken testimony and considered the same and be-
ing satisfied that the said thirty-two shares of
stock of the said Standard Oil Company of New
York was the property of the estate of the said
20 Gertrude Koss, deceased, and an order having
been made to that effect on the 4th day of April,
1928, and it appearing that a further order was
made by this court on the 11th day of May, 1928,
that the proceedings before the said Edward L.
Stasse, Esq., be reopened for the taking of fur-
ther testimony upon the application of the said
Bessie Koss, and the matter again coming on to be
heard before the said Edward L. Stasse, Esq., on
the 18th day of May, 1928, and no further evidence
having been submitted by the said Bessie Koss,
30 and it appearing to the Court that the said Ger-
trude Koss in her lifetime had terminated her em-
ployment with the said Standard Oil Company of
New York and had withdrawn from the said Stock
Purchase Plan and had ceased to be a participant
in said plan on April 30, 1927, pursuant to para-
graph 3 on page 8 of Exhibit R. 7, and that the
said thirty-two shares of stock of the said Stand-
ard Oil Company of New York is the property of
the estate of the said Gertrude Koss,

Order.

It is thereupon on this 26th day of June, 1928,
 ORDERED that the said Bessie Koss deliver and
 transfer said stock to the said Esther Grobe,
 administratrix of the estate of the said Gertrude
 Koss, deceased, within ten days from the date
 hereof, and that said Esther Grobe do take pos-
 session thereof to the end that the said stock may
 be administered upon as part of the estate of the
 said Gertrude Koss, deceased.

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WALTER D. VAN RIPER,
 Judge.

Respectfully advised,
 EDWARD L. STASSE,
 Advisory Master.

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Notice of Appeal.

(Filed June 27, 1928.)

ESSEX COUNTY ORPHANS' COURT.

10

IN THE MATTER

of

The Estate of GERTRUDE KOSS,
Deceased.

On Petition of
Appeal.
Notice of Appeal.

20

30

Bessie Koss, one of the next of kin of Gertrude Koss, deceased, and the respondent named in the petition for discovery of assets filed in the within cause by Esther Grobe, administratrix of the aforesaid estate, hereby appeals to the Prerogative Court from the decree entered herein on the twenty-sixth day of June, 1928, ordering the said Bessie Koss to deliver and transfer a certain certificate of stock to the said Esther Grobe within ten days from the date thereof and ordering the said Esther Grobe to take possession thereof to the end that the said stock might be administered upon as part of the estate of the said Gertrude Koss, deceased, and the said Bessie Koss hereby appeals from every part of the said order.

PRECKER & PRECKER,
Proctors for Appellant.

Dated, Newark, N. J., June 27, 1928.

Petition of Appeal.

(Filed June 30, 1928.)

NEW JERSEY PREROGATIVE COURT

IN THE MATTER <i>of</i> The Estate of GERTRUDE KOSS, Deceased.	}	On Petition of Appeal. Petition of Appeal.	10
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To the Ordinary of the State of New Jersey:

The petition of Bessie Koss, of the City of Jersey City, in the County of Hudson and State of New Jersey, respectfully shows that:

1. Petitioner is one of the next of kin of Gertrude Koss, late of the County of Essex, deceased. 20
 On the 26th day of June, 1928, the Orphans' Court of the County of Essex made its order that the petitioner herein deliver and transfer a certain certificate of stock to Esther Grobe, administratrix of the aforesaid estate, within ten days from the aforesaid date and that the said Esther Grobe take possession thereof to the end that same might be administered upon as part of the said estate.

2. Your petitioner claims and alleges that the whole and every part of the aforesaid decree is erroneous, improper and illegal, and that your petitioner is aggrieved thereby. 30

Your petitioner therefore prays that the aforesaid order of the said Orphans' Court and every part thereof be reversed by this court.

PRECKER & PRECKER,
 Proctors for Appellant.

MICHAEL S. PRECKER,
 Of Counsel.

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Dated Newark, N. J., June 29, 1928.

Answer to Petition of Appeal.

(Filed July 7, 1928.)

NEW JERSEY PREROGATIVE COURT.

10

IN THE MATTER
of
The Estate of GERTRUDE KOSS,
Deceased.

On Petition of
Appeal.
Answer.

The answer of Esther Grobe, administratrix of the estate of Gertrude Koss, deceased, respondent to the petition of appeal of Bessie Koss (Klein), appellant:

20

1. This respondent answering, admits the allegations contained in the first paragraph of appellant's petition of appeal filed herein.

30

2. This respondent is advised, believes and submits that the portions of said decree complained of by appellant are just and lawful, and this respondent denies that the aforesaid portions of said decree or any parts thereof are erroneous, improper or illegal and alleges that said portions of said decree are legal, proper and correct.

She therefore prays that the said petition of appeal may be dismissed, with costs.

HARRY KALISCH,
Proctor for and of Counsel
with the Respondent.

40

Order of Reference.

(Filed July 31, 1928.)

NEW JERSEY PREROGATIVE COURT.

IN THE MATTER
of
The Estate of GERTRUDE KOSS,
Deceased.

On Appeal.
Order of
Reference.

10

This matter being opened to the Court by Precker & Precker, proctors of the appellant and it appearing that Kalisch and Kalisch, proctors for the respondent have consented hereto:

20

It is on this thirty-first day of July, 1928, on motion of Precker & Precker, ORDERED, that the above-entitled cause be referred to Hon. M. L. Berry one of the Vice-Ordinaries of this court to hear the same for the Ordinary and to report thereon to him and to advise what order or decree should be made therein.

E. R. WALKER,
Ordinary.

30

We hereby consent to the entry of the foregoing order.

KALISCH & KALISCH,
Proctors for Respondent.

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Order of Designation.

(Filed September 4, 1928.)

NEW JERSEY PREROGATIVE COURT.

10

IN THE MATTER
of
 The Estate of GERTRUDE KOSS,
 Deceased.

On Appeal.
 Order of
 Designation.

20

Application having been made to fix the time and place for the hearing of the above stated cause, and it appearing that the respondent has consented thereto, it is on this 4th day of September, 1928, on motion of Precker and Precker, proctors for appellant,

ORDERED that Monday the fourth day of February, 1929, at the hour of ten o'clock in the forenoon at the Chancery Chambers in the Industrial Office Building, in the City of Newark, New Jersey, be and the same hereby is designated as the time and place for the hearing of said cause.

30

MAJA LEON BERRY,
 V. O.

E. R. WALKER,
 Ordinary.

I hereby consent to the fixing of the time and place in the foregoing order.

KALISCH & KALISCH,
 Proctors of Respondent.

40

Notice of Motion to Take Testimony.

(Filed September 12, 1928.)

NEW JERSEY PREROGATIVE COURT.

IN THE MATTER
of
The Estate of GERTRUDE KOSS,
Deceased.

On Appeal.
Notice of
Motion to Take
Testimony.

10

To KALISCH & KALISCH, Proctors of Respondent,
Kinney Building, Newark, N. J.

Gentlemen:

20

TAKE NOTICE that we shall appear before Hon-
orable Maja Leon Berry, Vice-Ordinary, at
Chancery Chambers, 1060 Broad Street, Newark,
N. J., on the eleventh day of September, 1928, at
ten o'clock in the forenoon, or as soon thereafter
as counsel may be heard, to apply for an order
permitting new evidence to be offered on the hear-
ing of the within appeal. At the time this ap-
plication is made we shall present to the Court
the original affidavit, a copy of which accompanies
this notice, as well as a copy of the affidavit of
Gilbert C. Loder, dated May 9, 1928 with which
you have previously been furnished.

30

PRECKER & PRECKER,
Proctors for Appellant.

40

Affidavit of Michael S. Precker.

(Filed September 12, 1928.)

STATE OF NEW JERSEY, }
COUNTY OF ESSEX, } ss.:

10 MICHAEL S. PRECKER, of full age, being duly sworn according to law on his oath deposes and says:

I am a counsellor-at-law of the State of New Jersey and a member of the law firm of Precker & Precker, proctors for appellant, Bessie Koss.

20 On the hearing of the within cause before the Essex County Orphans' Court I omitted to introduce certain evidence which was available to me, tending to prove that the intestate was at the time of her death employed by the Standard Oil Company of New York. My neglect to offer this evidence was due to several causes: First, I did not anticipate that the order which ultimately entered would be based on this point. Second, I did not expect that the question of employment would be decided on the paucity of the evidence offered, it appearing to me that the Court would of its own motion direct more evidence to be offered on this score, if he decided that it had an

30 important bearing on the case. Third, the only evidence in the case on the question of employment was offered by the appellant and same is diametrically opposed to the Court's finding. Fourth, the evidence at the hearing does not indicate any denial of appellant's testimony on this score by the respondent. Fifth, the hearings were of an informal nature and for this reason, instead of bringing my witness from New York to attend the hearing, I offered his deposition, showing that

40 he was employed by the Standard Oil Company

Affidavit of Michael S. Precker.

of New York and was in a position to know and did know that the intestate was employed by the said company at the time of her decease. Both the Court and counsel for the respondent were furnished with a copy of this deposition, yet the Court would neither admit same in evidence nor grant an adjournment in order to give me an opportunity to bring this evidence, so important in the eyes of the Court, before the Court. 10

The order appealed from was a surprise upon me. It was, at least in part, the result of my omission to put in this evidence under the mistaken belief that a formal admission of same was unnecessary. I believe that grave injustice may be done to my client unless this evidence is admitted.

MICHAEL S. PRECKER. 20

Sworn to and subscribed before me }
this 5th day of September, 1928. }

ISADORE SOTH,
Master in Chancery of New Jersey.

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Order.

(Filed September 11, 1928.)

NEW JERSEY PREROGATIVE COURT

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IN THE MATTER

*of*The Estate of GERTRUDE KOSS,
Deceased.On Appeal.
Order.

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This cause coming on to be heard in the presence of Harry Kalisch, Esq., of counsel with the respondent, and Precker & Precker, appearing for appellant, and the Court having heard counsel herein and having examined and considered the affidavits submitted by counsel, and it appearing to the satisfaction of the Court that the order entered herein by the Essex County Orphans' Court was a surprise upon appellant and was due in part to the omission of counsel for appellant to offer certain evidence available to him, which said omission was induced by the mistaken belief of said counsel that such evidence was unnecessary, and the Court being satisfied that due justice to all the parties in the within cause may not be done without the admission of the said evidence, it is therefore on this 11th day of September, 1928, on motion of Precker & Precker,

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ORDERED that the appellant herein have leave to bring in such further evidence on the hearing of the within appeal as may be relevant to the question of the employment of the intestate, Gertrude Koss, by the Standard Oil Company of

Order.

New York at the time of her decease, or such evidence as may in anywise elucidate the matters in question, with leave to the respondent to admit further evidence in rebuttal.

No testimony contradicting facts stipulated between counsel shall be admitted, anything to the contrary hereinbefore contained notwithstanding. 10

E. R. WALKER,
Ordinary.

Respectfully advised,
MAJA LEON BERRY,
Vice-Ordinary.

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Notice of Hearing.

(Filed October 4, 1928.)

NEW JERSEY PREROGATIVE COURT.

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IN THE MATTER
of
 The Estate of GERTRUDE KOSS,
 Deceased.

On Appeal.
 Notice of Hearing.

To Messrs. Kalisch & Kalisch, Proctors of Res-
 pondent

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TAKE NOTICE of the hearing of this cause before
 the Honorable Maja Leon Berry, the Viceordi-
 nary of this court to whom the said cause has been
 referred, on the fourth day of February, 1929,
 at the hour of ten o'clock in the forenoon, at the
 Chancery Chambers, in the City of Newark, the
 time and place designated by the order of the said
 Vice Ordinary made on the fourth day of Sep-
 tember, 1928.

PRECKER & PRECKER,
 Proctors of Appellant.

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John T. Roberts, for Appellant—Direct.

Testimony.

NEW JERSEY PREROGATIVE COURT.

IN THE MATTER of The Estate of GERTRUDE KOSS, Deceased.	}
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Transcript of testimony taken in the above entitled matter before Hon. Maja Leon Berry, Vice Chancellor, at the Chancery Chambers, Newark, New Jersey, on February 4, 1929.

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Appearances:—

MR. MICHAEL S. PRECKER, of Precker & Precker, Proctors for Appellant.

MR. HARRY KALISCH, of Kalisch & Kalisch, Proctors for Respondent.

JOHN T. ROBERTS, being duly sworn according to law, on his oath says:

30

Direct examination by Mr. Precker:

Q. Mr. Roberts, you are employed by the Standard Oil Company of New York, is that right?

A. That is correct.

Q. How long have you been employed by that company? A. About twenty-six years.

Q. What department are you in? A. Standard Oil Company, New York City Department.

40

John T. Roberts, for Appellant—Direct.

Q. Was Miss Gertrude Koss an employee in that department? A. She was.

Q. How long have you known Miss Gertrude Koss? A. Practically all the time she was in the company, about thirteen years.

10 Q. Were both of you working for the company at that time, during all that time? A. Yes.

Q. Do you remember when Miss Koss left the employ of the company? A. Yes, I do.

Q. About what time was it?

20 Mr. Kalisch: I object. The stipulation admits as a fact, the statement made by the trustees—I believe they are called—of this stock purchase plan, which sets out the date of her withdrawal from the company's employ.

Mr. Precker: Counsel refers to the statement on page 36 of the printed record (Case, p. 39), from which you will see that there is a reference to April 30, 1927, "the effective date of your withdrawal," which means the withdrawal of the employee from participation in the stock purchase plan, not from employment in the company.

30 Court: I don't think the word "withdrawal" as it appears in that statement on page 36 (Case, p. 39) can be interpreted, unless I know to what withdrawal it refers; I don't know what it means; withdrawal from what?

Mr. Precker: That is what we are trying to make clear by this testimony.

Mr. Kalisch: Withdrawal from the participation plan.

40 Court: If it is withdrawal from participation, that settles it. How am I going to know?

John T. Roberts, for Appellant—Direct.

Mr. Kalisch: Because the statement says this: "That the trustees under the stock purchase plan submit herewith a statement of your account from the beginning of your participation in the plan to April 30, 1927, inclusive, the effective date of your withdrawal."

10

Court: Is that withdrawal from the plan?

Mr. Kalisch: "From the beginning of your participation in the plan to April 30, 1927, inclusive, the effective date of your withdrawal." It is submitted, of course, that those facts were true, and in the order which your Honor made, there was to be no evidence in any way to in any way contradict that.

20

Court: You say that means "withdrawal from participation in the plan?"

Mr. Kalisch: That is the way I read it.

Court: Mr. Precker claims it means withdrawal from the business.

Mr. Precker: No.

Court: What do you claim?

Mr. Precker: I am trying to show—I admit it means the participation date of withdrawal from the plan, but my question is not as to when she withdrew from the plan, but when her employment terminated.

30

Court: If you are both agreed on the interpretation of that word, and its meaning, why all the argument?

Mr. Precker: There is quite an argument because the decision of the Court below is as to the effect of that wording, "the effective date of your withdrawal". If it does mean that the withdrawal became ef-

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John T. Roberts, for Appellant—Direct.

fective April 30, was it because the employee was retired or discharged, or because the employee died at that time? That is the thing that makes the whole difference.

10

Court: Is there anything in the stipulation respecting the date of the death? Read the question.

(Question and answer read):

Q. Do you remember when Miss Koss left the employ of the company? A. Yes, I do.

Q. About what time was it?

Court: Your statement and question are entirely different.

20

Mr. Precker: I was leading up to it.

Court: I am considering only this question. You said it asked for the reason for the withdrawal. It asks for the date of the termination of the employment.

Mr. Precker: I withdraw the question and put it this way.

Q. Do you remember when you last saw Miss Koss? A. Yes.

30 Q. When was it? A. The last time was about March 2, 1927.

Q. Was she in the office of the Standard Oil Company after that time?

Mr. Kalisch: I object to that; the last time he saw her was March 2. If she was in the office of the Standard Oil Company after that, it couldn't have been when he saw her; it must have been hearsay. He says the last time he saw her was March 2nd.

40

John T. Roberts, for Appellant—Direct.

Q. I mean to your personal knowledge.

Court: He is only testifying to his knowledge. I will permit the question.

A. After the first part of March I did not see her in the office.

10

Court: Was it your business to see her, if she had been there?

Witness: I would see her if she was in the office, in the same department.

Court: Were you there every day?

Witness: Every day.

Court: And still employed there?

Witness: Still employed there.

Q. Did you have any formal notice as to why she was not there? 20

Mr. Kalisch: I object to that. The question is a withdrawal from this participation.

Court: I think it makes a lot of difference. I will permit the question.

A. I did.

Mr. Kalisch: May I ask from whom that notice is? 30

Court: We can settle that very quickly on this point.

Is there anything stipulated in the printed record respecting the date of the termination of her employment, or the reasons therefor?

Mr. Precker: No, sir.

Court: Is there anything in this record or anything in the stipulation respecting the date of the termination of her employ- 40

John T. Roberts, for Appellant—Direct.

ment with the company and the reason for it?

Mr. Kalisch: There is nothing that I know of in the record.

Court: I will permit the answer.

10 A. Yes, I did.

Q. What was that notice, and from whom did it come? A. An authorization from our manager, Mr. Frank Platz—

Mr. Kalisch: I think that is hearsay; I object.

Court: Proceed.

20 A. (Continuing) An authorization from our manager, Mr. Frank Platz, that this young lady was away on sick leave, and to be carried on our payroll to a certain date, and to be carried and known as on sick leave.

Q. Until what date was she to be carried?

Court: Never mind what date she was to be carried. I am interested in the date on which her employment terminated.

30 A. The date her employment terminated would be the date she died.

Court: That settles it.

Q. On what date did she die? A. July 17, 1927.

Q. As an employee in your department would you receive from her a formal notice of withdrawal in the event that she decided to withdraw participation from the stock purchase plan? A. Yes, I would.

40 Q. Did you receive such a notice? A. I did not.

John T. Roberts, for Appellant—Direct.

Q. Was she still a member of the stock purchase plan at the time of her death? A. Yes, she was.

Q. Do the records in your department—

Mr. Kalisch: I object to this, your Honor; that is going right into the face of this stipulation.

10

Court: This stipulation refers to April 30, 1927, as "the effective date of your withdrawal." What does that mean?

What does that mean, Mr. Roberts?

Mr. Kalisch: Did this gentleman write this letter?

May I ask this question? May I cross-examine him on that?

Court: Just tell me what you gentlemen want to do; Do you want to withhold anything from the Court, or decide this case on the facts?

20

Mr. Kalisch: I want to decide it on the facts, but I don't want to have evidence after I have stipulated with counsel.

Court: I will be the judge as to whether or not any evidence is put in contradicting the evidence, or the facts which are stipulated. If there is any such evidence put in in the course of this proceeding, I will eliminate it from consideration, because it has already been determined that the stipulation controls. You may proceed with your examination, bearing in mind the fact that you are dealing with the court and not with a jury.

30

Q. Do the records of your department indicate the circumstances of Miss Koss' leaving? A. Yes, they do.

40

John T. Roberts, for Appellant—Direct.

Q. Have you those records with you? A. Yes, we have correspondence right in our bag here.

Q. Will you produce that, please? A. Yes. (Producing same.)

10 Q. I show you some records purporting to be records of the Standard Oil Company, and ask you what those records are? A. This is known as the Stock Purchase plan, pay-roll deductions, during our plan, for five years, showing the amount of money deducted from each subscriber from their salary each week.

20 Q. What is the purpose of making a deduction from the salary of the employees? You might explain that to the Court. A. The deductions to be deducted from the salary each week is to be credited to the account of each subscriber up to and including the twenty per cent of their salary, or the amount they authorize us to deduct from their salary. That amount is transferred monthly to our home office stock purchase plan department, and the total monthly pay-roll deductions are credited to the amount of each subscriber.

Q. In addition to those deductions, does the company make any contribution? A. They do.

30 Q. What contribution does the company make? A. Fifty per cent. of the amount deducted from their salary.

Q. What is done with this money? That is, both employees' money and the company's money; what is that money used for? A. To buy stock for each subscriber.

Q. What kind of stock, Mr. Roberts? A. Treasury stock of the Standard Oil Company of New York.

40 Q. Referring now, Mr. Roberts, to your record of deductions, will you tell the Court up to what time—up to what date these deductions contin-

John T. Roberts, for Appellant—Direct.

ued? A. Deductions continued up to April 30, 1927.

Court: That fact is stipulated here in this statement on page 36 [Case, p. 39].

Mr. Precker: Yes, and we are confirming it, rather than contradicting, but we want to show the fact. 10

Court: Why waste time?

Mr. Precker: To explain the reason for it; we have no other purpose.

Court: All right.

Q. What do your records indicate for the month of May for the account of Miss Koss? A. Miss Koss was on leave of absence during the month of May.

