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# New Jersey
# Court of Errors and Appeals

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| | |
|---|---|
| George W. C. Schmidt, Plaintiff-Appellee, vs. Marconi Wireless Telegraph Company of America, Defendant-Appellant. | Action at Law. |

## Notice of Appeal

(*Filed Jan. 6, 1914*)

*To the above named defendant, or Griggs & Harding, its attorneys*:

Please Take Notice, that the plaintiff appeals to the Court of Errors and Appeals, from the whole of the judgment entered in this cause, on the following grounds:

1. Because the Trial Court refused to strike out certain parts of the defendant's answer set forth and objected to in a certain notice of motion served by the plaintiff on the defendant on February 7th, 1913, and also set forth in the plaintiff's reply to said answer, and therein also objected to:

2. Because the Court refused to strike out the following answer by the witness, John W. Griggs:

"A—It was brought to my attention by some officer, I think the treasurer of the Company, that

among other persons that had exercised or assigned a claimed right to subscribe without being actual owners of stock was M. L. Parsons, who had assigned to Levy Brothers. I investigated the matter and subsequently saw one if not two, members of the firm of Levy Brothers in connection with one or more of their counsel; one I remember was Mr. Wollman, who was just on the stand, and the other was someone else from their office, I suppose it was the Mr. Cohn that he mentioned. They came to see me and confer with me relative to the objections that had been conveyed to them against their right to subscribe. I questioned Mr. Levy and his attorney as to whether M. L. Parsons or they actually owned this stock at the time they subscribed and informed them that our information was that they had sold and parted with all right to the stock in 1905. They said, yes, that was true, but that the persons that had bought the stock were in South America and inasmuch as they were in a measure clients of theirs they thought they ought to make this subscription to protect them. I asked them whether they had had any request from their clients to do it, and they said No. I asked then if they had any agreement with them to turn over the stock or the benefits of the stock to them, and they said No, but they were doing it on the broad principle that if they made anything out of it they would do what was right by those that had been their clients. There was considerable conversation between Levy Brothers attorney and myself as to the right of a person whose name appeared on the stock book of the company, but who had parted with his stock and had no further interest in it, or in the company, to subscribe, I taking the view that such a person had no right to subscribe, and they contending that they had.

However, ultimately, I informed them that the company did not think—that I did not think they had a right to this stock because they were not the actual owners of stock, and that we would refuse to issue the stock to them. I think that conversation occurred sometime—the first conversation—the first notice to them—about the middle of May, and since Mr. Wollman was on the stand I am inclined to think that my conversation with him was before the 10th of June, and that his delivery of that check was made in order simply to legalize the claim which they notified us they were going to bring in the shape of a lawsuit."

3. Because the Court refused to strike out the testimony of the witness, Sydney A. Ander son, that the Corporation Trust Company received a subscription agreement of Levy Brothers, who had an assignment of rights from L. M. Parsons, "for examination:"

4. Because the Court directed a verdict for the defendant.

Dated, January 2d, 1914.

Respectfully yours,

AARON A. MELNIKER,

Attorney for Plaintiff-Appellee.

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## Summons

*(Filed, January 14, 1913)*

(Seal) The State of New Jersey to the Marconi Wireless Telegraph Company of America, a corporation of New Jersey: You are summoned to answer the annexed complaint of George W. C. Schmidt, in an action at law in the

Circuit Court of the County of Hudson. And take notice that unless you file your answer to said complaint, with the clerk of said Circuit Court, at Jersey City, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

Witness, William H. Speer, Judge of our said Circuit Court, at Jersey City, this tenth day of January, nineteen hundred and thirteen.

JOHN F. CROSBY,
Clerk.