Q. Do your records show that? A. They do. 20

Q. Will you turn to the record, please? A. Stock Purchase Plan Deduction form is marked "Sick".

Q. For what month? A. Month of May.

Q. What does "Away sick" mean? A. That means the employee was on sick leave without pay.

Q. Will you turn, now, to your record for the month of June? A. Yes.

Q. What is indicated there as to Miss Koss? A. Marked "Sick"; no deductions made. 30

Q. Did I understand you to say before there was no salary paid Miss Koss during this period when she was on sick leave? A. Not since June 1, 1927.

Q. Can you verify that by your records? A. The records here show that she was on sick leave and no deductions made on the form, which shows that she received no salary.

John T. Roberts, for Appellant—Direct.

Mr. Kalisch: What is that date?

Witness: June 1, 1927.

Q. Do your records show any salary paid after April 30, up to June 1st? A. No deductions during the month of May.

10 Q. Was there any salary during the month of May?

Court: To what date was she paid her last salary?

Witness: April 30.

Court: Then when you said before, the last salary was June first, you were in error?

Witness: I was in error.

20 Court: The fact is that she was not in the paid service of the company after April 30?

Witness: That is the idea.

Court: Is that right?

Witness: Yes, she was on sick leave, after April 30, without salary.

Court: And "on sick leave" meant that if she recovered and came back, she would get her job back?

30 Witness: Yes, her job was good while she was away on sick leave.

Court: You claim, Mr. Precker, that that constitutes service up to the time of death?

Mr. Precker: Yes; she was still carried on the plan?

Witness: Yes.

Q. Do your records show that she was still carried on the stock purchase plan? A. As long as her name appears on the stock purchase plan
40 record, she is carried up to that date.

John T. Roberts, for Appellant—Direct.

Court: She would be carried on that record until she had withdrawn therefrom?

Witness: That is the idea.

Court: In any event?

Witness: In any event.

Court: Whether by death or otherwise?

Witness: Right. 10

Q. I will ask you, Mr. Roberts, does your company require any formal notice of withdrawal from the stock purchase plan? A. Each subscriber in practically all cases has got to sign a withdrawal notice, notifying the office that they want to withdraw from the plan.

Q. Have you a withdrawal notice in connection with Miss Koss? A. Yes, we have the original copy. 20

Q. Will you explain to the Court what that withdrawal notice indicates? (Showing witness paper.)

Court: Is that the withdrawal notice of Miss Koss?

Witness: Yes.

Court: Why not let the witness say what it indicates?

Witness: This is not signed by Miss Koss.

Mr. Precker: I intend to offer it in evidence. 30

Court: If it is not signed by Miss Koss, why do you say it is her notice?

Witness: That is the form we use in case of death of an employee; they notify our home office to make out the check or stock certificate.

Court: This was not made until after Miss Koss' death?

Witness: That is the idea. 40

John T. Roberts, for Appellant—Direct.

Court: How is it binding on her estate?

Witness: We were not informed at the time that Miss Koss died, until three or four days after, and the moment we were notified, we notified the stock purchase plan department by this form.

10

Court: Notified them of what?

Witness: Of death.

Mr. Precker: I think I can clear that up.

Q. In all cases of actual withdrawal on the part of a living employee, who signs the formal notice of withdrawal? A. The subscriber.

Q. In the event of death, who makes out that formal notice? A. The clerk in charge of that work, or myself.

20

Q. And is this formal notice one of the records in the department which was made under your personal supervision? A. This is one of the records. This is countersigned by myself.

Mr. Precker: I offer that formal notice. (Marked Exhibit A-1.)

Court: What authority have you, or anyone else in the employ of the company, to sign a withdrawal notice after the death of the participant?

30

Witness: You mean the subscriber's name?

Court: Yes.

Witness: I didn't sign her name here. Her name is typewritten on the form to save a lot of time in closing up the subscriber's account with our Home Office.

Q. To whom is that notice sent? A. To the Stock Purchase Plan Department, at 26 Broadway.

40

John T. Roberts, for Appellant—Cross.

Q. And this notice is the requisition on the Trustees of the Stock Purchase Plan, is it not, to pay out the money? A. It is an authorization.

Q. And it is also the authorization to deliver the stock in accordance with the information given therein? A. On our form, that is right.

Q. What does the notice indicate? A. That Miss Koss died July 17, 1927, and the last date of credit to the Stock Purchase Plan was as of April 30, 1927. 10

Cross examination by Mr. Kalisch:

Q. What do you mean by "withdrawal from the stock purchase plan?" A. Withdrawal?

Q. Yes. A. If any subscriber wants to withdraw out of the plan and receive back his salary—we already deducted it from the salary. 20

Q. Do you notify them and give them a statement of what the condition of their account is? A. No.

Q. Do the trustees? A. The trustees do.

Q. And when the trustees say "the effective date of your withdrawal", that means that is in answer to a communication from the subscriber that they have withdrawn formally?

Mr. Precker: I object to the question unless Mr. Kalisch indicates in what way that information is sent to the subscriber. 30

Court: The objection is overruled. I know what is meant; it means a notice from the company the trustees will—

Q. But that statement is always sent to the subscriber when they have withdrawn, is it not? A. Yes.

Court: Is it sent under any other circumstances? 40

John T. Roberts, for Appellant—Cross.

Witness: The notice is sent to the subscriber, to sign the form.

Court: Would it be sent to them if they did not ask for it?

Witness: No.

10 Q. Look at this paper and tell me what that indicates? (Witness shown paper.) A. This is a statement of Gertrude Koss, deceased from the time she started in the plan up to and including April 30, 1927.

Q. Go on; read. A. Showing the amount of—

Q. No; just read on. A. "the Trustees under the Stock Purchase Plan submit—"

Court: What is it?

20 Mr. Kalisch: That is the statement.

A. "The Trustees under the Stock Purchase Plan submit herewith a statement of your account from the beginning of your participation in the plan to April 30, 1927, inclusive, the effective date of your withdrawal."

Q. What does that mean? A. April 30 in this case means that the last day she was credited with anything in the Stock Purchase Plan was April 30, 1927.

30 Q. What does the word "withdrawal" mean; "the effective date of your withdrawal"? What does that mean? A. That means the time she withdrew from the plan.

Q. Exactly. She cannot come back into that plan after withdrawing for one year, can she? A. Right.

Q. That is correct, isn't it? A. That is correct.

40 Q. According to the rules in that booklet, that is so? A. Right.

John T. Roberts, for Appellant—Cross.

Q. I call your attention, under "Withdrawals", to Division A: "Such withdrawing employee shall not be eligible again to participate in the plan for a period of one year"; is that right?

Q. And that was in effect at the time that she withdrew? A. That is right.

Q. So that they couldn't put her back again before a year had elapsed, could they? A. That is, if she withdrew from the plan, they could not.

Q. That is what I am asking you; they couldn't put her back? A. If she withdrew on that date, no.

Q. Are you in charge of all the correspondence from these subscribers? A. I am.

Q. Did you receive a letter from either Gertrude Koss, in her lifetime, or someone for her, stating that because of her illness, it would be impossible for her to come back; have you such a letter? A. Impossible for her to come back?

Q. Yes, to the Standard Oil Company. A. I have not.

Q. Have you got all the correspondence? A. Up to the time of her sick leave.

Q. You mean April 30? A. Yes.

Q. Have you got the correspondence since April 30, 1927? A. Yes, I have.

Q. May I look at it? (Correspondence produced and handed to Mr. Kalisch.) Do you know what her illness was? A. As far as the authorization turned over to me, I do.

Q. What? A. A recurrence of a tumor operation in the year 1926.

Q. She had cancer? A. Not that I know of.

Q. She died of cancer on July 17? A. Not that I know of.

Q. You know furthermore, that she took a position over here in Newark after April 30, to be

John T. Roberts, for Appellant—Re-direct.

outdoors, a position that would permit her to be outdoors? A. I do not.

Q. You don't know that? A. No.

Examination by the Court:

10 Q. You distinguished between an actual withdrawal or an automatic withdrawal by reason of termination of employment? A. In that case if a subscriber to the Stock Purchase Plan is discharged from the employment of the company without cause, of course, the subscriber is entitled to all benefits of the plan, but in reversing around, if the employee is discharged for cause, the subscriber is only entitled to the amount of money deducted from their salary, at the rate of
20 six per cent. during the time they have been in the plan.

Q. Does that automatically terminate the participation plan? A. It does.

Q. Suppose she voluntarily withdraws from the services of the company, does that also automatically terminate the operation of the plan? A. It does.

Q. Does that of itself constitute what you consider in practice a "withdrawal of the plan"? A.
30 It does.

Re-direct examination by Mr. Precker:

Q. Counsel has referred you to this statement, Mr. Roberts; I ask you whose name appears on that statement?

Mr. Kalisch: That is self-evident.

Mr. Precker: So was the rest of the matter that you had him read.

Court: Answer.

John T. Roberts, for Appellant—Re-direct.

A. Gertrude Koss, deceased.

Q. That indicates, Mr. Roberts, does it, that the subscriber had already died at the time that the statement was made up? A. It does.

Q. Are these statements made up in your department? A. They are not.

10

By Mr. Kalisch:

Q. That was five days after she died? A. Yes.

Q. You have already said that is all that was sent in answer to a formal withdrawal? A. That comes from our main office, not from the department I am employed in, where Miss Koss was employed.

Q. Did you know about Miss Koss' employment here in Newark from July 1, 1927, I believe, for two weeks? A. That is news to me.

20

Q. I show you this salary check, or rather a photostatic copy of it, and ask you whether you ever saw her salary check from her employment here in Newark? A. No, I never did.

Re-direct examination by Mr. Precker:

Q. In answer to a question that counsel put, namely, whether this statement which I showed you a moment ago was sent in answer to a letter from the subscriber Gertrude Koss, I believe you answered "Yes". Do you mean that you had personal knowledge of the fact that that statement was sent in answer to a letter from Gertrude Koss? A. Not from Gertrude Koss, no.

30

Q. Do you know of any inquiry from Gertrude Koss for a statement of withdrawal? A. No.

Q. Do you know of any communication from Gertrude Koss to the managers of the Stock Purchase Plan? A. I do not.

40

John T. Roberts, for Appellant—Re-cross.

Re-cross examination by Mr. Kalisch:

Q. Who would get those notices? A. In reference to the Stock Purchase Plan?

Q. Who would get the notice of withdrawal?
A. I would.

10 Q. These notices from the subscribers of withdrawal? A. I would.

Q. You would get it? A. Yes.

Q. You say your records don't show any? A. No, not received from Gertrude Koss.

Q. Anybody for her? A. No, nobody for her, either.

Q. You are quite sure of that? A. I am sure; positive.

20 Court: Was any such application received after her death?

Witness: No application.

Court: Then why was this notice sent out?

Witness: The statement?

Court: Yes.

Witness: On the strength of the notice, the withdrawal notice, that we type in and send to our main accounting department.

30 Court: What date is that?

Witness: July.

Court: What authority had you for sending that?

Witness: Our chief accountant received a telegram from her sister that Gertrude Koss died, and on the strength of that telegram, her name was dropped from our payroll, and also the stock purchase plan, and the only way to drop anyone from the plan was to send out the ordinary form of withdrawal notice.

40

John T. Roberts, for Appellant—Re-cross.

Q. Why did you say "April 30, the effective date of your withdrawal"?

Mr. Precker: I object to the question, because he has already testified that these statements are not made up under his supervision. I have a witness here who will testify to that. 10

Court: He has already explained it anyway, by saying that that was the last date on which she received salary.

Witness: The withdrawal notice shows that.

Q. What does the word "withdrawal" there mean?

Mr. Precker: I object to the question. 20

Court: I will permit him to say what he considers it to mean. What does it mean in practice?

Witness: Are you referring to the withdrawal notice or that statement?

Mr. Kalisch: I am referring to this statement here, the words of which I want to draw your attention to are "the effective date of your withdrawal"; what does that mean; withdrawal from what? 30

Witness: From the stock purchase plan for employees.

Clifton C. Loder, for Appellant—Direct.

CLIFTON C. LODER, being duly sworn according to law, on his oath says:

Direct examination by Mr. Precker:

10 Mr. Precker: I wanted these records to be marked in evidence.

Court: Is there any necessity? What do they show, other than was read into the record? They simply show that she received her pay to April 30; that she was on sick leave, and according to the record of the company, until the time of her death.

20 Mr. Precker: I think your Honor is right. I have everything in the record that I need.

Q. Mr. Loder, where are you employed? A. 26 Broadway, New York, Standard Oil Company.

Q. In what capacity are you employed there? A. In charge of the Stock Purchase Plan.

Q. You refer now to the Stock Purchase Plan between employees and the trustees of the Standard Oil Company? A. I do.

30 Q. And this is the booklet which contains the terms and conditions and operations of that plan? A. Yes.

Mr. Precker: That is in evidence in the Court below.

40 Q. I show you a statement under the name of "Trustees under the Stock Purchase Plan for Employees of the Standard Oil Company of New York", dated July 22, 1927, the subscriber Gertrude Koss, deceased, and I ask you when that form of statement is used?

Clifton C. Loder, for Appellant—Direct.

Mr. Kalisch: I think that is objectionable. The purpose of this evidence, as I understand, was to explain this very statement which the witness has in his hands, and I don't believe it is signed by him.

It is not signed by you?

Witness: No, sir.

10

Mr. Kalisch: It is signed by three trustees; the names of the three trustees are printed, which would be the best evidence as to what they meant by the statement.

Court: It is one of the forms used in the regular course of business, isn't it?

Witness: I represent the trustees. I represent these gentlemen.

Q. I think you said you were the head of the department which has the operation of the Stock Purchase Plan? A. Yes, that is right.

20

Q. When is that form used that you have in your hand? A. That is used for every withdrawing subscriber.

Q. Is that form used no matter what the manner of withdrawal is? A. It is.

Q. Whether the withdrawal be by death or by resignation or retirement? A. That is right.

Q. Or discharged? A. Yes, that is right.

30

Q. That is a printed form of statement, is it not? A. Yes.

Q. And someone in the department types in the information? A. That is right.

Q. You will notice there that the words "April 30 inclusive" are indicated as the effective date of the withdrawal; does that indicate that there was an application on the part of the employee concerned, to withdraw from the plan?

40

Clifton C. Loder, for Appellant—Direct.

Mr. Kalisch: I object; I think that is quite leading.

Examination by the Court:

10 Q. What does that indicate? A. It indicates the date of last deduction from the pay-roll.

Q. Is that all it indicates? A. The date the pay-roll department took out the salary, whatever salary you have for stock purchase plan purposes.

Q. Is that all it indicates? A. Yes.

Q. Why do you use the word "withdrawal," then? A. The subscriber withdrew.

20 Q. Did she? A. Withdrew the money from the stock purchase plan of the last pay-roll deduction, put in of her money.

Q. Did she withdraw it or didn't she; that is the question. A. Well, we don't make up the settlement of account from this thing; we make it up from the withdrawal notice. This is a memorandum only of the statement of account. This statement represents a statement of the employee's account which would go to the subscriber, whether the subscriber is alive or dead. That represents how much money is in their account. This isn't our withdrawal notice.

30 Q. I understand that, but you are asked to explain the meaning of the word "withdrawal" as used in that statement. You said it meant the date of the last deduction from the pay-roll. A. That is right.

Q. I say why do you use the word "withdrawal," if that is what it means? A. It is the withdrawal—it means the date of last deduction which is taken from your salary.

40 Q. What it really means is, that it is the date as of which her rights in the fund terminate, isn't

Clifton C. Loder, for Appellant—Direct.

it? A. Yes, as a pay-roll deduction; but after this date, there could be other allotments made to her account, or anyone's account, as I show from the ledger account; I have the ledger account here. After April 30 there have been other entries made in her account, after the date of last deduction.

10

Q. Entry of what; interest? A. Entries of stock; for instance, on the date of April 30, this party had so much money in her account, therefore that entitled her to so many more shares of stock, which stock was credited into that account, after the date of April 30.

Further Direct Examination by Mr. Precker:

Q. Have you those records with you that you refer to? A. Yes.

20

Q. Before you go to those records, there is one question I want to ask you, in order to clear up what I think is a little misunderstanding. Is the word "withdrawal" on this statement typed in by you, or is it printed on the statement? A. It is printed on the statement.

Q. And in case an employee dies, do you make any change or alteration of that statement, striking out the "withdrawal," or any such alteration as that? A. No. sir.

30

Q. You may now refer to your records, and I ask you what the ledger indicates with regard to Miss Koss' account? A. It represents that Gertrude Koss, her last deduction from her salary was April 30, 1927, for the month of April. She had taken out of her salary five dollars a week, and for the month of April, there was 2, 9, 16, 23, and 30, making a total of \$25, representing pay-roll deduction, and \$12.50 company contribution. In other words, there was a balance in her account as of April 30, of \$41. On May 27—that

40

Clifton C. Loder, for Appellant—Direct.

was a day to apportion stock to the subscriber—to any subscriber—we apportioned one share of \$32 on May 27, which left a balance in her account; in addition to that there was one share at \$32, and then she would get dividends on the total amount of shares of stock which up to March 10 31 she had thirty-one shares plus one share May 27, which totaled thirty-two shares. Then she was entitled to forty cents a share for dividends. We credit her account with \$12.80 for dividends. This was also credited to her account as of May 27, leaving a balance in the account of thirty-two shares of stock and a credit balance of \$21.80. On receipt of the withdrawal notice, this account was closed. Under date of July 22, 1927, we put through a withdrawal to settle this account and 20 gave the beneficiary thirty-two shares of stock, and check for \$21.80.

Q. Mr. Loder, if there had been an actual formal notice of withdrawal from the employee, Miss Gertrude Koss, on April 30, would those credits have been made to her account on May 27? A. No, sir; they would not.

Q. The account would have been closed out on April 30? A. Yes.

Q. And no further credits would have been 30 made? A. No.

Cross-examination by Mr. Kalisch:

Q. You say that on April 30 she was entitled to a credit for certain stock, depending upon what had been taken from her salary? A. In other words, take the month of April, we received from Mr. Roberts, New York City Department, these pay-roll sheets, which showed on these sheets \$25 for the month of April, and \$12.50 company contribution. These amounts were credited to the 40 subscriber's account during the month of April.

Clifton C. Loder, for Appellant—Cross.

Q. What do you mean those credits were given to her? A. Another credit to the subscriber's account as of April 30.

Q. On the twenty-seventh of May what did you do? A. On the twenty-seventh of May, which was the date the company declared a dividend.

Q. On what? A. On the number of shares in the subscriber's account as of the twenty-seventh of May. At that time we apportion stock to the subscriber on the remaining balance.

10

Q. Because the stock then belonged to her, upon which you gave her the dividends?

Mr. Precker: I object; the booklet explains the stock during the operation of the plan is the property of the trustees; the booklet being already in evidence.

20

Q. I am trying to get an explanation of your testimony.

Court: You may proceed.

A. The stock don't belong to anybody until you get the withdrawal notice.

Q. I understand how in your book here. In your account book you credit her with a certain number of shares which her salary has paid for, or what has been taken from her salary. A. Previous salary.

30

Q. So these dividends which you credited to her was on stock which her salary up to April 30 entitled her to? A. That is correct.

Q. And that is what you gave her on May 27? A. Correct.

Q. And you had not yet issued the stock? A. Not yet.

Court: What was the allotment on? You said there was an allotment made on May 27.

40

Clifton C. Loder, for Appellant—Cross.

Witness: On the balance as of April 30. In other words, this subscriber had so much money in the account as of April 30. The apportionment of stock was on the balance remaining as of April 30, but that wasn't apportioned until May 27th.

10 Court: Suppose there had been an actual withdrawal by the subscriber on April 30, and she had then become entitled to her stock certificate for moneys which had been previously deducted, would there then have been an allotment on May 27?

20 Witness: No, sir; the account would have been closed out; if she had withdrawn April 30, the account would have been closed out. There would have been no allotment as of May 27, because if the stock was issued, the Chase National Bank would have paid the dividends if she got the stock. We only allot dividends when the subscription has not been withdrawn. When the stock is issued to the beneficiary, the dividend is paid by the Chase National Bank. They would pay the dividends and we wouldn't have their account.

30 Q. When were the dividends payable? A. The way we work the dividends payable——

Q. No, when were these dividends that you entered on May 27, when were they payable? A. They are payable——

Q. Up to what date was the dividend period? A. June 15—that represents the declaration date—in other words, the company declared a date when they will apportion dividends to everybody, which was May 27. That is when we credit the
40 subscriber——

Clifton C. Loder, for Appellant—Cross.

Q. I know that, but when did you declare—when was the dividend declared? A. May 27, payable June 15. But if we had a subscriber who withdrew on May 28, they would be entitled to the dividend just the same whether payable June 15th or not, because we credit it immediately to the subscriber.

10

Court: Suppose they had withdrawn on May 26th?

Witness: Then they wouldn't get the dividend.

Q. Who first gets the notification of this withdrawal? A. I do.

Q. What do you do with it? A. We look at the withdrawal and see what is the reason for the withdrawal, which shows on the withdrawal notice.