A. A. Melniker,
Attorney.

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## Complaint

HUDSON COUNTY CIRCUIT COURT

| | |
|---|---|
| GEORGE W. C. SCHMIDT, Plaintiff, vs. MARCONI WIRELESS TELEGRAPH COMPANY OF AMERICA, a corporation of New Jersey, Defendant. | Action at Law. Complaint. |

The plaintiff, residing at No. 586 Newark Avenue, Jersey City, New Jersey says:

1. That the defendant, the Marconi Wireless Telegraph Company of America, is a corporation organized and existing under the laws of the State of New Jersey, with its registered office in the City of Jersey City, County aforesaid:

2. That on or about the 18th day of April, 1912, the stockholders of said company, at a meeting regularly called and held, authorized the increase of the capital stock of said company, from $1,662,500.00 to $10,000,000.00:

3. That on or about said 18th day of April, 1912, by virtue of the authority vested in them, the directors of said company offered to stockholders of record at the close of business on April 20th, 1912, the right and privilege to subscribe for twenty-five shares of said new stock, at par value ($5.00), for every share held by them respectively, upon the following terms to wit:

(1) Subscriptions may be paid in full on or before May 6th, 1912, and thereafter, as soon as they can be prepared, certificates of stock will be issued for the same as of that date.

(2) If not paid, in full as above, the subscription shall be paid in installments as follows: 40 per cent, that is, $2.00 per share, to be paid at the time of making the subscription, or on or before May 6th, 1912; 60 per cent, that is $3.00 per share, to be paid on or before June 10th, 1912.

(3) Receipts will be given as partial payments are made, and shall be endorsed and surrendered when the certificates of stock are issued.

(4) Rights to subscribe belonging to any number of shares may be assigned, and the subscription may be made by the holder, but only upon presentation of a duly executed written assignment:

(5) The right to subscribe will cease on May 6th, 1912; subscriptions upon which said first payment is not then made will

be declared forfeited. Any portion of the new issue of $7,000,000.00 not subscribed for on or before May 6th, will be disposed of as the Board of Directors shall determine.

All subscriptions and payments for the new issue of stock must be made to the Corporation Trust Company, the registered agent, at No. 15 Exchange Place, Jersey City, New Jersey. And that annexed hereto is a copy of the notice of said offer, sent out by said Board of Directors, which is made a part hereof and marked Exhibit "A."

4. That at the close of business on said 20th day of April, 1912, one M. L. Parsons, was the holder of record of 135 shares of the capital stock of said company, and by virtue thereof, became entitled to subscribe for 3,375 shares of the increased capital stock of said company, upon the terms and conditions of said offer, hereinbefore in paragraph 3 set forth:

5. That on May 1st, 1912, said M. L. Parsons, for good and valuable consideration, by instrument in writing, a true copy of which is hereto annexed and made a part hereof, and marked Exhibit "B," transferred and assigned the right to subscribe for the shares of the increased capital stock of said company, attaching to said 135 shares, to Herbert Levy, Guy W. Levy and C. Sedgwick Levy, partners, trading as Levy Brothers, and that the said Levy Brothers thereby became entitled to subscribe for said 3,375 shares of the increased capital stock of said company:

6. That the said Levy Brothers thereupon, on May 3d, 1912, accepted said offer

and subscribed for said 3,375 shares of the increased capital stock of said company, and delivered said subscription agreement or acceptance, a true copy of which is hereto annexed and made a part hereof, and marked Exhibit "C," together with the sum of $6,750.00, in accordance with the terms of said offer, at the office of the registered agent of said company, at No. 15 Exchange Place, Jersey City, N. J., which said subscription agreement and said sum of $6,750.00 was received by said company:

7. That on June 10th, 1912, said Levy Brothers paid to said company the sum of $10,125.00, being the balance due upon said subscription, which sum was received by said company:

8. That thereafter, and ever since, said company has refused and still refuses to deliver to said Levy Brothers said 3,375 shares of said increase, although often requested so to do:

9. That by reason of the failure of said defendant company to deliver said stock to the said Levy Brothers, the said Levy Brothers have sustained damage in the sum of $47,250.00:

10. That on December 6th, 1912, said Levy Brothers for good and valuable consideration, transferred and assigned their said claim against said defendant company, to George W. C. Schmidt, by instrument in writing, a true copy of which is hereto annexed and made a part hereof, and marked Exhibit "D."

Plaintiff demands as damages the sum of $47,250.00 with interest.

A. A. MELNIKER,
Attorney of Plaintiff.

## Exhibit A

*Annexed to Complaint*

MARCONI WIRELESS TELEGRAPH COMPANY OF AMERICA

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New York, April 19, 1912.

*To the Stockholders of the Marconi Wireless Telegraph Company of America.*

At a meeting of the stockholders of the Marconi Wireless Telegraph Company of America held on the 18th day of April, 1912, the authorized capital stock of the company was increased from $1,662,500 to $10,000,000, and the par value of its shares was reduced from Twenty-five dollars to Five dollars per share. Of the total authorized capital stock of $1,662,500, there has neretofore been issued and now is outstanding $1,547,500. Your Board of Directors has recently made arrangements for entering actively into the business of trans-Atlantic wireless service between the United States and Great Britain and is about to erect a high-power station at New York City or in that neighborhood. It has entered into a contract with Marconi's Wireless Telegraph Company Limited of London to erect a similar station at or near London, these two stations to be used in carrying on the business of the Company between the two countries named. In addition thereto, your directors have entered into arrangements for and have in contemplation the erection of a similar highpower station on the Pacific Coast to connect with a station on one of the Hawaiian Islands, which in turn will connect, if per-

mission of the United States Government be secured, with another station in the Philippine Islands. These Pacific stations, it is expected, will eventually connect and co-operate with a station of high power on one of the islands of Japan or with some point in China. Your directors also have in contemplation the erection at or near New York of another high-power station to connect southwardly with the West Indies and South America. It will thus be seen that a plan of very broad development has been formulated and is intended to be carried out, the result of which, it is hoped, will be profitable to the stockholders.

The Board of Directors has resolved to offer for subscription to the stockholders of this Company $7,000,000, par value, of the capital stock of the Company, represented by the recent increase, the proceeds of which are to be used to enable the Company to carry on the work of construction and development hereinbefore outlined, as rapidly as possible. There is now offered to stockholders of record at the close of business on April 20th, 1912, the right and privilege to subscribe for twenty-five shares of said stock at par value (five dollars) for every share held by them respectively, upon the following terms, to wit:

(1) Subscriptions may be paid in full on or before May 6, 1912, and thereafter, as soon as they can be prepared, certificates of stock will be issued for the same as of that date.

(2) If not paid in full as above, the subscriptions shall be paid in installments as follows:

Forty per cent, that is, two dollars per share, to be paid at the time of making the subscription, on or before May 6, 1912:

Sixty per cent, that is, three dollars per share, to be paid on or before June 10th, 1912:

(3) Receipts will be given as partial payments are made and shall be endorsed and surrendered when the certificates of stock are issued.

(4) Rights to subscribe belonging to any number of shares may be assigned and the subscriptions may be made by the holder, but only upon presentation of a duly executed written assignment.

(5) The right to subscribe will cease on May 6th, 1912. Subscriptions upon which said first payment is not then made will be declared forfeited. Any portion of the new issue of $7,000,000 not subscribed for on or before May 6th, 1912, will be disposed of as the Board of Directors shall determine.

All subscriptions and payments for the new issue of stock must be made to The Corporation Trust Company, the registered agent, at 15 Exchange Place, Jersey City, New Jersey.

Blank forms for subscriptions are enclosed.

The stock transfer books were closed at twelve o'clock noon on April 15th, 1912, and will be opened on April 19th, 1912, at ten o'clock a. m.

Checks must be drawn to the order of The Corporation Trust Company and be payable either in Jersey City or New York funds.

All subscriptions not fully paid for on or before the 10th day of June, 1912, will be null and void, and any partial payments thereon will be forfeited to the Company.