20

Q. You had already, as you say, credited her on May 27th with the dividend? A. Yes.

Q. Having done that, why did your statement say that the effective date was April 30, 1927, "the effective date of your withdrawal," if subsequent to that, you credited her with a dividend? A. Let me go a step further. You will notice that this statement reads at the top, "July 22, 1927"; that represents that this withdrawal came along somewhere around July 22. That is the date the settlement was made, July 22.

30

Q. That is the date the settlement was made, but when is the date of the withdrawal? A. The date of the withdrawal is the date when we get it; we didn't get this until—

Q. But your statement says, "April 30th, the effective date of your withdrawal"; what does that mean? A. That means the date of last deduction.

40

Clifton C. Loder, for Appellant—Cross.

Q. Isn't that a withdrawal; haven't you said so? A. No, sir; that means—the effective date means the last date you paid any money out of your salary into this plan.

Q. That means that you still have your interest in the plan, then? A. Not necessarily.

10 Q. What does it mean if you say "effective date of your withdrawal"? A. It means the date of the last deduction from the salary.

Q. Why do you use the word "withdrawal"? That is what I want to know. A. The word "withdrawal" means that you withdraw, but your date of last deduction was April 30, but the settlement wasn't made until July 22.

20 Q. I don't care about the settlement; I am now talking about the use of the word "withdrawal"; that is what I am talking about. A. That means the date of last deduction.

Q. There is only one kind of a withdrawal. A. Oh, no; there are several kinds of withdrawal.

Q. Your booklet speaks of one kind of a withdrawal, and that is subdivision A. Can you show me anything else there which would indicate another kind of a withdrawal? A. There are all different classifications.

30 Q. Show me any other kind of a withdrawal. A. It is all withdrawal, but there are different classifications.

Q. The withdrawal that is marked Subdivision A merely has reference to the employee who is in the service, and who elects to withdraw. A. Right.

Q. Isn't that so? A. Yes.

Q. "B." speaks of any participating employee leaving the service of the company, or a subsidiary company, voluntarily. A. For cause.

40 Q. As to either of which, in case of dispute, the Board of Trustees shall be the sole judge. That

Clifton C. Loder, for Appellant—Cross.

is not a withdrawal, is it? A. That is a withdrawal.

Q. Does it say so? A. They are all withdrawals.

Q. You call it a withdrawal.

Court: They are all under the head of withdrawals.

10

Witness: It is a certificate of withdrawal, whether it is for the reason that you were discharged, or resigned, or went on an annuity plan, or you died. There are half a dozen classifications of withdrawal. The way that statement reads is just as though the word "withdrawal" were repeated before each paragraph, "Withdrawal A", "Withdrawal B".

Mr. Kalisch: I see that now. I thought it only referred to subdivision A.

20

Re-direct examination by Mr. Precker:

Q. You made a statement on cross-examination, about this statement being made contemporaneously with the time you get your notice of withdrawal from the plan. In actual operation, how long does it take; how much time elapses between the time of formal notice and the time when this statement is issued? A. You mean the time we get the withdrawal and the time the settlement is issued?

30

Q. Yes. A. It takes sometimes a week, because we have to have stock and checks issued and the rest of the detail.

Q. Does it ever take as long as two or three months? A. Oh, no.

Mr. Kalisch: Does it ever take as long as two or three weeks?

Witness: No, it doesn't take—a week is the longest; that is, six days.

40

Samuel H. Koss, for Respondent—Direct.

SAMUEL H. KOSS, being duly sworn according to law, on his oath says:

Direct examination by Mr. Kalisch:

10 Q. You are a brother of the deceased Gertrude Koss? A. I am.

Q. And what was the date of your sister's death? A. July 17, 1927.

Q. And do you recall when she was employed by the Standard Oil? A. I do.

Q. Do you recall when she left their employ? A. I think I do.

Q. In what way did she manifest that? A. You mean the final manifestation?

20 Q. Yes, how did she notify them, if she did notify them? A. There were several letters that she received from the Standard Oil, inquiring as to her physical condition, the intent of it being that they wanted to discover whether or not there was any possibility of her returning, and in several of the letters she wrote back that there were possibilities of her recouping her physical strength to return, until her last attack, when the doctor told her that it would be foolish for her to even attempt to go back, and she finally wrote
30 a letter to the Standard Oil, which I personally saw, and was delivered to her other sister, that roomed with her, to be mailed, telling the Standard that it would be impossible for her to return on her job, and that was sometime—I say sometime in April—March or April.

Q. Do you know whether she had a position elsewhere? A. The Charities, on High Street, in Newark.

40 Q. What sort of work did she do? A. Tracing up cases.

Samuel H. Koss, for Respondent—Direct.

Q. You mean field work? A. Field work.

Q. I show you a photostatic copy of a check, and ask you what it represents, if you know. A. This represents two weeks' salary that Gertrude received for her employment in this associated relief.

10

Mr. Precker: I object to the admission of the testimony, if it is the purpose of counsel to admit photostatic copies.

Mr. Kalisch: I haven't the original; I can produce it.

Court: I will admit the photostatic copy, subject to producing the original.

Mr. Kalisch: I offer it in evidence. (Marked Exhibit R-1.)

Court: How do you know it represents two weeks' salary? 20

Witness: We lived together and I personally typewrote her reports for her nights, of her field work, and she was employed exactly two weeks, when she went flat on her back. The check was delivered home by one of the executives of the Relief, on High Street.

Q. I take it from this check, which is dated April 1, that it was in payment of two weeks' preceding salary? A. That is right. She didn't return there—I think two weeks after that the check was delivered—because she couldn't even return there because of her physical condition. 30

Q. Where did she go; did she continue this work? A. She couldn't, physically; she was bed-ridden.

Q. Where did she go? A. Stayed home; bed-ridden practically after that.

Q. You mean after receiving this check—can you fix the time by this check, when she became 40

Samuel H. Koss, for Respondent—Direct.

bedridden; how long after this check was received? A. It was before that the check was received. That is, she put in two weeks in employment with Associated Charities, and then became bedridden, and she was bedridden about two weeks when that check was delivered personally
10 by one of the heads of the department on High Street, because she couldn't go back.

Court: Then the check was in payment of services rendered the first two weeks in March, evidently?

Witness: I cannot place that date exactly.

Court: You said she had been in bed for two weeks about when the check was delivered.
20

Witness: That is right.

Court: And the check is dated April 1.

Witness: That is right.

Court: Then it must have been——

Witness: Sometime in March.

Court: For services given apparently in the early part of March.

Witness: That is right.

Q. Is that her signature on the back, if you
30 know her handwriting? A. Yes.

Cross-examination by Mr. Precker:

Q. Did you read these letters that your sister sent to the Standard Oil Company? A. Some of them.

Q. When did she begin writing these letters? A. I cannot answer it.

Q. Why can't you answer it? A. For the simple
40 reason that Miss Bessie Koss, the girl who roomed with her,—that is a sister who roomed with her—

Samuel H. Koss, for Respondent—Cross.

carried out everything she could lay hands on, so we wouldn't have any letters that were going back and forth from Standard Oil.

Q. But you read the letters? A. Some of them.

Q. You remember the contents of the letters, but you don't remember the dates? A. Some of them; that is absolutely the truth. 10

Q. In what capacity was she employed with this Hebrew Agency? A. Field worker.

Q. What kind of work did she do? A. Searching up cases, finding out whether or not they were worthy of financial or other help.

Q. Was she doing this field work during the first two weeks of March? A. Approximately, I should say.

Q. You are certain of that? A. I said "approximately." I believe that is about the dates; I wouldn't gamble on that. 20

Mr. Kalisch: In order to substantiate that I can get two witnesses from this charity organization up there in High Street. I didn't bring them this morning.

Court: It is not much good, unless you do. That is one thing sure. My recollection of the testimony of this Standard Oil man is that at the very time which these checks were supposed to cover services for Miss Koss, she was in the employ of the Standard Oil Company, and was not on sick leave. 30

May I ask the gentleman who had charge of that record, when your records show that Miss Koss went on sick leave?

Mr. Roberts: March 14, 1927.

Court: It is quite evident that there is something wrong with the dates. That is, 40

Samuel H. Koss, for Respondent—Cross.

10 if this was received for services in the first part of March. It must have been services after she completed her work in the Standard Oil Company. It does not indicate a termination of services with the Standard Oil Company in any event, because she was still receiving her salary from the Standard Oil Company up to April 30, and at the very time she received this check.

Mr. Kalisch: It was for previous services.

20 Court: If you offer that check to show a termination of service or employment with the Standard Oil Company, I don't think it would be of much value, in view of the fact that she accepted a payment from the Standard Oil Company during the very period when this check was given for services.

30 Mr. Kalisch: I merely offer it as a corroborating circumstance, to indicate that she was employed with the Hebrew charities, because she was unable to commute between Newark and New York, due to the condition that she was in, and she did this on the advice of a doctor to do outdoor work, and she was only able to do that for a period of two weeks, when she became bedridden, and remained that way until she died, in July.

Court: If it is merely offered for that purpose, you may offer it; but if it is offered to show termination of service in the Standard Oil Company, I don't think it is of much value. It is quite evident she accepted the money from the company.

40 Mr. Kalisch: They kept crediting her account with the company.

Samuel H. Koss, for Respondent—Cross.

Court: They credited her with twenty per cent of that salary. There was five dollars a week deducted from her salary?

Mr. Loder: Yes.

JOHN T. ROBERTS, recalled for further

10

Cross-examination by Mr. Kalisch:

Q. When was the last check that you sent—salary check, that you sent to Miss Koss? A. Sometime during the month of May, 1927.

Q. Have you got such a check in your files? A. No, not here.

Q. Have you got such a check at your office? A. Yes, they are all in our general office file.

Q. Does your record show that? A. Not these records, or this record wouldn't show when I sent the check.

20

Q. How do you remember you sent a check to Gertrude Koss on May 27? A. I didn't say May 27th; I said sometime during May.

Q. How do you remember that you sent a salary check to her sometime during May, 1927? A. She was carried on our payroll up to April 30, so the final check would go out sometime in the month of May.

Q. You mean whatever you did send was up to April 30? A. Yes.

30

Q. But you sent no checks—whatever you credited her with, was not for any period of time after April 30? A. No. April 30 was the final payment for salary.

Mr. Kalisch: That is all.

Court: Mr. Precker, you may submit your brief, and Mr. Kalisch may have one week to answer. You may send along the exhibits, such as you may have, at the same time you send the briefs.

40

Exhibit A-1.

EE 354-500 sets
Form SP 6
Sheet No. E-583

10

STANDARD OIL COMPANY OF NEW YORK
STOCK PURCHASE PLAN

— WITHDRAWAL NOTICE —

Place: Penn. Term. Bldg.

Date: July 18th, 1927

TO STANDARD OIL COMPANY OF NEW YORK

20

Effective as of Apr. 30th, 1927, I desire to withdraw from the Stock Purchase Plan for employees of the Standard Oil Company of New York for the following reason: Deceased, July 17th, 1927.

Settlement in accordance with the terms of the plan may be made with me at the address given below.

GERTRUDE KOSS
(Applicant)
531 Clinton Ave.,
(Street Address)
Newark, N. J.
(City and State)

30

Approved

W. B. NELSON
Ass't. Manager.

40

Exhibit A-1.

(The following information to be furnished from office from which employee receives pay):

Subscriber's No., E-28.
 Name, Gertrude Koss.
 Department, New York City.
 Main or sub-office, Penn. Term. Bldg. 10
 Amount of last deduction, 5.00.
 Date of last deduction, Apr. 30th, 1927.
 Total deductions per record card local cur-
 rency U. S. Dollars.

Correct

J. S. ROBERTS
 Paymaster

Original to be mailed to New York.
 Duplicate to be retained by main office. 20
 Triplicate to be retained by sub-office.

[Stamped] Received July 21, 1927, Stock Purchase Plan.

30

40

Exhibit R-1.

(*Opposite*) 

RELIEF COMMITTEE
UNITED HEBREW CHARITIES

No. 3449

NEWARK, N.J.

April 1 1927

PAY ORDER
TO THE ORDER OF

Bertunde Rose

\$ 50.00

Fifty 00/100

DOLLARS

TO THE

WEST SIDE
TRUST COMPANY
55-16 NEWARK, N.J.

RELIEF COMMITTEE

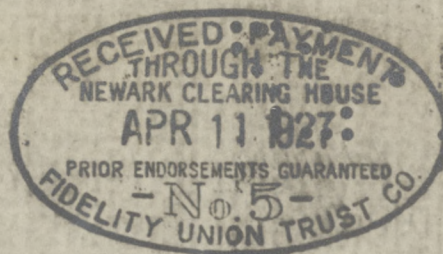
Leon J.

CHAIRMAN

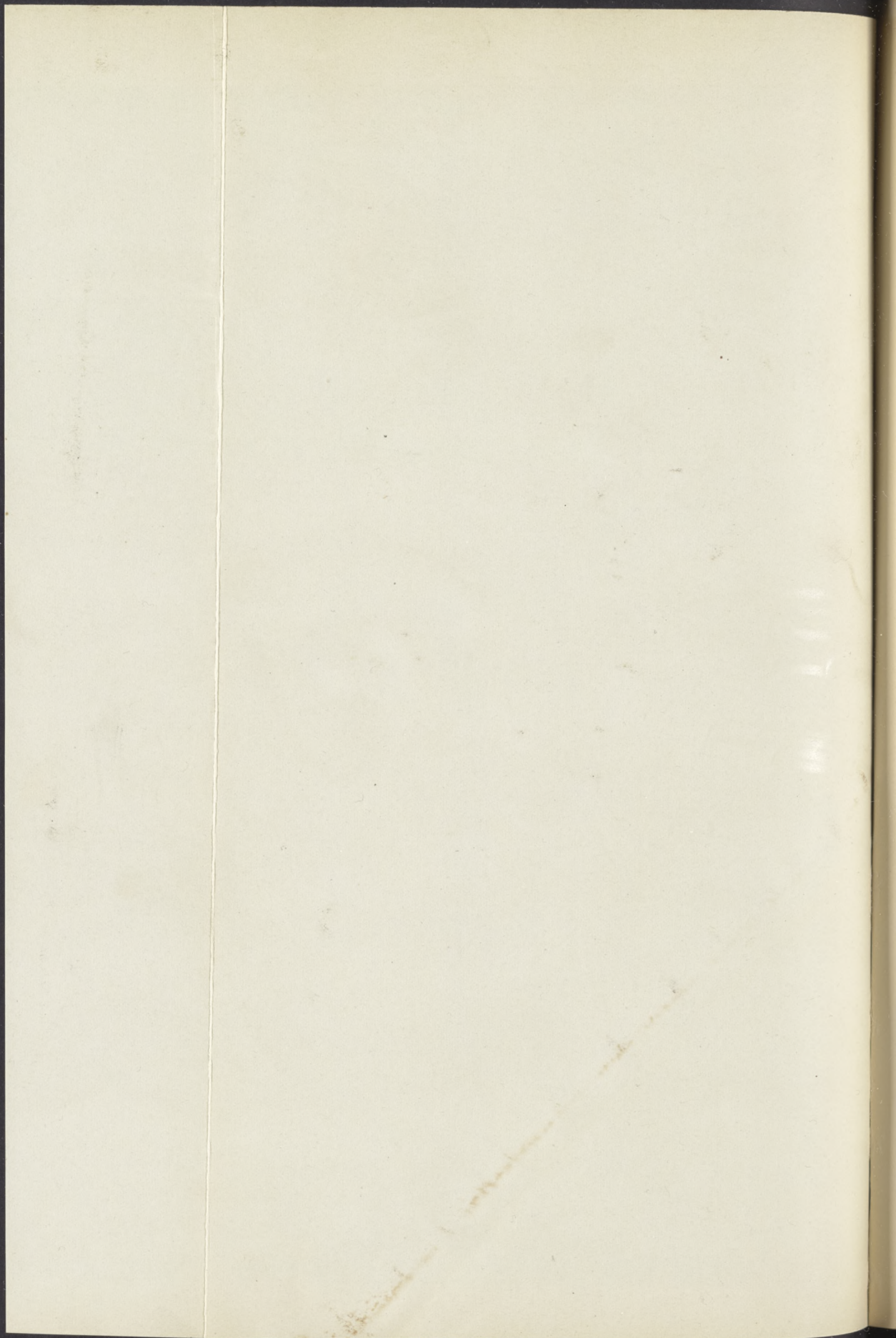
MULBURN & SONS, N.Y.

24 R. 100

Bertunde Rose



Pay FIDELITY UNION TRUST COMPANY
Newark, N. J., or order
Prior Endorsements Guaranteed
CITIZENS NATIONAL BANK AND TRUST COMPANY
NEWARK, N. J.
CHARLES W. HOLWEG, Cashier
APR 9 1927
RECEIVED PAYMENT
through the Newark Clearing House
Prior Endorsements Guaranteed
FIDELITY UNION TRUST COMPANY



Conclusions.

(Filed June 17, 1929.)

NEW JERSEY PREROGATIVE COURT.

10

IN THE MATTER
of
The Estate of GERTRUDE KOSS,
Deceased.

On Appeal
from the
Essex County
Orphans' Court.
Conclusions.

PRECKER & PRECKER, for Appellant.

KALISCH & KALISCH, for Respondent.

20

BERRY, VICE ORDINARY.

30

This is an appeal from a decree of the Orphans' Court of Essex County and involves the ownership of certain stock of the Standard Oil Company of New York. The question before the Court is not the propriety of that decree in view of the case as there presented. The hearing here may be *de nova*. *Rusling v. Rusling*, 36 N. J. Eq. 603, *Smith v. Smith*, 48 N. J. Eq. 566. The matter was fully tried in this Court with little regard to the evidence presented below, as is permissible under our practice, due application to that end having been made and sufficient reasons appearing therefor. *Personette v. Johnson*, 40 N. J. Eq. 173; *White v. Starr*, 47 N. J. Eq. 244.

40

The decedent, Gertrude Koss, was an employee of the Standard Oil Company of New York and remained in the employ of that Company until her death on June 17, 1927, although she was on sick leave for two or three months immediately preceding her death.

Conclusions.

In November, 1923, that Company inaugurated a "stock purchase plan for the employees of Standard Oil Company of New York". The details of this plan are set forth in a booklet issued by the company and offered as an exhibit in this cause and are as follows:

10

"STOCK PURCHASE PLAN FOR THE EMPLOYEES
OF STANDARD OIL COMPANY OF NEW YORK."

PURPOSES: The purposes of the plan are to enable employees of the Company to become stockholders therein on favorable terms and to assist them in paying for their stock.

20

EMPLOYEES' PARTICIPATION. Subject to the limitations prescribed in this plan, every employee (including officers and directors) who at the time of subscribing has been continuously in the service of the Company and/or of any of its subsidiary Companies, one year or more immediately prior thereto, may become a participant in this plan by authorizing the Company to deduct from the amount due him as current compensation for services, each pay day, whether monthly or otherwise, a sum not to exceed 20 per cent. thereof, and credit the same to the account of such employee with the trustees herein provided for, to be used for the purposes of this plan, which deduction and credit shall thereupon be made by the Company.

30

COMPANY'S PARTICIPATION. Concurrently with the making of any such deduction the Company shall, out of its own moneys credit the account of such employee with said trustees, for the purpose of this plan, but subject to the conditions hereinafter provided, a further sum equal to 50 per cent. of such deduction.

40

THE TRUSTEES. This plan shall be administered by three trustees to be appointed

Conclusions.

10 by the Board of Directors of the Company, and said Board shall have the right to fill vacancies caused by resignation or otherwise and the further right of removal and substitution. Said trustees may act through any one of their number and shall have charge of the administration of the funds so credited and shall hold all stock of the Company acquired under this plan for the benefit of participating employees during the continuance of the plan and in accordance therewith.

The trustees shall not be held personally responsible except for their wilful misconduct or gross neglect and shall not be required to give bond, nor shall they receive any compensation for their services as trustees.

20 PRICE OF STOCK. The price of such stock to be so sold by the Company and issued by said trustees for said participating employees shall be fixed by the Board of Directors, first, as of the day on which the plan shall become operative, and quarterly thereafter as of the first day of January, April, July and October of each year, as substantially the average market price of the stock during the previous quarter, but shall in no case be below the par value of the stock, and the price so fixed shall be the price at which said stock shall be sold and issued to said trustees until the first day of the succeeding quarter.

30 All stock sold to employees under this plan shall be purchased from the Company, provided, however, that if the average market price of the stock for any quarter shall have been less than par, the trustees may during the succeeding quarter fulfill the requirements of the trust by purchasing for employees under this plan stock of the Company in the open market out of the funds credited to said employees, but only so far as the same can be obtained at less than par.