Stockholders who have not heretofore exchanged the old certificates of the par value of $100 for those of $25 each as directed by the amendment to the Charter made April 18th, 1910, may now exchange each share of $100 par value for five shares of $5 par value, and may either before or after such exchange subscribe for the

new stock now offered on the basis hereinbefore stated for holders of $25 shares.

By order of the Board,

JOHN BOTTOMLEY,
Secretary.

N. B.:

For each share of par value of $100 or $25 the holder may subscribe for and take 25 new shares of the par value of $5 each, requiring a payment at the time of subscription of $2 for each share subscribed for, and a further payment of $3 for each share on or before June 10th, 1912.

Stockholders may subscribe for a less number of shares than they are entitled to, but no subscription for a fractional part of a share will be accepted.

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**Exhibit B**

*Annexed to Complaint*

MARCONI WIRELESS TELEGRAPH COMPANY OF AMERICA
ASSIGNMENT OF RIGHTS. .....Rights.

For value received, I hereby sell, assign and transfer to Levy Bros., the rights attaching to one hundred and thirty-five shares of the Marconi Wireless Telegraph Company of America, to subscribe for and pay for shares in the increase of the capital stock of said Company, under the provisions of the Company's circular dated April 19, 1912.

Without recourse. May 1st, 1912.

M. L. PARSONS,
LEVY BROS.,

H. A. PINCOTT.

To secure the benefit of these rights, formal subscription by the purchaser thereof must be filed with the Corporation Trust Co., Jersey City, N. J., before three o'clock, p. m., on May 6th, 1912.

Endorsed on side—without recourse.

Endorsed—as to M. L. Parsons, "Signature correct—The Mechanics & Metals Nat'l. Bank—J. Robinson."

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## Exhibit C

*Annexed to Complaint*

MARCONI WIRELESS TELEGRAPH COMPANY OF AMERICA

Subscription to new shares of capital stock.

May 3, 1912.

I hereby agree to take 3,375 shares of the increase in the capital of the Marconi Wireless Telegraph Company of America, and to pay for the same, at the rate of $5 per share according to the terms named in the Company's circular dated April 19, 1912.

May 3, 1912. LEVY BROS.

The right to make this subscription will expire at three o'clock p. m., on May 6th, 1912, after which no subscription can be accepted. Send this subscription with money order or banker's draft on New York for $2.00 for each share taken to the Corporation Trust Co., Jersey City, N. J.

Certified checks herewith for $6,750—being first installment.

## Exhibit D

*Annexed to Complaint*

KNOW ALL MEN BY THESE PRESENTS, that we, HERBERT W. LEVY, GUY W. LEVY and C. SEDGWICK LEVY, partners, trading as LEVY BROTHERS, of the City, County and State of New York, for the sum of One Dollar and other good and valuable considerations, the receipt whereof is hereby acknowledged, do hereby sell, assign, transfer and set over unto GEORGE W. C. SCHMIDT, his executors, administrators and assigns, to his and their own proper use and benefit, any and all sums of money due and owing to us, and all claims, demands, cause or causes of action, of any kind, whatsoever which we ever had, now have or may have against the MARCONI WIRELESS TELEGRAPH COMPANY OF AMERICA, by reason of the failure of said company to deliver to us thirty-three hundred and seventy-five (3,375) shares of the increase of the capital stock of the said company, which increase was authorized by a resolution of the stock-holders of said company, adopted April eighteenth, nineteen hundred and twelve, which shares were subscribed on May third, nineteen hundred and twelve:

And we hereby constitute and appoint the said GEORGE W. C. SCHMIDT, his executors, administrators and assigns, our true and lawful attorney, with full power of revocation, for us and in our names but for his sole use, to ask, demand and sue for, in his name and right, collect, receive, compound and give acquittance for the said claim or claims or any part thereof.

New Jersey State Library

In witness whereof, we have hereunto set our hands and seals this sixth day of December, nineteen hundred and twelve.

In presence of

Aaron A. Melniker.

HERBERT W. LEVY (L. S.)

GUY W. LEVY (L. S.)