40 INVESTMENT OF FUNDS. There shall be kept a separate account for each participating em-

Conclusions.

ployee and when the amounts credited under this plan to any employee are equivalent to the value of one or more whole shares of the Company's stock at the price fixed as herein provided, the Company will issue to said trustees such share or shares of its capital stock and will debit the employee's account with the trustees and reduce the amount of cash credited to the employee in said account accordingly. 10

DIVIDENDS AND STOCK RIGHTS. Cash dividends or dividends equivalent to cash declared on stock held by the trustees shall be credited to the account of each employee for the acquiring of stock hereunder. Any stock dividend, so-called, declared on stock held by trustees shall be issued to the trustees and held for and delivered by them to the employee with the stock purchased for said employee under this plan and without further payment therefor. If during the life of this plan the Company shall offer any subscription rights to its stockholders, each participating employee shall have the right to subscribe through said trustees for the shares of stock for which such employee would be entitled to subscribe if such employee were the owner of the shares of stock held by the trustees for each employee, upon paying to the trustees the subscription price therefor in which case the trustees shall subscribe and pay for said stock; provided, however, that if at said time there is a cash credit in the account of such employee with the trustees, such credit or any part thereof, at the request of such employee shall be applied to the payment for said stock, and the cash payment required from the employee reduced accordingly. Such additional stock shall be issued to the trustees and held by them and delivered when the stock purchased for such employee is delivered to said employee. Unless the employee elects to subscribe and 20 30 40

Conclusions.

pays for said stock, as above provided, the subscription rights shall be sold by the trustees and the proceeds of the sale added to the other credits of the employee for acquiring stock hereunder. No fractional share of stock shall be issued and in case the employee shall become entitled to such fractional share through a stock dividend, or otherwise, the trustees shall dispose of the same, and add the proceeds to the credit of such employee for the purchase of stock hereunder.

10

EFFECTIVE DATE AND TERMINATION OF PLAN.

The operation of the plan shall begin November 1, 1923, and continue to October 31, 1928, both dates inclusive, unless sooner terminated by the Board of Directors, who shall have the right to terminate this plan at any time. Except as hereinafter provided, no employee shall be entitled to receive stock, or other securities, or cash from the trustees before the termination of the plan, but upon such termination the accounts shall be closed by the distribution to each participating employee of all of the stock, securities and cash to the credit of such employee in said accounts.

20

WITHDRAWALS. (A)

Any participating employee who remains in the service of the Company, or of a subsidiary Company, may, if he so elects, withdraw from the plan at any time and shall thereupon be entitled to receive only the amount of money deducted from his compensation with interest thereon at the rate of 6 per cent per annum, and shall thereupon forfeit all rights and interest in this plan and in all stock, securities and credits of every kind appearing in the account of such employee with the trustees, and said stock, securities and credits shall be transferred to the Company. Such withdrawing employees shall not be eligible again to participate in the plan for a period of one year.

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40

Conclusions.

(B) Any participating employee who leaves the service of the Company, or of a subsidiary company, voluntarily, or is discharged for cause, as to either of which in case of dispute, the Board of Directors shall be the sole judges, shall thereupon cease to be a participant in the plan and the account of such employee shall be closed by returning to such employee only the amounts deducted from the compensation of the employee with interest at the rate of 6 per cent per annum. Such employee shall thereupon cease to have any rights or interest in this plan or in any stock, securities or credits appearing in the account of such employee with the trustees, and all such stock, securities and credits shall thereupon be transferred to the Company. 10

(C) Any participating employee who is retired under the Company's annuity plan, or whose employment is terminated by the Company through no fault of his own, as to which in case of dispute the Board of Directors shall be sole judges, shall cease to be a participant in the plan and shall thereupon receive the full amount of cash, stock and other securities standing to the credit of such employee in the account of such employee with the trustees. 20

(D) In case of the death of any participating employee while in the service of the Company, or of any subsidiary company, the trust in respect to such employee shall then terminate, and thereupon the full amount of cash, stock and other securities standing to the credit of such employee in the account of such employee with the trustees, shall be paid, transferred and delivered to such beneficiary or beneficiaries as such employee may have designated in writing and cause to be filed with the Company, or failing such designation to the estate of such employee. 30

TITLE TO STOCK. All stock purchased or acquired by the trustees under this plan shall 40

Conclusions.

10 be issued in the name of the trustees and their successors as "Trustees under the Stock Purchase Plan for Employees of the Standard Oil Company of New York," and the trustees for the time being and the survivor or survivors of them or their successor or successors shall have the title to such stock, and have the right to vote the same at all meetings of stockholders, either in person or by proxy, and to exercise all other rights incident to the ownership thereof. Stock purchased or acquired for any employee shall be credited on the books of the trustees to such employees when purchased or acquired, but the rights and interest of any employee in said stock and in other securities and cash credited to the account of such employee with the trustees shall be only as herein declared.

20 **NON-ASSIGNABILITY.** The employee's rights under this plan are wholly personal, and no assignment or transfer of an employee's rights and interest in said plan or in the stock, securities or cash credited to the account of such employee will be permitted or recognized.

30 **BOARD OF DIRECTORS MAY FORMULATE DETAILS, ADD TO, OR CHANGE THE PROVISIONS HEREOF.** The Board of Directors shall have the power to formulate additional details and regulations for carrying out this plan, and add additional restrictions and conditions thereto, and make such changes therein as, from time to time, they may deem proper, but no additions or changes inconsistent with the provisions hereof as to the consideration for which such stock may be issued, the extent of the participation of the employees and the amount of the contributions to be made by the Company, shall be made."

40 The decedent became a participant in this plan and upon a form furnished by the company for that purpose designated as her beneficiary in the

Conclusions.

event of her death, her sister, Bessie Koss (Klein) who is the appellant here. The pertinent language of that form is as follows:

“To the Standard Oil Company of New York, the trustee under the stock purchase plan for employees of said company—

In the event of my death while a participant in the stock purchase plan for employees of Standard Oil Company of New York, I hereby designate as my beneficiary (name of beneficiary). I reserve the right to change from time to time the beneficiary named herein by giving proper notice in writing.”

At the time of the death of Gertrude Koss she was entitled under this plan to thirty-two shares of stock having a value of \$1,084.50 and uninvested cash amounting to \$21.80, and pursuant to the provisions of the plan this stock and cash were delivered by the Standard Oil Company to the appellant. The administratrix of the decedent's estate claimed the stock for the estate and on her petition for discovery of assets the Essex County Orphans' Court ordered its delivery to her, that Court holding that the “withdrawal” was under clause “C” of the stock purchase plan. Without discussing in detail the evidence submitted on this appeal, much of which was not before the Orphans' Court, I consider it my duty to hold that the withdrawal was under the provisions of Section “D” and not under Section “C” and I so announced in open court, and if this were the only question involved, I should feel obliged to advise a decree reversing the order of the Orphans' Court from which this appeal is taken.

But a more serious question is involved and that is, whether or not the attempted disposition of the fund here in dispute was a testamentary one, and, in the form attempted, contravenes the

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statute of wills. That it is in violation of that statute is the contention of the respondent, while on the other hand it is contended for appellant that the attempted gift may be maintained either as a gift *inter vivos* or as a completed trust. The respondent contends that it is evident that there was no donative intent of a then present gift on the part of the donor at the time she named the appellant as her beneficiary, because the gift was to take effect only at the donor's death and that it was, therefore, testamentary in character; that there was no delivery of the subject of the gift and the donor did not strip herself of dominion over the property during her lifetime.

This plan became effective on November 1, 1923, and was to continue until October 31, 1928 unless sooner terminated by the Board of Directors of the Company to whom alone was reserved this right of termination. There were four classes of withdrawals from the plan, (A), (B), (C), and (D), as already recited.

It is to be noted that "*the employee's rights under this plan are wholly personal*" and not assignable. There could, therefore, have been no gift *inter vivos*. To establish a gift *inter vivos* there must be, first, donative intent; second, actual delivery, except where the gift is of a chose in action; and third, the donor must divest himself of all ownership and dominion. *Bailey v. Orange Memorial Hospital*, 102 Atl. 8; *Stevenson v. Earl*, 65 N. J. Eq. 721; *Meyers v. Meyers*, 134 Atl. 95; *Mullen v. Mullins*, 130 Atl. 628. In *Crane v. Crane*, 100 N. J. Eq. 402, Vice Chancellor Backes said:

"There was no donative intent of a present gift of the shares in the company. It was to take effect as such at donor's death and

Conclusions.

was testamentary in character * * * And the donor did not strip himself of the ownership and dominion of the shares. He obviously had no intention to presently hand the company over to his family."

This language is peculiarly applicable to the case at bar. Here there is not the slightest evidence of a donative intent of a present gift. The decedent's purpose when she became a participant in the plan was that she was to receive those shares herself at the end of the five year trust period and in the meantime she retained in herself the power of withdrawal; but she had no power of present assignment. During her lifetime she retained entire control. In designating a beneficiary the decedent merely provided for the disposition of the stock on her death providing that event occurred before the end of the five year period. If it did not occur within that period the fund would be received by the decedent. In his brief, counsel for appellant now disclaims any contention that there was a gift *inter vivos*, as obviously there was not.

It is argued, however, that the plan is similar to that of an insurance policy, but the only analogy to such policy is the naming of a beneficiary and the power to change that beneficiary during the period of participation in the plan, and the Standard Oil Company is not an insurance company nor can it be seriously contended that this plan was in any sense a plan of insurance.

Counsel for appellant strongly urges that the situation here disclosed is that of a trust completely created by the decedent for the benefit of the appellant; in other words, that there is an executed trust. Under the provisions of the plan the company deducted a certain sum each week

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from the decedent's salary and deposited it with the trustee. To this amount the company added fifty per cent. of the salary deduction and the total sum thus accumulated was from time to time invested, as the amount warranted, in stock of the company which the trustee then held under the terms of the plan. The legal title to the stock was in the trustee. It is contended that the decedent had no present rights in the stock except upon withdrawal under Sections A and B, in which event she would receive only the cash deducted from her salary with interest but not any of the company's contributions; that this indicated a complete transfer of title to the trustee, and that the reservation of the right to withdraw and to change the beneficiary did not invalidate the trust, as a reservation of a power of revocation is not destructive of a trust already completely established. It is contended that the *cestuis qui trust* under this plan were the donor (the decedent) and the appellant, or their survivor, and that the appellant is entitled to the stock as the survivor of the *cestuis* and that in this respect the case at bar resembles the joint bank account cases of which *Hoboken Bank For Savings v. Schwoon*, 62 N. J. Eq. 503, is an example; but respondent contends that the stock was for the benefit of the employees only; that is, for the decedent, and that by the naming of the appellant as beneficiary no joint interest or estate in the fund was created and distinguishes it from the joint bank accounts, because in those cases there is a present interest established in the account when the joint account is opened, and argues that no present joint interest could be created here because of the non-assignability clause. And to the argument that the trust is a completed one, respondent argues that there was no intent by de-

Conclusions.

cedent to divert herself of her equitable interest in the stock.

I think all these contentions must be resolved in favor of the respondent. This case is clearly distinguishable from *Kaufman v. Edwards*, 92 N. J. Eq. 554, *Hoboken Bank v. Schwoon*, (*supra*) and also from *Green v. Tulane*, 52 N. J. Eq. 169. 10 It is more nearly akin in principle to *Stevenson v. Earl*, 65 N. J. Eq. 721, where it was held that where the agreement between donor and depository is that the donor has complete right of ownership and control during her life, and that so much as is remaining at her death shall be delivered to donee who shall *then* become the owner thereof, such a disposition is a testamentary one and invalid. In *Kaufman v. Edwards*, Vice Chancellor Buchanan very clearly distinguishes 20 between the act of a donor which "is a presently effective transfer of an interest" and a transfer which is to become effective only upon the death of the donor. In the instant case, the non-assignability of the fund is significant. In *Green v. Tulane* (*supra*) there was a complete transfer of the property with a reservation of income only; here the transfer to the trustees was only for a term of years with power of withdrawal and right to change the beneficiary reserved. The benefi- 30 ciary was to become entitled to no interest in the fund except upon the death of the donor within a certain period. The language of the form, designating the beneficiary is significant and controlling. It is "in the event of my death while a participant," etc. Then and then only was the gift to take effect, and it seems to me that the conclusion that this was an attempted testamentary disposition, invalid under our statute of wills, is inescapable. The decree of the Essex 40 County Orphans' Court will, therefore, be affirmed.

Decree.

(Filed June 25, 1929.)

NEW JERSEY PREROGATIVE COURT

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IN THE MATTER
of
 The Estate of GERTRUDE KOSS,
 Deceased.

On Appeal from
 Essex County
 Orphans' Court.
 Decree.

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This cause having been brought to hearing on appeal from the Orphans' Court of the County of Essex, filed in behalf of Bessie Koss, on February 4th, 1929, and Precker & Precker, appearing for the appellant and Harry Kalisch, of Kalisch & Kalisch, appearing for the respondent, having been heard and the questions brought up by said appeal, having been duly considered; it is on this 24th day of June, 1929, on motion in behalf of the respondent,

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ORDERED, ADJUDGED AND DECREED, that the Order of the Orphans' Court of the County of Essex, made on the twenty-sixth day of June, 1928, which is appealed from by said appellants, be and the same is hereby in all things affirmed, and that said petition of appeal be dismissed, with costs, and that the said Harry Kalisch, be allowed the sum of \$200, as and for a counsel fee; and it is further Ordered, Adjudged and Decreed, that the record be remitted to the Essex County Orphans' Court to proceed thereon according to law and the practice of said Court.

EDWIN ROBERT WALKER,
 Ordinary.

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Respectfully advised
 MAJA LEON BERRY, V.O.

Notice of Appeal.

(Filed July 3, 1929.)

NEW JERSEY PREROGATIVE COURT

IN THE MATTER
of
 The Estate of GERTRUDE KOSS,
 Deceased.

On Appeal from
 Essex County
 Orphans' Court.
 Notice of Appeal.

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The appellant, Bessie Koss, hereby appeals from the final decree made by the Ordinary on the advice of Maja Leon Berry, Vice-Ordinary, in the above entitled cause on the 24th day of June, 1929, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

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Dated July 2, 1929.

PRECKER & PRECKER,
 Proctors for Appellant.

MICHAEL S. PRECKER,
 Of Counsel.

30

I conceive there is good cause for appeal in the above entitled cause.

MICHAEL S. PRECKER,
 Of Counsel with Appellant.

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New Jersey Court of Errors and Appeals

IN THE MATTER <i>of</i> The Estate of GERTRUDE KOSS, Deceased.	}	On Appeal from Decree of Prerogative Court.
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BRIEF FOR APPELLANT.

This is an appeal from a decree of the Prerogative Court advised by Vice-Ordinary Berry on June 24, 1929, affirming an Order of the Orphans' Court of Essex County, requiring the appellant to transfer to the Administratrix of the estate of Gertrude Koss, 32 shares of the capital stock of the Standard Oil Company of New York (hereinafter for convenience termed the "Company"), of the par value of \$25 each (Rec., p. 130). These shares are claimed by appellant as her own property.

The appellant, who was the sister of Gertrude Koss, received the shares in question as the beneficiary designated by the latter, a participant in a Stock Acquisition Plan adopted by the Board of Directors and stockholders of the Company for the benefit of its employees. Such designation of beneficiary the learned Vice-Ordinary held to be an attempted testamentary disposition not effected in compliance with the Statute of Wills. This, we submit, was an erroneous view and construction of the feature of the plan in question.

While the amount directly in controversy is comparatively small, being only about \$1,100 (Rec., p. 39; p. 125, l. 17), the final decision of the issue involved is of much importance as it will

affect the rights of many thousand employees of the company under its Stock Purchase Plan (Exhibit R-7, Rec., pp. 42-53) and a much larger number of employees of other companies sought to be benefited by plans with identical or similar provisions.

Statement of the Case.

Gertrude Koss, of whose estate the appellee is administratrix, died on July 19, 1927 while an employee of the company. After she had been in its employ a number of years, the Company adopted the above-mentioned Stock Purchase Plan for the benefit of its employees (Rec., p. 14, l. 25; p. 42, l. 39). The material provisions thereof were as follows: Anyone who had been in the employ of the Company for a year or more could become a participant in the plan by authorizing in writing the Company to deduct from each installment of his wages a sum not to exceed 20% thereof, and to credit the amount of such deductions to his account with the trustees provided for by the plan (Rec., p. 43, l. 20). Concurrently with the making of each payroll deduction the Company agreed to contribute a sum equal to 50% of the amount of such deduction (Rec., p. 43, l. 38). The plan provided for its being administered by three trustees and that *they* should from time to time invest the fund so received from the participants and the Company in shares of its capital stock for the participants in the plan (Rec., p. 44). A separate account was required to be kept for each participant and when the amount to the credit thereof was equivalent to the cost price of one or more shares of the Company's stock, the Company agreed to sell to the trustees such share or shares (Rec., p. 45, l. 15). The dividends received on

the shares at any time so standing to the credit of any employee were to be similarly applied by the trustees. The plan went into operation on November 1, 1923 and was to continue until October 31, 1928 when the shares of stock or money standing to the credit of the account of each participant was to be distributed to him (Rec., p. 46, l. 31).

Prior to the termination of the plan no participant therein was entitled to receive stock or cash from the trustees except in the event of his withdrawal from the plan. Such withdrawal might be effected in any one of the four following ways:

A. At his election, at any time he saw fit while still in the service of the Company;

B. By his leaving its service or being discharged for cause;

C. By his being retired under the Company's Annuity Plan, or having his employment terminated by the Company through no fault of his own; or

D. By his death while in the service of the Company prior to the termination of the plan.

The exact provisions of these four withdrawal clauses of the plan as set forth therein are as follows:

“(A)—Any participating employee who remains in the service of the Company, or of a subsidiary Company, may, if he so elects, withdraw from the plan at any time and shall thereupon be entitled to receive only the amount of money deducted from his compensation with interest thereon at the rate of 6 per cent per annum, and shall thereupon forfeit all rights and interest in this plan and in all stock, securities and credits of every

kind appearing in the account of such employee with the trustees, and said stock, securities and credits shall be transferred to the Company. Such withdrawing employees shall not be eligible again to participate in the plan for a period of one year.

“(B)—Any participating employee who leaves the service of the Company, or of a subsidiary company, voluntarily, or is discharged for cause, as to either of which in case of dispute, the Board of Directors shall be the sole judges, shall thereupon cease to be a participant in the plan and the account of such employee shall be closed by returning to such employee only the amounts deducted from the compensation of the employee with interest at the rate of 6 per cent per annum. Such employee shall thereupon cease to have any rights or interest in this plan or in any stock, securities or credits appearing in the account of such employee with the trustees, and all such stock, securities and credits shall thereupon be transferred to the Company.

“(C)—Any participating employee who is retired under the Company's annuity plan, or whose employment is terminated by the Company through no fault of his own, as to which in case of dispute the Board of Directors shall be sole judges, shall cease to be a participant in the plan and shall thereupon receive the full amount of cash, stock and other securities standing to the credit of such employee in the account of such employee with the trustees.

“(D)—In case of the death of any participating employee while in the service of the Company, or of any subsidiary company, the trust in respect to such employee shall then terminate, and thereupon the full amount of cash, stock and other securities standing to the credit of such employee in the account of such employee with the trustees, shall be paid, transferred and delivered to such beneficiary or beneficiaries as such employee may have

designated in writing and caused to be filed with the Company, or failing such designation to the estate of such employee" (R., pp. 47-48).

It will be noted that any participant withdrawing from the plan pursuant to either Clause A or B was entitled to receive from the trustees only the aggregate amount of deductions so made from his wages with six per cent. interest thereon, and that it was only as the result of a withdrawal either under Clause C or D that any of the shares so acquired by the trustees could be distributed to a participant or his beneficiary prior to the termination of the plan.

The plan further provided that all stock purchased by the trustees thereunder should be issued in the name of the trustees and their successors as "Trustees under the Stock Purchase Plan for Employees of the Standard Oil Company of New York." Except as limited by the above withdrawal provisions C and D, the title to all stock acquired by the trustees remained in them until the termination of the plan. The trustees had the right to vote all the stock issued to them at all meetings of stockholders, and to exercise all other rights incident to the ownership thereof, and this notwithstanding that the shares purchased had been credited on the books of the trustees to the accounts of the participants in the plan (Rec., p. 48, l. 26). After declaring that the rights and interest of any employee in any stock or cash so credited to his account should be only as declared in the plan, it further provided that the employee's rights under the plan were wholly personal and no assignment or transfer thereof would be permitted or recognized (Rec., p. 49, l. 10).