C. SEDGWICK LEVY (L. S.)

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## Answer

HUDSON COUNTY CIRCUIT COURT

*(Filed, January 24, 1913)*

| | |
|---|---|
| GEORGE W. C. SCHMIDT, Plaintiff, vs. MARCONI WIRELESS TELEGRAPH COMPANY OF AMERICA, a corporation of New Jersey, Defendant. | Action at Law. Answer. |

Defendant, a corporation organized under the laws of New Jersey whose principal office is at Jersey City, in the County of Hudson and State of New Jersey, says that:

(1) Defendant admits the first, second and third paragraphs of the complaint filed in the above stated action.

(2) Defendant denies the fourth paragraph of said complaint wherein it is alleged that at the close of business on the said 20th day of April, 1912, one M. L. Parsons was the holder of record

of 135 shares of the capital stock of said Company, and by virtue thereof became entitled to subscribe for 3,375 shares of the increase capital stock of said Company upon the terms and conditions of said offer in paragraph three of said complaint set forth. The defendant alleges that said M. L. Parsons was not the owner and holder of record of said last named shares of stock at the close of business on said 20th day of April, 1912, and defendant alleges that for a long time prior to the said 20th day of April, 1912, to wit, several years prior thereto, the said M. L. Parsons had sold, assigned, and conveyed all her right, title and interest in and to said shares of stock and, since said sale and assignment and conveyance thereof, had not held any interest whatever therein at any time thereafter and that the said M. L. Parsons was not at any time entitled to subscribe for any shares of the increase of capital stock of said Company upon the terms and conditions of said offer.

(3) As to the statement made in the fifth paragraph of said complaint, that on May 1, 1912, said M. L. Parsons for good and valuable consideration, by instrument in writing, transferred and assigned the right to subscribe for the shares of the increased capital stock of said company attaching to said 135 shares, to Herbert Levy, Guy W. Levy and C. Sedgwick Levy, partners, trading as Levy Brothers, defendant has not any knowledge and information thereof, sufficient to form a belief, and defendant denies, that the said M. L. Parsons was the owner or holder of record or had any interest whatever in said 135 shares or any or either of them at any time after said offer to subscribe was made and defendant alleges that said Parsons had not had any such

interest since her said sale, assignment and conveyance thereof as aforesaid; and defendant further alleges that the said Parsons had no right to transfer or assign the right to subscribe for the said shares of increased capital stock of said company or any or either of said shares and defendant denies that the said Levy Brothers by reason of said assignment or otherwise became entitled to subscribe for said 3,375 shares of the increased capital stock of said company or of any share or part thereof.

(4) As to the statements in the sixth and seventh paragraphs of said complaint wherein it is alleged that said Levy Brothers on May 3, 1912, accepted said offer and subscribed to said 3,375 shares of the increased capital stock of said company and delivered said subscription agreement together with the sum of $6,750.00 at the office of the registered agent of defendant and that the same were received by said defendant and that on June 10, 1912, said Levy Brothers paid to said Company the sum of $10,125.00 the balance due upon said subscription which was received by this defendant, this defendant alleges that neither the said registered agent of this defendant nor this defendant either received said subscription agreement or said sums of money or either of them under or by virtue of any agreement of this defendant or its said registered agent that the same should be received or taken for said 3,375 shares of said increased stock or any share or part thereof. And defendant alleges, that neither this defendant nor its said registered agent, ever in anywise agreed that said Levy Brothers should subscribe for said increased capital stock, and never recognized any right on the part of the said Levy Brothers to make said

subscription, and this defendant alleges that any subscription agreement or any sum or sums of money received by this defendant or its registered agent from said Levy Brothers, as alleged in said paragraph six and seven of said complaint, was deposited only temporarily with said registered agent and this defendant, pending the action which should thereafter be taken by the defendant with reference to said subscription; and the defendant further alleges that the defendant rejected said Levy Brothers offer to subscribe to said stock, refused and still refuses to deliver to said Levy Brothers said shares of said increase; and the defendant at the time of such refusal returned to said Levy Brothers any money and papers temporarily left with the defendant or its registered agent, for the purpose of such subscription.

(5) Defendant admits the eighth paragraph of said complaint.

(6) Defendant denies the ninth paragraph of said complaint.

(7) As to the statement in the tenth paragraph of said complaint the defendant has not any knowledge or information sufficient to form a belief, but defendant alleges that said Levy Brothers did not on the sixth day of December, 1912, or any other time own or have any right, title or interest in or to said 135 shares of said stock formerly owned by said Parsons and had no right to transfer or assign the same or any interest therein to George W. C. Schmidt, the plaintiff, and the defendant denies that the said plaintiff had any right, title or interest whatever in and to said 135 shares of said stock or had any right whatever to subscribe for said 3,375 shares of

said increase or any share or part thereof. Defendant denies that either said Levy Brothers or plaintiff has been deprived of any right or opportunity to which he is entitled, or sustained any damages whatever for which defendant is liable.

(8) The defendant further alleges that said offer made by this defendant to its stockholders to subscribe for said new stock was by its terms made only to the owners and holders of record of said stock at the close of business on April 20, 1912, and to persons to whom such holders and owners of record had assigned shares upon presentation of a duly executed written assignment thereof. And the defendant avers that the said Levy Brothers were neither holders or owners of record of said 135 shares of said stock or any part thereof nor did they hold the same or any part thereof by assignment from the holder of record and owner of said stock who held the same until the time of said assignment, and that the said Levy Brothers never gave or offered to the defendant or its registered agent any reasonable or satisfactory proof or evidence that the said 135 shares of stock or any share or part thereof was held or owned by the said Parsons on the 20th day of April, 1912, or at any other time since said Parsons sold and assigned and transferred her stock as aforesaid, and the said Levy Brothers failed and refused to produce or submit to the defendant any certificate or certificates for said 135 shares or any share or part thereof assigned from any owner or holder of record thereof although requested so to do by the plaintiff.

(9) And defendant alleges that plaintiff's said complaint does not allege or disclose any cause of action against the defendant and defendant

hereby and herein sets up and raises the objection that said plaintiff does not allege or disclose any cause of action against the defendant.

GRIGGS & HARDING,
Attorneys of Defendant.

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## Notice to Strike out Parts of Answer

HUDSON COUNTY CIRCUIT COURT

(*Filed Feb. 7, 1913.*)

| | |
|---|---|
| GEORGE W. C. SCHMIDT, Plaintiff, vs. MARCONI WIRELESS TELEGRAPH COMPANY OF AMERICA, Defendant. | Action at Law. Notice to Strike out Parts of Answer. |

*To the above named defendant or Griggs & Harding, Esquires, its attorneys:*

Please take notice, that on Friday, the 14th day of February, 1913, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, I shall apply to the Honorable William H. Speer, Judge of the Hudson County Circuit Court, at the County Court House, in the City of Jersey City, for an order striking out the following allegations from the answer interposed by the defendant in the above entitled action:

1. In paragraph 2 that part of said paragraph which reads as follows:

"That at the close of business on the said 20th day of April, 1912, one M. L. Parsons was the

holder of record of 135 shares of the capital stock of said company."

2. That part of paragraph 2 which reads as follows:

"The defendant alleges that the said M. L. Parsons was not the owner or holder of record of the last named shares of stock at the close of business on the said 20th day of April, 1912. The defendant alleges that for a long time prior to the said 20th day of April, 1912, to wit, several years prior thereto, the said M. L. Parsons had sold, assigned and conveyed all her right, title and interest in and to said shares of stock, and since said sale and assignment and conveyance thereof, had not held any interest therein whatever, or at any time thereafter, and that the said M. L. Parsons was not at any time entitled to subscribe for any shares of the increase of the capital stock of said company, upon the terms and conditions of said offer."