Gertrude Koss became a participant in the plan at the time it went into operation, and then ap-

pointed her sister, the appellant, as the beneficiary thereunder to receive whatever shares and cash should be distributed under clause D in case it became operative (Ex. R-3, Rec., p. 39). In March, 1927, she became ill and was granted an indefinite leave of absence, her salary being paid to April 30, 1927 (Rec., p. 83, l. 27; p. 84, l. 19; p. 87, l. 15; p. 88, l. 3). The 20% deductions therefrom provided for by the plan were made and credited to her account under the plan each week up to that date, as were also the agreed contributions of 50% thereof by the Company (Rec., p. 86, l. 37; p. 99, l. 35; p. 101, l. 30). At the time she was granted leave of absence there was standing to the credit of her account 31 shares of the stock and a small amount in cash. These last-mentioned deductions from her wages, plus such further contributions of the Company up to April 30, 1927, plus a dividend declared in May, 1927, upon such 31 shares, enabled the trustees to purchase an additional share for her which was credited to her account in May, 1927 (Rec., p. 101, l. 30). She remained an employee of the Company and a participant in the plan until the date of her death. There had been no withdrawal or attempted withdrawal by her from the plan prior to the date of her death and she was recognized as a participant therein by both the Company and the trustees up to that time (Rec., p. 84, l. 29; p. 96, l. 32; p. 105, l. 15). There was then to the credit of her account 32 of said shares and \$21.80 in cash (Ex. R-3, Rec., p. 39). Upon being informed of her death, the trustees therefore issued a certificate for 32 shares of the Company's stock to appellant and paid her the small cash balance which was also to the credit of her deceased sister's account with the trustees under the plan (Ex. R-3, Rec., p. 38).

The case was originally tried in the Orphans' Court. Under leave of the Court additional testimony was taken in the Prerogative Court and the case heard *de novo* (Rec., p. 118, l. 22). As already appears, the Vice-Ordinary found that Gertrude Koss was a participant in the plan at the time of her death and affirmed the order of the Orphans' Court solely upon the ground that "the attempted disposition of the fund here in dispute was a testamentary one, and, in the form attempted, contravenes the statute of wills" (Rec., p. 125).

We respectfully submit that the learned Vice-Chancellor erred in reaching this latter conclusion; that the disposition of the shares in question was in nowise of a testamentary nature and that the decree appealed from should be reversed.

I.

The contract between the company and its employee, Gertrude Koss, under which she designated appellant as the one to receive the shares in question under Clause D in case it should become operative, was not an attempted testamentary disposition of property, but a valid contract.

At the outset we desire to call to the Court's attention the pertinent fact that the stock purchase plan contract in question entered into by Gertrude Koss at the time of its making did not relate to any property then in existence, but was a contract dealing with property rights thereafter to come into being. It was merely one of many similar contracts made by the Company with its employees to encourage their continued loyal service on its behalf in return for additional compensation. As stated in the foreword of the plan, the directors recommended to the employees "participation in this plan in the belief that it

affords the employees an opportunity to become stockholders in the Company and thus share in its profits, on terms which furnish an incentive to continued loyal service on the part of employees, and which at the same time, offers an investment sufficiently safe and attractive to encourage thrift and saving" (Rec., p. 42, l. 22). The form by which an employee elected to become a participant in the plan shows clearly that the whole arrangement, including the designation of a beneficiary in the event of death during his continued participation in the plan, was a contract entered into for the purposes and considerations just mentioned. It stated "I have read the said plan and understand its contents. I hereby *accept* the terms thereof and agree to be bound thereby" (Rec., pp. 52-53).

It was in effect and in fact a contract as follows: Gertrude Koss thereby elected to have the Company deduct a sum from each installment of her wages not to exceed 20% thereof and to pay the same to the trustees provided for in the contract. In consideration thereof the Company agreed that it would at the time of each such deduction make to the trustees a payment of one-half of the amount thereof out of its own funds. The moneys thus contributed by the employee and the employer immediately passed to the trustees appointed to administer the plan. Neither the participating employees nor the Company thereafter had the control of either the money they contributed or of its investment. The plan expressly provided that it was to be used by the trustees in the purchase of stock of the Company and that the title to all of the stock purchased was to vest in the trustees. *They* were required to set up on *their* books an account for each participating employee showing the amount thus received by them for him and placed to his credit.

When this amount became sufficient to enable the trustees to purchase one or more shares of the Company's stock they were required to do so but the title to any shares so purchased at all times remained vested in the trustees, although credited to the accounts of the various participating employees. While the dividends received on the shares appearing to the credit of any such account were likewise to be credited thereto, any money in the account remained the property of the trustees, and when such dividend money was invested the shares purchased thereby likewise became vested in the trustees. They and they alone had the right to vote the stock or to exercise any of the rights of the owner of the stock. Gertrude Koss had neither title to nor any equity in any of the specific property held by the trustees. She had no possible dominion or control over any part of it. Her sole right was the contract one prescribed by the plan.

Under Clause A she could withdraw from the plan at any time but if she did so she was entitled to receive only the amount of money deducted from her wages with interest thereon at the rate of 6% per annum. Under Clause B, if she left the service of the Company voluntarily or was discharged for cause, she ceased to be a participant in the plan and was likewise to receive only the amount of her contributions with interest as just stated. If she withdrew under either of such clauses she forfeited all stock, securities or credits appearing in her account with the trustees (Rec., p. 47). Under Clause C, if she retired under the Company's Annuity Plan or her employment was terminated by the Company through no fault of her own, she was entitled to receive the money and a number of shares of stock of the Company equal to those then standing to the credit of her account with the trustees. Under Clause D, in

the case of her death while still a participant in the plan, there was to be paid, transferred and delivered to the beneficiary, if any, she had designated in writing to receive the same, the amount of cash and the number of shares just referred to, while in the absence of a designation such payment, transfer and delivery was to be made to her estate.

It will be seen, therefore, that by no action of hers could Gertrude Koss ever have acquired the shares in question. If she withdrew from the plan under either Clause A or B, she would have received only money. The conditions imposed by Clause C, under which alone she personally could ever have received any stock from her participation in the plan, were entirely beyond her control. Under Clause D she could not have received any stock because no delivery thereof was to be made until after her death.

It already appears and the entire record discloses that the contract under review was in no wise designed to circumvent the provisions of the Statute of Wills. It was formulated not by Gertrude Koss or the appellant but by the Company solely for the *bona fide* and legitimate purpose of encouraging its employees not only to continue in its employ but to render it loyal service, the inducement therefor being the extra compensation provided by the plan. The fact that the Company had agreed that in the event of the death of an employee while the plan was in operation the trustees administering it would transfer and deliver the cash and stock to which he should be entitled to such beneficiary as he might name—being merely part of an entire contract entered into for such laudable purposes—we submit cannot constitute the transaction an attempted testamentary disposition of property owned by the employee.

The confusion between a situation of the kind here presented and the one dealt with in *Stevenson v. Earl*, mainly relied upon by the Vice-Ordinary, was ably pointed out by Vice-Chancellor Stevenson in *Dunn v. Houghton*, 51 Atl. Rep. 71 (not officially reported), where he said in part as follows:

“* * * A large part of the difficulty, it seems to me, has arisen from a failure to recognize the distinction between a donative transfer of property by the procurement of a contract, the performance of which may benefit the donee, and the donative transfer of a contract theretofore existing between the donor and a third party by delivery of the evidence of the contract by the donor to the donee. The two cases are far asunder. They can, perhaps, most conveniently be illustrated by referring to a life insurance policy. A man may effect a donative transfer of a large portion of his estate to a beneficiary through the instrumentality of a life insurance policy made payable to such beneficiary, and it may be observed that the whole beneficial enjoyment of the gift is necessarily postponed until the death of the donor, and the validity of the donative transfer is not affected by a reservation of power in the policy of the donor to extinguish the liability of the insurance company in his own lifetime by surrendering the policy. The other case above referred to is illustrated by a gift of the benefits of a life insurance policy made payable to the donor, which under our law can be effected by delivery of the policy to the donee with the essential donative purpose. *Insurance Co. v. Grant*, *supra*, and cases cited. In all those cases where the intention is to donate a chattel or a negotiable instrument, or a chose in action which is so related to a chattel, like a savings bank book or a nonnegotiable note or bond, that possession and production of such chattel are ordinarily necessary in order to reduce the chose in action to possession, delivery of the chattel

is a natural requirement, in the absence of a written assignment. But where the donative purpose is sought to be accomplished by procuring a third party, such as a savings bank, to contract directly with the donee, or for his benefit, the whole law as to delivery seems to be in a large degree inapplicable. There is nothing to deliver. The donation is actually effected when the donor delivers his property to the savings bank, and thereby procures the savings bank to contract with or for the benefit of the donee. In the case of a donation through a life insurance policy payable to a beneficiary, no one ever heard that delivery of the policy or of anything else was necessary to effectuate the gift. One may purchase an annuity payable to himself for life, and then to a donee for life, and *reserve a power to extinguish the annuity whenever he may see fit*, and thus destroy all possible beneficial results to the donee from the contract. But in all such cases the gift is complete when the *contractual right is vested in the donee, however conditional or contingent any enjoyment may be which the donee can derive from performance of the contract.*

* * * * *

“One additional topic must be briefly discussed, and that is the relation to the matter in hand of the statute of wills, or the law of wills, before our modern statutes were enacted. In some of these savings bank book cases it is intimated that where the donor retains possession of the bank book with intent that the donee shall not control the collection of the money except in case he survive the donor, and that the donor may retain the right and power during his lifetime to collect the money due on the bank account and appropriate it to his own use, thus destroying the beneficial value of the donation, the transaction is an invasion of the province of a will, and in conflict with the letter or spirit of the statute of wills. No statute of wills

that I am aware of has ever been passed which undertook to interfere with the making of a donation by a legal conveyance, a legal contract, or a legal trust, because of the presence in the transaction of either or both of the elements above referred to. If the statute of wills could be construed to have such an effect, it would long ago have been applied to the abolition of that ancient legal curiosity, the *donatio mortis causa*. Lord Eldon, in the case of *Duffield v. Elwes* (1827) 1 Bligh (N. S.) 533, expressed the opinion that it would be an improvement of the law to strike out altogether this peculiar form of gift, but added that, as that had not been done, he was obliged to 'examine into the subject of it.' In *Keepers v. Deposit Co.*, *supra*, as we have seen, the court of errors declares that the law of gifts *causa mortis* should not be extended. But no case has ventured to hold that either the *donatio mortis causa*, or any analogous donative provisions through life insurance contracts, annuity contracts, trusts, etc., which operate beneficially only in case of survivorship, and only upon the happening of contingencies which the donor controls, have ever been abolished by any statute of wills. A will is a mere 'declaration or sentence of a man's mind as to what he would have to be done with his estate after his death.' 5 Bac. Abr. tit. 'Of Wills and Testaments' (A) p. 497; Jarm. Wills, c. 2, and cases and authorities there cited. A will during the life of the testator is absolutely inoperative, like an undelivered deed. If a gift must rest merely upon a declaration made by a deceased donor in his lifetime, the statute of wills applies with controlling power, and renders inoperative any declaration not made in the manner which the statute prescribes. But if the form of the gift as distinguished from the donative purpose, is a contract, a conveyance, or a trust, the statute of wills has no application to the transaction. The sufficiency of the form of the gift in such cases is to be determined solely by the law of contracts, the law of conveyances, or the law of

trusts. Voluntary settlements by conveyances or mere delivery of personal property to trustees for the donor's benefit during his life, and after his death for the benefit of the donee, are valid dispositions of property. *Green v. Tulane*, 52 N. J. Eq. 169, 28 Atl. 9; *Stone v. Hackett*, 78 Mass. 227; *Viney v. Abbott*, 109 Mass. 300. And the reservation of a power of revocation, so far from exposing such settlements to any legal objection, helps to relieve them from the defect of improvidence. The whole body of established law in relation to voluntary settlements of real and personal property would be undermined if a settlement could be set aside because it invaded the province or discharged the function of a will. The function of a will is to effect the disposition of property after the donee's death in accordance with a mere declaration made by the donor in his lifetime, and during his lifetime entirely inoperative; but no conveyance, contract, trust, or other disposition of property can be declared illegal or ineffectual because it practically discharges the same function as a will after the death of the person who made it. How dangerous it is to attempt to make a voluntary settlement without reserving full power of revocation, so as to make such settlement, like a gift *causa mortis*, in effect an ambulatory and testamentary disposition, is illustrated by a long series of American and English cases. *Garnsey v. Mundy*, 24 N. J. Eq. 243, and cases cited in the opinion of the chancellor; *Van Houton v. Van Winkle*, 46 N. J. Eq. 380, 385, 20 Atl. 34; *Hall v. Otterson*, 52 N. J. Eq. 522, 531, 28 Atl. 907. In *Hall v. Hall*, L. R. 14 Eq. 365, counsel aptly refers to these purely donative settlements as 'quasi testamentary dispositions' of property. A conveyance or settlement which practically discharges the function of a will may be an evasion of laws imposing taxes on legacies, or other laws limiting the power of the owner of property to dispose of it after his death,

but cannot in any correct sense be said to be an evasion of the statute of wills. An instrument, to be an evasion of the statute of wills, must seek to be accorded the status of a will, without actually possessing the necessary attributes of a valid testamentary declaration. * * *"

It will be noted that Vice-Chancellor Stevenson in *Dunn v. Houghton* repeatedly drew an analogy between the contract before him and an insurance policy. The same analogy between the stock subscription plan and an insurance policy was pressed on the hearing below, but the Vice-Ordinary dismissed it with the remark that the Company was not an "insurance company nor can it be seriously contended that this plan was in any sense a plan of insurance." We submit that this is no answer, particularly when the sole objection to the plan is the claim that it attempts a testamentary disposition of property in violation of the Statute of Wills. There is nothing in the Statute of Wills to exempt insurance companies any more than any other corporation or any individual from its provisions. Appellant does not contend that the plan is one of insurance, but as far as the provision for naming a beneficiary thereunder being testamentary in character is concerned, the analogy referred to is perfect. A comparison of the material provisions of an endowment policy and the Stock Purchase Plan under review proves this. Under such a policy the insured agrees to pay a certain premium for a limited period of years if he lives that long. If he either elects not to or is unable to make a stipulated premium payment, the policy has a withdrawal value measured by the premiums theretofore paid which he can obtain. If the policy matures before the insured's death he receives the full amount payable thereunder. If he dies during the term of the policy and while

it is in force, the amount of the insurance effected is payable to any beneficiary he may have named therein. In such a policy the insured usually reserves the right to change the beneficiary as he may elect.

As has been seen, an employee under Clause A of the Stock Purchase Plan could elect not to have any further deductions made from his wages whereupon under the contract he had thereby made with the Company he had the right to receive from the trustees the total amount of such deductions theretofore made with interest. Under Clause B his rights were the same in case he left the employ of the Company or was discharged for cause. Under Clause C if he was retired or his employment terminated by the Company through no fault of his own, he received a larger compensation, just as under many life insurance policies, the insured if he becomes disabled prior to the maturity of the policy receives additional stipulated benefits. Under Clause D upon the death of the employee the benefits of his contract, exactly as in the case of the proceeds of such a policy following the death of the insured, were to be paid to a beneficiary if he has designated one, if not, to his estate. The beneficial object sought to be accomplished through the designation of beneficiaries in insurance policies is akin to the one that led to the making of the contract under attack in this suit. In each case industry and thrift and the protection of dependents are sought to be furthered. We respectfully submit that there is no more reason for declaring the contract here under review invalid as constituting a testamentary disposition in violation of the Statute of Wills than there would be for similarly construing such policies of insurance. Yet no one would venture to contend that they violate the Statute of Wills.

The distinction so clearly recognized by Vice-Chancellor Stevenson in *Dunn v. Houghton*, *supra*, between a situation where one retains dominion and control over property during his life and attempts to make a gift thereof effective upon his death in any manner other than by will, and a case like the present where one enters into a contract with another whereby the latter for a valuable consideration assumes definite obligations, even though one thereof may be an obligation to pay money or deliver property to a third party upon the death of the first-mentioned one so contracting, has been recognized and applied by this Court in *New Jersey Title Guarantee & Trust Co. v. Archibald*, 91 N. J. Eq. 82, and other of its decisions therein cited.

In the *Archibald* case money was deposited in a bank in the joint names of a mother and daughter. They both signed and delivered to the bank a writing which provided—

“This account and all money to be credited to it belongs to us as joint tenants and will be the absolute property of the survivor of us; either and survivor to draw.”

The pass book was not required to be produced on withdrawals. The mother died and the question was whether the daughter was entitled to the balance of the account. A bill filed by the executor of the mother to secure the fund was dismissed in the Court below and this Court affirmed the decree holding that the transaction was a contract made with the bank, and not a testamentary disposition of property. In an able opinion by Mr. Justice Trenchard he said in part as follows:

“At the outset it is to be remarked that we are not here concerned with the class of cases where the rights of the parties depend in part, at least, upon the possession of a pass

book without the possession of which the moneys could not be withdrawn. Here the rights of the parties depend *upon the legal effect of the contract upon which the deposit was made* and which contained no such provision.

"It will be noticed that it does not appear clearly from the bill of complaint whether the moneys deposited belonged originally wholly to the mother, or in part to her and in part to the daughter. But that is immaterial.

"We think that where, as here, moneys belonging originally either wholly to the mother, or in part to her and in part to her daughter, are deposited by them in a bank in their joint names, and at the same time they both sign and deliver to the bank a writing stating that 'This account and all money to be credited to it belongs to us as joint tenants and will be the absolute property of the survivor of us; either and the survivor to draw,' upon the death of the mother the undrawn moneys belong to the surviving daughter.

"Such is the logic of *East Rutherford S. L. & B. Assn. v. McKenzie*, 100 Atl. Rep. 931; affirmed, 87 N. J. Eq. 375.

"It is, however, contended that the essentials of a technical joint tenancy are not present because of the right of both to draw out the entire fund, and it is argued that what was intended was a testamentary disposition which was void for non-conformity to the statute of wills. But a somewhat similar deposit was dealt with in *Hoboken Bank for Savings v. Schwoon*, 62 N. J. Eq. 503, and the survivor was held entitled to the fund. In answer to the argument based upon the fact that the power of disposition remained in the donor during his lifetime the court said: 'This circumstance has not deterred the court from giving effect to such arrangements. This has been done on two grounds—*first*, that a joint estate or interest is created with an express right of survivorship which operates naturally and legally upon whatever of the fund remains unused at the death of the donor; and *second*, on the ground of a completed trust.'

“Whether the deposit in the case at bar created a technical joint tenancy is beside the mark. We have pointed out that it was a deposit of moneys originally belonging either wholly to the mother, or in part to her and in part to the daughter. More strictly speaking, it was a loan by the depositors to the banks upon the terms stated, since a deposit in a bank creates the relation of debtor and creditor between the depositor and the bank. *Schippers v. Kempfes*, 67 Atl. Rep. 1042; affirmed, 72 N. J. Eq. 948. The bank therefore contracted with the mother and daughter that such moneys should be held for them ‘as joint tenants and will be the absolute property of the survivor; either and the survivor to draw.’ That contract they had a right to make, and undrawn moneys so deposited belong to the survivor. *Dial’s Administrator v. Merchants & M. Savings Bank* (Va.), 91 S. E. Rep. 135. In such case it is not necessary to establish the existence of a technical joint tenancy to create the right of survivorship; in other words, the incident of survivorship which exists by implication in a joint tenancy is expressly provided for by such a form of deposit.

“It is argued that there was no gift from the donor to the donee because there was no delivery. But we think that is not so. The right was contractual and was vested in both depositors jointly and the survivor. The contract entered into by the bank with the mother and her daughter exhibited a donative purpose from donor to donee (not one merely for use and convenience of the donor) and hence constituted a valid gift. See *East Rutherford S. L. & B. Assn. v. McKenzie*, *supra*; *Schippers v. Kempfes*, *supra*; *Dunn v. Houghton*, 51 Atl. Rep. 71.”

It will be noted that one of the cases relied upon by this Court in reaching its decision in the *Archibald* case was *Dunn v. Houghton*, from which we have hereinabove quoted at length.

In the opinion below neither *Dunn v. Houghton* nor *New Jersey Title Guarantee & Trust Co. v. Archibald* are cited and it must be assumed that they were not brought to the attention of the learned Vice-Ordinary. He did consider the cases of *Hoboken Bank for Savings v. Schwoon*, 62 N. J. E., 503, cited with approval by this Court in the *Archibald* case and *Kaufman v. Edwards*, 92 N. J. Eq. 554, but sought to distinguish them from the instant case by holding that they involved the creation of a joint estate and that no such estate was created by the plan. In so doing he entirely overlooked the basic principle of the present case, viz., the contract relation. In fact, in *New Jersey Title Guarantee & Trust Co. v. Archibald*, this Court said:

“Whether the deposit in the case at bar created a technical joint tenancy is beside the mark. * * * More strictly speaking, it was a loan by the depositors to the banks upon the terms stated, since a deposit in a bank creates the relation of debtor and creditor between the depositor and the bank. *Schippers v. Kempfes*, 67 Atl. Rep. 1042; affirmed, 72 N. J. Eq. 948. The bank therefore contracted with the mother and daughter that such moneys should be held for them ‘as joint tenants and will be the absolute property of the survivor; either and the survivor to draw.’ That contract they had a right to make, and undrawn moneys so deposited belong to the survivor. * * * ”

The Vice-Ordinary’s decision was largely controlled by *Stevenson v. Earl*, 65 N. J. Eq. 721, which he expressly said was “akin in principle” to the present case. But in *Stevenson v. Earl* the only question determined was whether the gift involved was one *inter vivos*. Vice-Ordinary Berry found that there could have been no gift *inter vivos* because “the employee’s rights under

this plan are wholly personal and not assignable.” But no contention is made on behalf of the appellant that a gift *inter vivos* was effected by the decedent’s entry into the plan. As already pointed out, there was at that time no property in existence of which she could make a present gift. She merely contracted to secure to herself or her named beneficiary the benefits the plan offered. The non-assignability provision was obviously included solely for the purpose of preventing the laudable objects of the plan from being defeated by having employees dispose to outsiders their rights thereunder. It was a contract of a personal nature and like all similar contracts essentially non-assignable.

In fact, there is no similar feature in the stock purchase plan here involved and the employees’ saving fund considered in *Stevenson v. Earl* other than the immaterial one that they both related to transactions between an employer and an employee. Earl was an employee of the Pennsylvania Railroad Company and became a depositor in its saving fund. He named his wife as the person to whom the balance of such fund should be paid at his death. The rules of the company provided that he could always withdraw all or any part of the fund on ten days’ notice. He did draw out part of the money on various occasions and exercised the same complete dominion and control over the money in the fund as if he had designated no such beneficiary. This Court held that to uphold such a method of disposing of property would be to practically repeal the Statute of Wills in its operation as to personal property. But it there expressly differentiated, as it did in *New Jersey Title Guarantee & Trust Co. v. Archibald*, *supra*, cases like the present one for it said as to Earl that “neither by force of his contract with the company nor by the delivery of the pass book

did he intend to nor did he in fact part with his complete dominion over any part of the moneys deposited by him''. The doctrine of *Stevenson v. Earl* has never been held to prevent the creation of a definite contract obligation although the beneficiary does not obtain possession of the property until after the death of the obligor. *Dunn v. Houghton, New Jersey Title Guarantee and Trust Co. v. Archibald; Commercial Trust Co. v. White, supra.*

That Gertrude Koss could by retiring from the plan have obtained a return of her contributions to the fund with interest in nowise makes the situation here involved similar to the one dealt with in the *Stevenson case*. In fact, she made no such attempt, and, as already pointed out, had she done so she could not have acquired the shares in question but would have forfeited any right thereto. The plan did not permit her prior to its termination to acquire possession by any act of hers of any of the money contributed by the Company or the shares that had been purchased by its and her contributions to the trustee fund. The privilege of withdrawing, as well as the right to name other or additional beneficiaries, were both a part of the terms of the original contract. No statute, rule of law or public policy can be said to be violated by the making of such a contract. The contract being valid when made, its validity can in no wise be affected by the fact that some part thereof was to be performed after the death of one of the contracting parties.

II.

The trust created was a complete and valid one.

The plan here involved had every element of a completed trust. *Perry on Trusts*, 5th Ed., Vol. 1, Sec. 95; *Lewin on Trusts* (Amer. Ed.), p. 67. It is

fundamental that a declaration of trust "may be conditional or contingent at first, but if the conditions are finally eliminated and the provisions of the trust are settled so that the declaration becomes unequivocal, it is sufficient." Such is the case where a trust is declared dependent on the performance of certain acts by the *cestui que trust*. *American & English Ency.*, Vol. 28, p. 894; *Gildersleeve v. Stratton*, 59 N. J. Eq. 1.

Nor can it be denied that a trust may be created for a fixed period and that future earnings may be the subject of a trust. *American & English Ency.*, Vol. 28, p. 949; *Cyc.*, Vol. 39, p. 95; *Siter v. Hall*, 294 S. W. 767 (Sup Ct. Ky., 1927). Such are every day practices.

As already clearly appears, both the deductions from the earnings of Miss Koss and the resulting contributions from the Company, were to be and were from time to time during the continuance of the trust paid to and invested and held by the trustees under the plan.

The Court below, in its determination that a completed trust had not been effected, said:

"The beneficiary was to become entitled to no interest in the fund except upon the death of the donor within a certain period. The language of the form, designating the beneficiary is significant and controlling. It is 'in the event of my death while a participant,' etc. Then and then only was the gift to take effect, and it seems to me that the conclusion that this was an attempted testamentary disposition, invalid under our statute of wills, is inescapable."

It is apparent that in reaching this erroneous conclusion Vice-Ordinary Berry was governed by two circumstances, (a) that Gertrude Koss had reserved to herself an interest under the trust during the period of her life and (b) that she re-

tained the right to name a new beneficiary. But in this he entirely overlooked, or at least failed to recognize, the controlling effect of two fundamental principles:

A. The character of a trust as complete is not affected by the fact that the right of enjoyment is reserved to the settlor until a future period. That a trust estate may be created whereby the settlor reserves an interest with remainder over to another.

We shall refer to but few of the many cases laying down this principle, all of which are in harmony. Perhaps the leading one is *Green v. Tulane*, 52 N. J. Eq. 169. There Paul Tulane had deposited in the hands of Judge Green certain bonds under a writing in which he authorized and directed him in case of his death to deliver the bonds to certain named individuals to be equally divided between them. Nothing more appeared except that during Mr. Tulane's lifetime, either Judge Green or his son cut the interest coupons from the bonds and paid the proceeds to Mr. Tulane. After the latter's death, it was urged that such disposition of the bonds violated the Statute of Wills. In overruling this contention, Vice-Chancellor Pitney said:

"The only ground upon which I can conceive that the gift can be attacked is that it was testamentary in its nature. By the terms of the declaration of trust, if it be viewed in that light, the bonds were to be delivered to the beneficiaries '*in case of my death*'. Inasmuch as death is a certain event, that was tantamount to saying '*at my death*'. Admitting that the result was a reservation by implication of a life estate to the donor, I am still unable to perceive how it follows that the gift must, under the circumstances, be treated as testamentary in its character. It is quite competent for one to make a settle-

ment on another *in praesenti*, reserving a life estate to himself, without bringing the affair within the definition of a testamentary disposition or of a gift *causa mortis*."

From page 53 of the record herein it will be seen that the words used in the designation of the appellant as the beneficiary of her sister, Gertrude Koss, were in effect identical with those we have italicized in this quotation from the *Tulane case*. They were "In the event of my death".

In *Gilman v. McArdle*, 99 N. Y. 451, quoted with approval by the learned Vice-Chancellor in the *Tulane case*, a married woman had placed in the hands of McArdle a sum of money with directions to use the same for the support and maintenance of herself and husband as long as they lived, and after the death of the survivor, to expend the amount remaining in his hands for certain purposes. Both the wife and husband having died and there being a considerable balance left in the hands of McArdle, suit was brought by the administrator of the original donor to recover it. Judge Rapallo, in sustaining the gift both on the theory of a contract and a completed trust, said:

"The learned judge who rendered the judgment in the present case expressed the opinion that the disposition in question would have created a valid trust if contained in a will, though not valid under the circumstances of this case as a disposit^{ION}~~ION~~ *inter vivos*, but it seems to us that any trust of property which would be valid if created by will, can be created by the owner of the property in his lifetime, provided it is then to go into operation although it is to be executed after his death, and that in the case of money or personal property, it may be created by oral agreement accompanied by a transfer or delivery of the property, and that such delivery will pass the title to the property, and that as a trust its validity is to be tested by

the same rules whether it be created by will or by contract *inter vivos*."

Other New Jersey cases to the same effect are *Sibley v. Somes*, 62 N. J. Eq. 595 and *Mullen v. Mullins*, 130 Atl. Rep. 628, 630 (not officially reported), in which latter case this Court affirmed the opinion of the Court below.

In *Allen v. Hendrick, et al.*, 206 Pac. 733 (Sup. Ct. of Oregon, 1922), the Court said in part:

" * * * A trust may be created for the benefit of the settlor during his life with remainder to other persons. 39 Cyc. 36; *Kelley v. Snow*, 185 Mass. 288, 70 N. E. 89; *Lewis v. Curnutt*, 130 Iowa, 423, 106 N. W. 914.

* * * * *

"The difference between a will and a trust is that a will operates only from the moment of death while a trust operates *in praesenti*, to a certain extent. *Nicholas v. Emery*, 109 Cal. 323, 41 Pac. 1089, 50 Am. St. Rep. 43; *Hiserodt v. Hamlett*, 74 Miss. 37, 20 So. 143; *Kelly v. Parker*, 181 Ill. 49, 54 N. E. 615; *Lewis v. Curnutt*, 130 Iowa 423, 106 N. W. 914; *Basket v. Hassell*, 107 U. S. 602, 2 Sup. Ct. 415, 27 L. Ed. 500. It is competent for the settlor to make his death the event upon the happening of which the estate in interest, previously vested *in praesenti* but to be enjoyed *in futuro*, is to come into possession. Death is the time when the trust, already perfectly constituted, is, as to the estate previously vested in interest by it in the trustee, for the beneficiary, to come into possession of the beneficiary to be enjoyed. *Hiserodt v. Hamlett*, 74 Miss. 37, 20 South. 143. The fact that the enjoyment of the estate is postponed to a future date does not negative the idea that a present interest is created in favor of the party or parties for whose benefit the trust is declared. A present interest is transferred, but the enjoyment of that interest is deferred."

In *Hiserodt v. Hamlet*, 20 So. 143 (Sup. Ct. of Miss., 1896) one Smitha, who held an insurance policy on his life, assigned it to a third person for a small loan. Smitha directed him that if he should die without having paid the money, to collect on the policy and divide the proceeds among certain persons after deducting the amount of the loan. Smitha had the power to revoke the trust by paying the amount of the loan. After his death his administrator filed a bill to recover the proceeds of the policy. The Court held that a valid trust had been created and that the reserved power of revocation, unexercised, did not defeat it. As to it being a testamentary disposition, it said:

“* * * We must not allow ourselves to be confused by the fact that the event upon the happening of which the interest was to be enjoyed—the trust was to be executed—was death. It is as competent for one to make the event, in the future, upon the happening of which the estate is to come into possession,—the trust is to be executed,—death of the donor, as any other event. The fact, in such case, that the event named is death, rather than some other selected event, is not at all determinative of the quality or legal character of the trust. It is a mere time when the trust, completely and perfectly constituted theretofore, is, as to the estate already thus vested in interest by it in the trustee, for the beneficiaries, to come into possession,—to be enjoyed. * * *”

B. *Even a reservation of a full power of revocation does not result in converting a trust otherwise valid into a testamentary disposition of property.*

The authorities also universally hold that the reservation of a power of revocation or a power to modify or change a trust in nowise makes it of

a testamentary nature. In many of these cases, as in *Hiserodt v. Hamlet*, *supra*, there was also present an element of a postponement of the enjoyment of the trust estate by the third party beneficiary until after the death of the settlor.

One of such cases is *National Newark & Essex Banking Co. v. Rosahl*, 97 N. J. Eq. 74. There the settlor assigned and delivered to complainant securities upon trust to pay the net income to him for life, then to his widow, corpus to his lawful issue; if no widow or issue, then to pay the net income to his mother, and upon her death to his three sisters, and the survivors of them, and upon the execution of these life interests to pay the principal to his appointee by will. The deed contained a provision that the settlor might during his lifetime by instrument in writing "revoke as an entirety this deed of trust and the trusts then subsisting thereunder. In such case the trustee shall thereupon pay over, deliver or otherwise dispose of, the entire trust fund, both principal and income, in such manner as shall be by such writing directed." In upholding the validity of this trust, Vice-Chancellor Backes said:

"The deed of trust is not, as claimed by the administrator, testamentary, and, therefore, invalid, because it was not executed as wills are required to be. The trust was completely executed. The property passed out of the donor and vested in the trustee to the beneficial use of the *cestuis que trustent*. That some of them were not to come into enjoyment until after the death of the donor did not affect the vesting of their interest. If the power of revocation is not exercised the interest remains vested as though such power had not been reserved. 1 Perry Trusts 137. The power is personal to the trustor. *Jones v. Clifton*, 101 U. S. 225; *Brandies v. Cochran*, 112 U. S. 344. The reservation of such power is not inconsistent with the passing of

title to the property to the trustee. *Stone v. Hackett*, 78 Mass. 227; *Windolph v. Girard Trust Co.*, 91 Atl. Rep. 634. The omission of such reservation has led to voluntary settlements being set aside on the ground of mistake. 26 R. C. L. 107, *Garnsey v. Mundy*, 24 N. J. Eq. 243. The distinction between trusts thus created and transfers of property to take effect after death, as in *Stevenson v. Earl*, 65 N. J. Eq. 721, upon which the administrator relies, is that in the one the property immediately passes out of the donor while in the other it remains in him and passes at death. The doctrine of that case, as pointed out by Chancellor Walker in *Robeson v. Duncan*, 74 N. J. Eq. 745: 'Applies to the disposition in his lifetime of property which will be in the donor at the time of his death; the tradition to take place at or after death. * * * It can have no application to a case where the grantor has by his conveyance divested himself of his property in his lifetime.' The courts have frequently upheld such trusts as against attacks, that they were testamentary. *Green v. Tulane*, 52 N. J. Eq. 169. See, also, *New Jersey Title Guarantee Trust Co. v. Archibald*, 91 N. J. Eq. 82; *Kaufman v. Edwards*, 92 N. J. Eq. 554; *Dunn v. Houghton*, 51 Atl. Rep. 71."

In *Mayer v. Tucker*, 141 Atl. Rep. 799, 801, this Court held that a power of revocation may be reserved in a trust without in anywise invalidating it.

One of the cases which was given the express approval of this Court in the case just cited as it was also by Vice-Chancellor Pitney in the *Tulane* case is the leading one of *Stone v. Hackett*, 12 Gray 227 (Sup. Ct. of Mass., 1858). There the settlor delivered shares of stock to a trustee to pay the income to the settlor during his life and upon his death to transfer the shares to certain named beneficiaries. The settlor reserved the right to modify or revoke the trust. After his

death his widow claimed the stock on the ground that the trust was void. In upholding the validity of the trust, Bigelow, J., said:

“The key to the solution of the question raised in this case is to be found in the equitable principle, now well established and uniformly acted on by courts of chancery, that a voluntary gift or conveyance of property in trust, when fully completed and executed, will be regarded as valid, and its provisions will be enforced and carried into effect against all persons except creditors or *bona fide* purchasers without notice. It is certainly true that a court of equity will lend no assistance towards perfecting a voluntary contract or agreement for the creation of a trust, nor regard it as binding so long as it remains executory. But it is equally true that if such an agreement or contract be executed by a conveyance of property in trust, so that nothing remains to be done by the grantor or donor to complete the transfer of title, the relation of trustee and *cestui que trust* is deemed to be established, and the equitable rights and interests arising out of the conveyance, though made without consideration, will be enforced in chancery.”

In answer to the objection that the donor was never stripped of dominion over the property, the Court said:

“It was suggested by the learned counsel for the widow that the donor never parted with his power or dominion over the property, because he retained a right to annul or revoke the trust. But this seems to us quite immaterial. A power of revocation is perfectly consistent with the creation of a valid trust. It does not in any degree affect the legal title to the property. That passes to the donee and remains vested for the purposes of the trust, notwithstanding the existence of a right to revoke it. If this right is never exercised according to the terms in which it

is reserved, as in the case at bar, until after the death of the donor, it can have no effect on the validity of the trusts or the right of the trustee to hold the property.

“Nor are we able to see any force in the suggestion that the trust which the donor created in some of its features looked to a disposition of the property which was the subject of the gift after his death. We know of no principle of law which renders such a transfer of property *inter vivos* invalid. The entire *jus disponendi* was in the donor. Perhaps if there were any facts to show that the transaction was intended to be testamentary in its character, and was entered into for the purpose of evading the provision of law regulating the execution of last wills and testaments, there might be some ground for impeaching the validity of the conveyance and withholding the sanction of the court from the trusts which the donor intended to establish. But it is not necessary to determine this question; because there is no evidence from which any such intent on the part of the donor in the present case can be inferred. The form of the transaction, and the trusts which were declared between the parties, afford no just ground for the inference that there was any collusion or fraudulent attempt by the donor to defeat the operation of the law of the State of New Hampshire or to deprive his widow of a fair share of his estate.”

In *Wilcox v. Hubbell*, 163 N. W. 497 (Sup. Ct. of Mich., 1917), Wilcox transferred his personalty to a trustee to invest for him and pay him the income and on his death the balance was to be paid to certain named beneficiaries. Wilcox reserved the right to change the disposition of the trust. The Court held that the trust was valid, saying:

“In the instrument before us there is an estate designated, a trustee named, a trust expressed, an owner of the estate, who is set-

tlor of the trust, designated beneficiaries. The instrument recites the transfer of title to the property by the settlor to the trustee. There are persons who have an immediate right to the possession of the property upon the ceasing of the precedent estate—upon the death of the settlor. The power to make a different designation of beneficiaries is reserved, to be exercised with the consent of the trustee, by a mutual instrument. It may be said that two trusts are declared; the second not to take effect in possession and enjoyment until the death of the settlor. This is not because the instrument is testamentary in character, but because the instrument in terms so declares. The rights of the beneficiaries accrued at the time of the execution and delivery of the instrument and the property, except as the instrument contained a limited right of revocation. A power of revocation in a deed of trust does not render the instrument testamentary.”

The same ruling was made by the United States Supreme Court in *Jones v. Clifton*, 101 U. S. 225, where it said:

“The powers of revocation and appointment to other uses reserved to the husband in the deeds in question do not impair their validity or their efficiency in transferring the estate to the wife, to be held by her until such revocation or appointment be made.”

In respect to the control over the property constituting the trust, the power of Miss Koss to change the beneficiary did not compare with the absolute power of revocation reviewed and upheld in the authorities just quoted. In the case of such reservation the donor has the power to regain control and power over the property and to dispose of it in any other way he sees fit. No change of beneficiary that Miss Koss might have made could have resulted in her acquiring any of

the shares or cash held by the trustees under the plan. The power reserved did not in any degree affect the legal title to the contributions made by Miss Koss or the Company or to the shares of stock in which the same were invested. The title to the contributions, as well as the stock, indisputably was in the trustees. Nothing remained to be done by Miss Koss to effect the transfer of title or otherwise perfect the trust. It was a completed trust in every respect and we submit it was a valid trust.

III.

In a well considered opinion, the Supreme Court of Kentucky has upheld the validity of a stock purchase plan identical in all essential respects with the one here under review.

Counsel for appellant desire to direct the attention of the Court to *Siter v. Hall*, 294 S. W. 767, decided by the Court of Appeals of Kentucky in 1927, in which that Court sustained the validity of a trust created by a stock purchase plan of the Standard Oil Company of Kentucky. The following quotation from the able opinion therein shows that the two plans were identical in so far as any issue in this suit is involved:

“Crittenden T. Collings was president of the Standard Oil Company of Kentucky for 20 years, and chairman of its board of directors during the last four years of his life. As an executive Mr. Collings took a deep interest in the employes of the company, and desired them to adopt habits of economy and thrift, and to lay aside something for their declining years. He also believed that they would best serve the company by becoming

shareholders and directly interested in its success, and that this would produce amity and good will between them. In order to effectuate these purposes, Mr. Collings formulated and put into effect three cooperative plans. * * *

“The third or stock purchasing plan was put into effect July 1, 1922. This was printed in pamphlet form, and, together with an explanatory letter by the president, was before that date mailed to each employe. It authorized each of those who had been in service for one year to participate in the purchase of the company's stock in accordance with the plan. Substantially its provisions were that the company should retain 10 per cent. of the employe's monthly wage, and supplement this by a contribution of 50 per cent. of the amount so retained, and deliver these sums to three trustees to be selected by the company from its board of directors, who were to hold the funds until a sufficient amount had accumulated to purchase one or more shares of the company's stock, and then to purchase from the company; and it would issue to them treasury stock at market prices, the stock to be held in the names of the trustees, and voted by them, and all dividends accruing thereon to be paid by them and applied along with the other funds so received by them to the purchase of more stock; this arrangement to continue until the 1st of July, 1927, at which time the accumulated stock was to be transferred and issued to the employe. In the meantime he was forbidden to assign or transfer the stock. If he was discharged or resigned, his contribution was returned with interest, and he forfeited all other rights. If he desired to withdraw from the plan, he could make a written request, together with his reasons therefor, to the board of directors of the company, and, if they approved, he was paid his contribution, with interest. When retired on the pension list, his stock was issued to him. It was further provided:

'In the event of an employee's death before July 1, 1927, all stock held by the trustees for his benefit and cash standing to the credit of the employee shall be delivered to the beneficiary named by him or to his estate.' "

An employee of the company desiring to participate in the plan, on the same sheet of paper by which he agreed to do so, signed a form reading as follows:

"* * * I hereby agree that if my death occur during the life of this plan, all shares of stock or cash standing to my credit at the time of my death shall be paid to the beneficiary named in the insurance policy carried for me by the Standard Oil Company (Kentucky)."

The original beneficiary named by him was his wife. Subsequently he designated one of his daughters as a new beneficiary. After his death, a controversy arose over the succession to the shares of stock which by the terms of the plan were issuable to such new beneficiary. It was claimed that the designation was testamentary in character and not being executed as a will, was ineffective. In overruling this contention the Court said:

"1. It is well settled that, unless properly executed as a will, a gift to take effect at the death of the donor, who in the meantime retains full ownership and control of the subject of the gift, passes no right or title to the donee. Among the numerous cases in which writings attempting to dispose of the property at the death of the maker were held to be testamentary in character, and therefore ineffective, may be cited, *Morrison v. Bartlett*, 148 Ky. 833, 147 S. W. 761, 41 L. R. A. (N. S.) 39; *Ward v. Ward*, 104 Ky. 857, 48 S. W. 411, 20 Ky. Law Rep. 986; *Ison v. Halcomb*, 136 Ky. 523, 124 S. W. 813; *Pelley v. Earles*, 107

Ky. 640, 55 S. W. 550, 21 Ky. Law Rep. 1395; *Rudd v. Rudd*, 184 Ky. 400, 214 S. W. 791; *Knott v. Hogan*, 4 Metc. (61 Ky.) 99; *Drake v. Security Trust Co.*, 203 Ky. 733, 263 S. W. 4; *Warsco v. Oshkosh Bank & Trust Co.*, 183 Wis. 156, 196 N. W. 829; *Springvale National Bank v. Ward*, 122 Me. 227, 119 A. 529; *Stevenson v. Earl*, 65 N. J. Eq. 721, 55 A. 1091, 103 Am. St. Rep. 790, 1 Ann. Cas. 49; *Russell v. Webster*, 213 Mass. 491, 100 N. E. 637. In each of these cases, however, the donor retained the absolute power of disposition over the subject of the gift during his life, and could have defeated the gift by a subsequent disposition.

"It is equally well settled that, if the donor alienates his property in such a way as to lose unfettered control over it, and thus be unable to defeat the gift by subsequent disposition, the gift will take effect, even though its enjoyment is postponed until the death of the donor. Also it will be admitted that a trust may be created for a fixed period, and that future earnings are the subject of a trust; that the grantor may name himself as a *cestui que trust* or as one of several *cestui que trustents*; the fundamental elements of a trust being 'that the trust property so long as the trust lasts is irrevocably devoted to the benefit of certain specified persons called *cestui que trustents*, of whom the donor may be one.' 3 Bouvier's Law Dictionary, 3328. He may reserve the power of revocation or of changing the terms of the trust, though, as construed by our court, he can make no such changes in the absence of a reservation. *Beard v. Beard*, 173 Ky. 131, 190 S. W. 703, Ann. Cas. 1918C, 832; *Burton v. Burton's Trustee*, 198 Ky. 429, 248 S. W. 1031; *Garrott v. McConnell, et al.*, 201 Ky. 61, 256 S. W. 14; *Lee v. Belknap*, 163 Ky. 418, 173 S. W. 1129. And we can perceive no reason why the same principle should not apply to a reservation authorizing a change of beneficiaries. In the consideration of this case we do not deem it material as to whether the dual contributions

constituted joint or separate trusts. The employe alienated a portion of his earnings, together with a certain bonus contributed by the company, for a fixed period to trustees to invest in stock in their own name for his benefit. They were to collect and invest the dividends in like manner, hold and vote the stock, and otherwise exercise entire control over it during the accumulation period, and to deliver it to him at the expiration of that period, or upon his retirement on a pension list. A qualified right of revocation was reserved, which enabled him to abolish the trust and receive back his personal contributions with interest, in the event of his resigning or being discharged or withdrawing from the plan with the company's consent. But, consistent therewith, during the life of the plan the property was irrevocably devoted to the benefit of the *cestui que trustents*, and therefore constituted a valid trust in favor of the employe. As to the additional *cestui que trustent*, it may be said that the plan is primarily for the benefit of the employe, and that he is treated as the beneficial owner throughout, except as provided in the paragraph quoted *supra*, which reads:

'In the event of an employe's death before July 1, 1927, all stock held by the trustees for his benefit and cash standing to the credit of the employe shall be delivered to the beneficiary named by him or to his estate.'

"If this provision were eliminated, there can be no doubt that, subject to the restriction upon alienation, the employe was the equitable owner of the stock, and, in the event of his death during the life of the plan, its succession would have been transmitted by inheritance or devise as directed by him. From this conclusion it is argued that this paragraph attempts to confer a power already possessed by the owner of the fee which is not enlarged or diminished thereby, leaving the owner the full power of disposition, and rendering the attempted exercise of the power ineffective, unless executed as a will. If this

paragraph attempts to confer the power of appointment upon the donee of the trust, there is much force in the argument; but we do not so construe it. On the contrary, the settlor was reserving such power to himself. He named himself as *cestui que trust* to take the stock at completion of the plan, but reserved and exercised the right to name additional beneficiaries who would take if he died in the meantime. He could do this with his own contributions, and, with the consent of the company, could exercise the same power with the bonus given for that purpose.

"Suppose A. gives a sum of money to a trustee to be loaned for five years, with direction to pay principal and interest to B. if A. died within that period, but, in the event of his surviving that period, to pay it to C. Can it be doubted that a valid trust is created, and that both B. and C. take a present interest in the fund, though necessarily the actual enjoyment of the fund will vest in but one of them; the consummation of each right depending upon the contingency of A. dying within, or surviving, the life of the plan? The same principle would apply if A. directed the fund paid to C. at the end of the period, but reserved and exercised the right to appoint a person to take if he (A.) died in the meantime, which is entirely similar to this case. Thus construed, the plan created a trust, with power reserved in the settlor to appoint additional beneficiaries, and the writing signed by Mr. Collings on June 12, 1922, was a valid exercise of such power of appointment."

It will be noted that this Kentucky case considered and distinguished *Stevenson v. Earl* upon the ground that there the donor retained the absolute power of disposition over the subject of the gift during his life, whereas under the plan all interest to the contributions, both of the employee and the Company, immediately vested in the trustees to be held and disposed of by them as defi-

nately provided therein—in other words, it was a completed valid trust.

Conclusion.

The plan under attack in the instant case is of the same nature and in fact practically identical in its essentials with those adopted by numerous New Jersey corporations under the express authority given them for that purpose by Chapter 175 of the Laws of 1920. Such plans conform to the express public policy of this State, as declared in this recent statute. Their beneficial effect must be recognized by everyone.

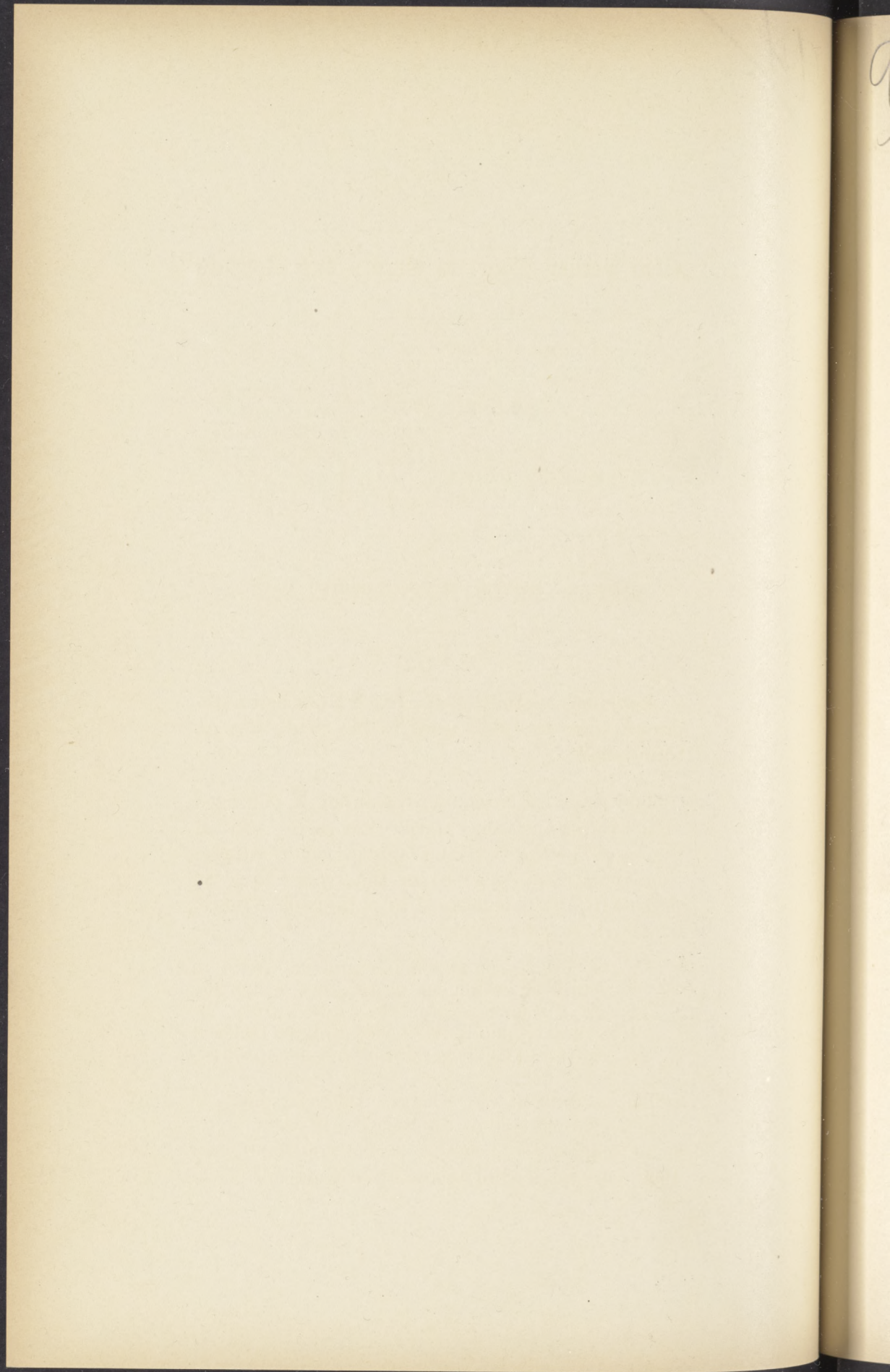
We submit that the designation made by Miss Koss has been herein clearly shown to be both a valid contract and a completed trust, and that it should be sustained on one or both of these grounds.

For the reasons stated, we submit that the decree appealed from should be reversed and the property in question awarded to the appellant.

Respectfully submitted,

PRECKER & PRECKER,
Solicitors of the Appellant.

MICHAEL S. PRECKER,
J. EDWARD ASHMEAD,
FREDERIC J. FAULKS,
Of Counsel.



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New Jersey Court of Errors and Appeals

IN THE MATTER

of

the Estate of
GERTRUDE KOSS,
Deceased.

ON APPEAL
FROM
DECREE OF
PREROGATIVE
COURT.

REPLY BRIEF FOR APPELLANT.

I.

Appellee's claim that Gertrude Koss had withdrawn from the plan prior to her death has no foundation.

This claim is based entirely upon a distorted view of a stipulation entered into on the trial of the cause in the Orphans' Court. This stipulation appears on page 54 of the record and the pertinent part is contained in paragraph 1 thereof, which reads as follows:

"1. All facts appearing and set forth in the copy of statement of trustees under the Stock Purchase Plan, etc., dated July 22, 1927, and signed by Henry C. Folger, Herbert L. Pratt and Charles C. Meyer (Case, p. 39)."

The statement of trustees thus referred to appears on page 39 of the record. It was a statement sent by the Trustees to the appellant after they were advised of the death of Gertrude Koss.

She died on July 19, 1927, and the statement is dated July 22, 1927. It referred to April 30, 1927, as "the effective date of your withdrawal".

It was indisputably established upon the trial *de novo* had in the Prerogative Court that this statement was merely a printed form uniformly used for every withdrawing subscriber whether the withdrawal resulted from death, resignation, retirement or discharge, and that the phrase "the effective date of your withdrawal" indicated only "the date of last deduction from the payroll. * * * The date the Payroll Department took out the salary, whatever salary you have for stock purchase plan purposes" (Rec., pp. 99-100; pp. 105-106). The date of termination of the employment of Gertrude Koss was "the date she died" (Rec., p. 84, l. 29). As already appears by appellant's main brief, she was recognized as a participant in the plan by both the Company and the Trustees up to the time of her death (Rec., p. 84, l. 29; p. 96, l. 32; p. 105, l. 15).

Although she had been granted a leave of absence on account of ill health and her salary was temporarily discontinued as of April 30, 1927, subsequently a dividend upon the shares held by the Trustees was declared and thereafter the proceeds thereof was used in purchasing additional shares of stock, a proportionate part of which shares was thereupon credited to her account (Rec., p. 101, l. 30). Mr. Loder, who had charge of subscriptions and withdrawals by employees under the Stock Purchase Plan, testified that if Gertrude Koss had in fact withdrawn from the plan on April 30th, this dividend would not have been credited to her account, nor would it have been used toward the purchase of any additional stock for her account. He said "We only allot dividends when the subscription had not

been withdrawn'' (Rec., pp. 104-105). Mr. Roberts produced the Company's records which showed that Gertrude Koss was in its employ during both May and June, 1927, and that she was carried thereon as a participant in the plan up to the date of her death (Rec., p. 87, l. 17; p. 88, l. 36). Mr. Loder's testimony, with that of Mr. Roberts, made it clear that Gertrude Koss "was still a member of the Purchase Plan at the time of her death" (Rec., p. 85, l. 1). The Trustees upon receipt of notice from the Company of the death of Gertrude Koss, actually caused the shares to be transferred to the appellant and new certificates therefor to be delivered to her pursuant to the provisions of Clause "D" of the Plan.

Upon all the evidence the learned Vice-Ordinary was obliged to, and without hesitation did, find that Gertrude Koss remained a participant in the plan up to the time of her death, and that her withdrawal became effective only on her death. On this point he said:

"Without discussing in detail the evidence submitted in this appeal, much of which was not before the Orphans' Court, I consider it my duty to hold that the withdrawal was under the provisions of Section 'D' and not under Section 'C', and I so announced in open court * * * ."

II.

The naming of Bessie Koss as beneficiary under the plan pursuant to withdrawal clause "D" thereof did not in any sense constitute a testamentary disposition of property.

It is apparent from appellee's brief that there is nothing in any of the cases relied upon therein that is inconsistent with the cases cited in the

original brief of the appellant. In fact, it would seem that the appellee concedes that (1) a contract may be made between living parties for the benefit of a third party, the enjoyment of which benefit may be deferred until after the death of either of the contracting parties, and (2) a trust may be created reserving to the settlor a life interest in the trust property and full power of revocation.

Appellee's sole contention when analyzed reduces itself to the mere proposition that neither the contract nor the trust, as far as the beneficiary named therein was concerned, had any effect until the death of Gertrude Koss, a proposition which when attempted to be applied to the real facts of the case is without the slightest merit.

The circumstance which seems to us to have confused appellee's counsel, as well as the Court below, is a misapprehension of the extent of control that Gertrude Koss reserved over the contract or trust created. The plan in essence is an obligation by the Company to pay an additional wage in consideration that the employee will practice thrift by saving a portion of the wages received by him. It was a three-party arrangement originating in an offer of the Company, accepted by the employee, to be carried out by three independent trustees. The Company from the time of the acceptance of the offer by the employee was irrevocably bound by the terms of the plan (Rec., p. 49, l. 20). As pointed out in our original brief, the employee could never by any act of his own acquire any of the stock purchased or held by the Trustees during the term of the trust. Upon receipt of the payments by the Company and the employees the Trustees became absolutely independent of both the Company and the employees in respect to the trusts. Neither the employee nor the Company could give them directions either as

to the management, control or disposition of the trust property. From the time the payments were received by the Trustees no part thereof could be disposed of in any other way than that provided by the terms of the Plan.

Whether the plan be considered as a contract or a completed trust, an analysis of it demonstrates that its obligations as a contract arose at the time of the employee's acceptance of the Company's offer by entering the plan. While the performance of certain stipulations thereof may have been deferred to a later time, all obligations of the contract became effective at that time. Immediately upon receipt of the moneys from the Company and the employee the trust became completed. The appellee erroneously argues the date set for performance is the date the contract or trust obligation arose. The fact is that when Gertrude Koss became a participant in the plan there were thereby and then definite rights created in her favor and that of the appellant. The fact that the latter was not to come into the enjoyment of these rights until after the death of Gertrude Koss did not postpone their being vested until that time. They were created and fixed then and did not result in a testamentary disposition.

Respectfully submitted,

PRECKER & PRECKER,
Solicitors of the Appellant.

MICHAEL S. PRECKER,
J. EDWARD ASHMEAD,
FREDERIC J. FAULKS,
Of Counsel.

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New Jersey Court of Errors and Appeals

In the Matter of the Estate of
GERTRUDE KOSS, Deceased.

*On Appeal
from Decree
of
Prerogative
Court.*

BRIEF FOR APPELLEE.

This appeal brings up for review a decree of the Prerogative Court advised by Vice-Ordinary Berry on June 24, 1929, affirming an order of the Orphans' Court of Essex County. The Prerogative Court decree of affirmance provides as follows:

"ORDERED, ADJUDGED AND DECREED, that the Order of the Orphans' Court of the County of Essex, made on the twenty-sixth day of June, 1928, which is appealed from by said appellants, be and the same is hereby in all things affirmed, and that said petition of appeal be dismissed, with costs, and that the said Harry Kalisch, be allowed the sum of \$200, as and for a counsel fee; and it is further Ordered, Adjudged and Decreed, that the record be remitted to the Essex County Orphans' Court to proceed thereon according to law and the practice of said Court" (State of Case, p. 130, ll. 25 to 36).

The Orphans' Court order affirmed as aforesaid by Vice-Ordinary Berry, is as follows:

"It is thereupon on this 26th day of June, 1928, ORDERED that the said Bessie Koss deliver and transfer said stock to the said Esther Grobe, administratrix of the estate of the said Gertrude Koss, deceased, within ten days from the date hereof, and that said Esther Grobe do take possession thereof to the end that the said stock may be administered upon as part of the estate of the

said Gertrude Koss, deceased'' (Case, p. 67, top of p. to l. 12).

In addition to the Orphans' Court order there exists a stipulation between counsel for the respective parties requiring Bessie Koss to transfer the certificates of stock in question in case the Court so orders; the terms of the stipulation being as follows (case, p. 54, bot of p. to p. 55):

"It is further agreed and stipulated by and between the aforesaid proctors that in case the Orphans' Court of Essex County or any court to which an appeal might be taken by either party determines that the shares of stock subscribed for by the said Gertrude Koss, deceased, in her lifetime belongs to the estate of the said Gertrude Koss, that upon such determination the said Bessie Koss will endorse for transfer to said estate the certificate of stock standing in her name and marked Exhibit R-4.

HARRY KALISCH,
Proctor for the Estate of Gertrude Koss.

PRECKER & PRECKER,
Proctors for Respondent."

The appellant Bessie Koss who was the sister of Gertrude Koss, deceased, received the shares in question as the beneficiary designated by the said Gertrude Koss, deceased, in her lifetime, the said Gertrude Koss being the participant in a stock purchase plan of the Standard Oil Co. of New York for the benefit of its employees. Such a designation of beneficiary the learned Vice-Ordinary held to be an attempted testamentary disposition not effected in compliance with the Statute of Wills. It is from this determination that this appeal is taken.

The matter in controversy is 32 shares of Standard Oil Co. stock (see case, pp. 39 and 40)

of the value of approximately \$1,100.00; appellant seems to think that the issue involved is of much importance because it affects the rights of many thousands of employees (P. 2, appellant's brief). I do not see in what way the employees are affected excepting that it might require the Standard Oil Co., and other companies who have a similar plan, to comply with the laws of this State and thus afford a greater protection for their employees.

Statement of Case.

This controversy arises out of the claim made by the administratrix of the estate of Gertrude Koss, to the stock of the Standard Oil Co. of New York which was issued to Bessie Koss, the person designated as the beneficiary in the stock purchase plan. Gertrude Koss had been in the employ of the Standard Oil Co. of New York for a number of years and became a subscriber under the stock purchase plan for employees of that company at the time it went into operation. In becoming such subscriber, she designated her sister, Bessie Koss, as her beneficiary in case she died before the plan terminated. Anyone who had been in the employ of the company for a year or more could become a participant of the plan by authorizing in writing the company to deduct from each installment of her wages a sum not to exceed twenty per cent. thereof and to credit the amount of such deductions to her account with the trustees provided for by the plan. Concurrently with the making of each payroll deduction, the company agreed to contribute a sum equal to fifty per cent. of the amount of such deduction. The plan was administered by three trustees and they were required to invest from time to time the

fund so received from the participants and the company in shares of its capital stock for the participants in the plan. The dividends received on the shares at any time, so standing to the credit of any employee, were to be similarly applied by the trustees.

The plan went into operation on November 1, 1923, and was to continue until October 31, 1928, when the shares of stock and money standing to the credit of the account of each participant, was to be distributed to her or him. Under the terms of the plan, a participant might withdraw in any one of the four following ways:

A. At his election, at any time he saw fit while still in the service of the Company;

B. By his leaving its service or being discharged for cause;

C. By his being retired under the Company's Annuity Plan, or having his employment terminated by the Company through no fault of his own; or

D. By his death while in the service of the Company prior to the termination of the plan.

The exact provisions of these four withdrawal clauses of the plan as set forth therein are as follows:

“(A)—Any participating employee who remains in the service of the Company, or of a subsidiary Company, may, if he so elects, withdraw from the plan at any time and shall thereupon be entitled to receive only the amount of money deducted from his compensation with interest thereon at the rate of 6 per cent. per annum, and shall thereupon forfeit all rights and interest in this plan and in all stock, securities and credits of every kind appearing in the account of such employee with the trustees, and said stock, se-

curities and credits shall be transferred to the Company. Such withdrawing employees shall not be eligible again to participate in the plan for a period of one year.

“(B)—Any participating employee who leaves the service of the Company, or of a subsidiary company, voluntarily, or is discharged for cause, as to either of which in case of dispute, the Board of Directors shall be the sole judges, shall thereupon cease to be a participant in the plan and the account of such employee shall be closed by returning to such employee only the amounts deducted from the compensation of the employee with interest at the rate of 6 per cent. per annum. Such employee shall thereupon cease to have any rights or interest in this plan or in any stock, securities or credits appearing in the account of such employee with the trustees, and all such stock, securities and credits shall thereupon be transferred to the Company.

“(C)—Any participating employee who is retired under the Company's annuity plan, or whose employment is terminated by the Company through no fault of his own, as to which in case of dispute the Board of Directors shall be sole judges, shall cease to be a participant in the plan and shall thereupon receive the full amount of cash, stock and other securities standing to the credit of such employee in the account of such employee with the trustees.

“(D)—In case of the death of any participating employee while in the service of the Company, or of any subsidiary company, the trust in respect to such employee shall then terminate, and thereupon the full amount of cash, stock and other securities standing to the credit of such employee in the account of such employee with the trustees, shall be paid, transferred and delivered to such beneficiary or beneficiaries as such employee may have designated in writing and caused to be filed with the Company, or failing such designation to the estate of such employee (R., pp. 47-48).

The plan further provided that all stock purchased by the trustees thereunder should be issued in the name of the trustees and their successors as "Trustees under the Stock Purchase Plan for Employees of the Standard Oil Company of New York."

After declaring that the rights and interest of any employee in any stock or cash so credited to his account should be only as declared in the plan, it further provided that the employee's rights under the plan were wholly personal and no assignment or transfer thereof would be permitted or recognized (Rec., p. 49, l. 10).

In March, 1927, Gertrude Koss became ill and was granted an indefinite leave of absence, her salary being paid to April 30, 1927. The twenty per cent. deductions from her salary provided for by the plan were made and credited to her account each week up to April 30, 1927, as were also the agreed contributions of fifty per cent. thereof by the company. At the time she was granted leave of absence, there was standing to the credit of her account 31 shares of the stock and a small amount in cash. These last-mentioned deductions from her wages, plus such fund contributions of the company up to April 30, 1927, plus a dividend declared in May, 1927, upon such 31 shares, enabled the trustees to purchase an additional share for her which was credited to her account, making in all 32 shares of stock and \$21.80 uninvested balance.

POINT I.

From the evidence taken before Vice-Ordinary Berry, and the stipulation between Proctors, it conclusively appears that Gertrude Koss withdrew from the Stock Purchase Plan on April 30, 1927, which was about two and one-half months before her death, and therefore all her rights as a participant in the plan had terminated, and whatever stock and money was due belonged to her before she died and became part of her estate.

On case, p. 54, will be found a stipulation marked Exhibit R. 8 entered into by Proctors for the Estate of Gertrude Koss and for Bessie Koss, paragraphs 1 and 2 of which read as follows:

1. All facts appearing and set forth in the copy of statement of trustees under the Stock Purchase Plan, etc., dated July 22, 1927, and signed by Henry C. Folger, Herbert L. Pratt and Charles C. Meyer. (Case, p. 39.)

2. That the deceased, Gertrude Koss, subscribed under said Stock Purchase Plan in accordance with the provisions contained in booklet Exhibit R. 7.

The statement of trustees mentioned in paragraph 1 of the stipulation is to be found on case, p. 39, and is marked Exhibit R. 3, and reads as follows:

Exhibit R. 3.

TRUSTEES UNDER THE STOCK PURCHASE PLAN FOR
EMPLOYEES OF THE STANDARD OIL
COMPANY OF NEW YORK

Subscription No. *E-28* *July 22, 1927*
Subscriber *Gertrude Koss, deceased*

The Trustees under the Stock Purchase Plan submit herewith a statement of your account,

from the *beginning of your participation in the Plan to April 30, 1927 inclusive; the effective date of your Withdrawal.*

If there is any question of the correctness of this account, you should notify the Trustees, Room 1919, 26 Broadway, New York City.

Deductions from Pay Roll	\$ 684.00
Interest at 6% per annum on above	
Company contribution	342.00
Dividends on shares purchased under the Plan and Fractional Stock Distribution	80.30

Total Credits	\$ 1106.30
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LESS

29 Shares of Standard Oil Co. of New York Stock purchased under the Plan and 3 shares Stock Distribution.	\$1084.50
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Uninvested balance.	\$ 21.80
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HENRY C. FOLGER	} Trustees
Herbert L. Pratt	
Charles F. Meyer	

This stipulation therefore established as a fact that the date of Gertrude Koss' withdrawal from the plan was April 30, 1927. This fact was admitted as true, as though proven in court. (See above stipulation, Exhibit R. 8, case, p. 54.) Vice-Ordinary Berry, however, permitted proctors for the appellant on the hearing of the appeal, to introduce evidence to explain what *they claimed* was ambiguous in the statement above referred to.

A plain reading of this statement will show that there is nothing ambiguous about the statement. It, however, was damaging to the appel-

lant and they endeavored to explain it away by introducing the testimony of two witnesses employed by the Standard Oil Company to attempt to give it a different meaning than the language plainly imports. These witnesses failed in this, however. The first witness, John T. Roberts, testified (on p. 92 of case, beginning at l. 30) as follows:

Q What does the word withdrawal mean; "the effective date of your withdrawal." What does that mean? A That means the time she withdrew from the plan.

And on page 94 of case, line 26, this witness testifies as follows:

Mr. Kalisch: I am referring to this statement here, the words of which I want to draw your attention to are "the effective date of your withdrawal." What does that mean; withdrawal from what?

Witness: From the stock purchase plan for employees.

And on page 100 of case, line 16, the other witness, Clifton C. Loder, testified as follows:

Q Why do you use the word withdrawal then? A The *subscriber* withdrew.

Gertrude Koss died July 17, 1927, and the statement of the three trustees above referred to (the facts therein contained being stipulated as established), in conjunction with the evidence of the two witnesses, undoubtedly shows that Gertrude Koss had ceased to be a participant in the stock purchase plan two and one-half months before her death. That being so, it is our contention that under paragraph C of Withdrawals she was entitled to receive the full amount of cash, stock and other securities standing to her credit and, having died with the stock and case belonging to her, it became part of her estate.

POINT II.

Two theories are offered by appellants in support of the Stock Purchase Plan; one is that it constitutes a contract and the other that it is a complete and valid trust.

The idea of it being a gift is disclaimed by appellant (see p. 21, Appellant's Brief, top of page).

One of the New Jersey cases relied upon by appellant to support these theories is *Dunn v. Houghton*, 51 Atl. Rep. 71 (not officially reported). The opinion is by Vice-Chancellor Stevenson and is set out in appellant's brief on page 11. The case never reached the Court of Errors and Appeals and should not be considered as an authority in this State, *so far as the question here involved is concerned*.

In the case of *Nicklas v. Parker*, 71 Eq. on p. 783, the Court of Errors and Appeals in affirming the decision of Vice-Chancellor Garrison, and adopting his opinion as their own, had this to say concerning the *Dunn v. Houghton* case:

"While that part of the decision in Dunn v. Houghton which holds that the Statute of Wills does not prevent a trust operative only at the death of the settler may be in conflict with the principle subsequently laid down in the case of Stevenson v. Earl (and I do not stop to consider or determine this), much that is said and the review of the New Jersey cases therein contained sustains the principles which I deem applicable in the case in hand."

Certainly the following statement from Vice-Chancellor Stevenson's opinion in the *Dunn* case (p. 14, appellant's brief) is in direct conflict with all the New Jersey cases on the subject.

"The function of a will is to effect the disposition of property after the donee's

death in accordance with a mere declaration made by the donor in his lifetime, and during his lifetime entirely inoperative; *but no conveyance, contract, trust or other disposition of property can be declared illegal or ineffectual because it practically discharges the same function as a will after the death of the person who made it.*"

Especially is the foregoing statement in conflict with the leading case of *Stevenson v. Earl* (as was hinted at by Vice-Chancellor Garrison in *Nicklas v. Parker supra*).

In *Stevenson v. Earl*, 65 Eq., Chief Justice Gummere on page 725 says:

"Such a gift, it seems to us, is purely testamentary in its character. If it is not, then it is a perfectly easy thing for a person to retain the *absolute* control and dominion over his moneys and personal securities during his life (as in the instant case), and transfer that dominion to another at his death, with total disregard of the requirements contained in the statute of wills, by the simple device of depositing such moneys and securities, under an *agreement* with the depositary that he shall have the right to use them or deal with them as he pleases during his life, and that at his death so much of them as may remain shall be delivered to such person as is named in the *agreement*, who shall then become the owner thereof, and then delivering the agreement to the beneficiary with a statement of the same purport as that made by the deceased to his wife when he gave the pass-book to her. To hold that such a method of disposing of property by the owner at his death is valid, would be to practically repeal the statute of wills in its operation upon personal property, so far as its mandatory provisions are concerned.

Our conclusion is that the moneys remaining to the credit of Earl, at his death, in the

savings fund of the Pennsylvania Railroad Company, *did not* become the property of his wife, *notwithstanding the provision in the agreement between him and the company* that such moneys should be paid to her at his death, our reason for so concluding being that such *agreement* constituted a testamentary disposition of his property, which was invalid because not made in the manner prescribed by the Statute of Wills. The necessary result of this conclusion is that such moneys passed to his executor, on his death, as part of his estate.

It is to be noted that in the conclusion arrived at in the *Stevenson v. Earl* case, the opinion speaks of the *agreement* as constituting a testamentary disposition of property; so that when appellant in the case at bar urges the *theory of an agreement* in support of his contention rather than the theory of a gift (see p. 21, appellant's brief), he is in no better position; for such an agreement is declared invalid in the *Stevenson v. Earl* case.

Another Court of Errors case in point is *United States Trust Co. v. Giveans*, 97 N. J. L. p. 266. That case involved the validity of the following agreement:

"We Jane C. Wrigley and Mary E. Giveans have on this day purchased a safe made by the American Safe Company of Anderson, Indiana. Number of safe is 7169, under the following agreement: Upon the death of either one the safe and personal contents becomes the property of the other, cash, bank books and bonds, etc.

Jane C. Wrigley (SEAL)
Mary E. Giveans. (SEAL)"

Jane C. Wrigley died and her executor United States Trust Co., brought replevin to recover

the property mentioned in the agreement: The Court in rendering its opinion said (p. 267):

“But nevertheless the document could not operate to transfer any title to the contents of the safe to the defendant, for the obvious reason that it was a *contract* in the nature of a will; it was a *contract* which attempts to dispose of property after death after the manner of a will without being executed as a testament in conformity with the statute of wills.”

So that if the stock purchase plan is to be considered as a contract rather than a gift it must be one that in effect does not attempt to perform the office of a will. If the contract of the stock purchase plan transfers any right or interest in the *lifetime of the deceased* even though for future enjoyment, that is if the right or interest vests in the beneficiary in the lifetime of the deceased—then the contract is not in effect a testamentary disposition and is valid.

But if the transfer or vesting of the right or interest in the beneficiary is not effected during the lifetime of the deceased—that is if the deceased retains the title to the right or interest until her death—the tradition to take place at or after death it is a testamentary disposition.

Chancellor Walker in the case of *Robeson v. Duncan*, 74 Equity on page 750 has this to say:

“The complainants in their bill charge that the second condition in the deed under consideration is null and void because it is an attempt to make disposition of the estate of the grantor after his death without complying with the requirement of the statute of wills, etc. This doctrine applies to the disposition in his lifetime of property which will be in the donor at the time of his death, the tradition to take place at or after death. It can have no application to a case where the

grantor has by his conveyance divested himself of his property in his lifetime."

The one point stressed in all the New Jersey cases, whether they involve contracts, gifts or trusts is that the donor, contractor or settlor must *in his lifetime* vest the right, interest or property in the donee, beneficiary or *cestui que trust* if it is to be enforced.

This does not prevent the donor, contractor or settlor from retaining a life interest for himself, for that life interest ends with his life and what is left over after his death has been given in his lifetime so that he dies without having anything to dispose of.

That was the case in *National Newark and Essex Banking Co. v. Rosahl*, 97 Eq., p. 75 (cited by appellant in his brief, p. 28).

In that case it appeared that one Rosahl by deed assigned and delivered to the complainant securities upon trust to pay the net income to him for life then to his widow for life, corpus to his lawful issue, etc. The trustee was advised in an opinion by Vice-Chancellor Backes that:

"The deed of trust is not as claimed by the administrator, testamentary and therefore invalid because it was not executed as wills are required to be. The trust was completely executed. The property passed out of the donor and vested in the trustee to the beneficial use of the *cestui que trustent*. That some of them were not to come into enjoyment until after the death of the donor *did not affect the vesting of their interest*."

In that case the remainder interest *vested* at the time the trust was created which was in the lifetime of the settlor even though enjoyment was postponed until after his death. Hence at his death, the settlor had nothing to dispose of.

Another case in point is *Green v. Tulane*, 52 Eq., p. 169. This case is cited by appellant in his brief on p. 24 but I do not see that it can afford him any comfort for it does not depart in the slightest degree from the principle contended for above. The case disclosed the following facts: Paul Tulane in his lifetime deposited with Hon. Caleb S. Green three coupon bonds of \$1,000 each payable to bearer and at the same time handed to him a paper signed by himself, in these words:

“Having deposited in the hands of Caleb S. Green three \$1,000 bonds of the State of New Jersey, I hereby authorize and direct him in case of my death to deliver said bonds to Miss Marien Passage and her sister Adelaide Clifton to be equally divided between them. Dated May 17, 1873.

Paul Tulane.”

During Mr. Tulane's lifetime either Judge Green or his son cut the interest coupons from these bonds and paid the proceeds to Mr. Tulane. He died March 27, 1887. After Mr. Tulane's death it was urged that his disposition of the bonds was testamentary and hence invalid.

Vice-Chancellor Pitney in deciding the case says on p. 173:

“It is quite competent for one to make a settlement on another *in presenti* reserving a life estate to himself without bringing the affair within the definition of a testamentary disposition or of a gift *causa mortis*. The authorities in support of this position are numerous.”

Then follows numerous citations.

Now what does Vice-Chancellor Pitney mean when he says *a settlement on another in presenti*; reserving a life interest to himself? “*In presenti*,” undoubtedly means that the settlor must vest the interest or estate in the remainder-

man or beneficiary *presently*, that is in the lifetime of the settlor and at the very time the trust is created. To the same effect are the numerous cases cited by Vice-Chancellor Pitney. One or two will be noted. In *Gerrish v. New Bedford Savings Institution*, 128 Mass. 159, the judge on p. 163 says:

"In the case at bar the claimants offered to prove declarations of the testator made to them at different times in language which fairly implied that he intended to give to them an *immediate equitable title* in the principle fund reserving only the income for life. These declarations define the nature of the trust assumed and show that a testamentary disposition of the property was not intended."

In *Barlow v. Loomis, et al.*, 19 Federal Reporter 677. Judge Wheeler *inter alia* says:

"The sole inquiry is as to the *effect* of what he (the testator) did. He could control the disposition of his estate after his death only by will executed according to the statute of wills but he could divest himself of his property *during life* by mere delivery and transfer, such as he fully accomplished."

Let us now examine the stock purchase plan to see whether under its terms the designated beneficiary had in the *lifetime* of the deceased any right or interest either legal or equitable to the stock or money in the hands of the trustees. As was said by Vice-Chancellor Pitney in *Green v. Tulane (supra)*, top of p. 172: "For whom did Judge Green hold them (meaning the bonds)." Did the trustees of the Standard Oil Co. in the Stock Purchase Plan hold the stock and money for the designated beneficiary *during the life of the deceased*? We maintain that they did not.

On p. 44 of case under heading "The Trustees" appears the following:

"Said trustees may act through any one of their number and shall have charge of the administration of the funds so credited *and shall hold all stock of the Company acquired under this plan for the benefit of participating employees* during the continuance of the plan and in accordance therewith."

On p. 43 of case under heading "Purposes" is the following:

"The purposes of the plan are to enable *employees* of the company to become stockholders therein on favorable terms and to assist *them* in paying for *their* stock."

On the same page under the significant heading "Employees Participation" appears the following:

"Subject to the limitations prescribed in this plan every *employee* who at the time of subscribing has been continuously in the service of the company etc. one year or more may become a participant in this plan authorizing the company to deduct from the amount due him etc., a sum not to exceed 20 per cent. thereof and credit the same to the account of such *employee with the trustees herein provided for,*" etc.

Under the heading "Company's Participation," p. 43, the company out of its own moneys shall credit the account of such *employee* with said trustees a further sum equal to 50 per cent. of the employees' contribution.

Under the heading "Investment of Funds" on p. 45 of case there shall be kept a separate account for each *employee*. Under the heading "Dividends and Stock Rights" all dividends declared on stock held by the trustees shall be credited to the account of each *employee*.

Throughout the entire plan the beneficiary is ignored.

On p. 48 under the heading "Title to Stock" is the following provision:

"All stock purchased or acquired by the trustees under this plan shall be issued in the name of the trustees and their successors as 'Trustees under the Stock Purchase Plan for *employees* of the Standard Oil Company of New York.'"

Can there be any question then as to whom the trustees held the stock for, during the life of the deceased? For no other than Gertrude Koss herself. If not, then what sort of interest or property did the designated beneficiary have in the lifetime of the deceased? Was she a *cestui que trust* or joint owner with the deceased? She was not an employee and the plan was for employees only. The preamble and every term of the plan speaks of employees. The beneficiary is only mentioned in the paragraph designated "Withdrawals" under subdivision "D" which provides for the emergency of death occurring before the five-year period of the plan terminates.

This subdivision "D" of withdrawals is most significant and conclusive upon the subject of the testamentary character of the designation of the beneficiary. It is as follows:

"D. In case of the death of any participating employee while in the service of the Company or of any subsidiary company the trust in respect to such employee shall then terminate and thereupon the full amount of cash stock and other securities *standing to the credit of such employee* in the account of such *employee* with the trustees shall be paid transferred and delivered to such beneficiary or beneficiaries as such employee may have designated in writing and caused to be

filed with the Company or failing such designation to the estate of such employee."

This paragraph provides that *at death* the cash, stock and other securities *standing to the credit of such employee* shall be turned over to the beneficiaries. This is unquestionably a case where the property is retained until death—the tradition taking place at death; it is therefore a testamentary disposition.

It is further to be noted that the foregoing paragraph says that in case of the death of any participating employee while in the service of the Company, the stock, etc., will be turned over to the beneficiary. How then can the beneficiary have a vested interest in the lifetime of the deceased? He can only take in case of the death of the participating employee during the five years of the plan and after the five years if the employee survives he gets it himself. The plan does not intend to give a present interest to the beneficiary its purpose was to make the employee the complete owner of the stock and Gertrude Koss, the employee, intended when she subscribed to become the absolute owner. In designating a beneficiary she merely provided for the emergency of death overtaking her before the end of the five-year period and she retained the equitable interest up to the time of her death without any limitations whatsoever. It is not to be forgotten that in designating a beneficiary she reserved the right to "change from time to time the beneficiary named herein" (see p. 53). So there was no set purpose to vest any interest in the designated beneficiary.

Furthermore, under the non-assignability paragraph on 49:

“The employee’s rights under this plan are wholly personal and no assignment or transfer of an employee’s rights and interest in said plan or in the stock securities or cash credited to the account of such employee will be permitted or recognized.”

How then could the beneficiary have a vested interest in the stock in the lifetime of the deceased? Where did she get it from? She could not under the non-assignability paragraph get it from the employee.

Under the plan she could only get it at the death of the employee; hence it was a testamentary disposition and invalid.

For the foregoing reasons there should be an affirmance.

Respectfully submitted,

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