3. That part of paragraph 3, which reads as follows:

"The defendant denies that the said M. L. Parsons was the owner or holder of record or had any interest whatever in said 135 shares or any or either of them, at any time after said offer to subscribe was made, and defendant alleges that said Parsons had not had any such interest since her said sale, assignment and conveyance thereof as aforesaid."

4. That part of paragraph 3 which reads as follows:

"The defendant further alleges that said Parsons had no right to transfer or assign the right to subscribe for said shares of the increased capital stock of said company, or any or either of said shares."

Notice to Strike out Parts of Answer

5. That part of paragraph 3 which reads as follows:

"And the defendant denies that the said Levy Brothers by reason of said assignment or otherwise, became entitled to subscribe for said 3,375 shares of the increased capital stock of said company, or of any share or part thereof."

6. That part of paragraph 7 which reads as follows:

"Defendant alleges that said Levy Brothers did not, on the 6th day of December, 1912, or at any other time, own or have any right, title or interest in or to the said 135 shares of said stock, formerly owned by said Parsons, and had no right to transfer or assign the same or any interest therein, to George W. C. Schmidt, the plaintiff."

7. That part of paragraph 7 which reads as follows:

"Defendant denies that said plaintiff had any right, title or interest whatever in and to said 135 shares of said stock or had any right whatever to subscribe for said 3,375 shares of said increase or any share or part thereof."

8. That part of paragraph 8 which reads as follows:

"Defendant further alleges that the said offer made by this defendant to its stockholders to subscribe for said new stock, was by its terms, made only to the owners and holders of record of said stock at the close of business on April 20th, 1912, and to persons to whom such holders or owners of record had assigned shares, upon presentation of a duly executed written assignment thereof."

9. That part of paragraph 8 which reads as follows:

Notice to Strike out Parts of Answer

"The defendant avers that the said Levy Brothers were neither holders or owners of record of said 135 shares of said stock or any part thereof."

10. In paragraph 8 the word "owner" in the 11th line of said paragraph.

11. That part of paragraph 8 which reads as follows:

"And that the said Levy Brothers never gave or offered to the defendant or its registered agent, any reasonable or satisfactory proof or evidence that the said 135 shares of stock or any share or part thereof, was held or owned by the said Parsons on the 20th day of April, 1912, or at any other time since said Parsons sold and assigned and transferred his stock as aforesaid."

12. That part of paragraph 8 which reads as follows:

"And the said Levy Brothers failed and refused to submit to the defendant, any certificate or certificates for said 135 shares or any share or part thereof, assigned from any owner or holder thereof, although requested so to do by the plaintiff."

For the following reasons, namely:

That each and every part of the defendant's answer hereinabove objected to, is untrue, impertinent, irrevelent, states a conclusion of law, is not germane to the issue and is so framed as to embarrass and delay a fair trial of this cause.

Respectfully yours,

AARON A. MELNIKER,

Attorney of Plaintiff.

## Decision

HUDSON COUNTY CIRCUIT COURT

(*Filed, March 22, 1913*)

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| GEORGE W. C. SCHMIDT, Plaintiff, vs. MARCONI WIRELESS TELEGRAPH COMPANY OF AMERICA, Defendants. | Action at Law. On Motion to strike out portions of answer. |

Aaron A. Melniker, Esq., Attorney for plaintiff.

John W. Harding, Esq., Attorney for defendant.

William H. Speer, Circuit Judge.

As stated in his brief plaintiff's claim is as follows: "The defendant, a corporation, authorized the issuance of an increase of its capital stock. The offer was made to all stockholders of record on April 20, 1912. On that day, M. L. Parsons appeared on the books of the company to be the holder of 135 shares. One of the terms of the offer was that the rights to subscribe belonging to any number of shares were assignable, and the assignee could subscribe upon presentation of a duly executed assignment. Parsons assigned his rights to subscribe upon a blank form provided by the company, to Levy Brothers, who, within the time limited in the offer, subscribed for 3,375 shares, and paid the required deposit. Levy Brothers, afterwards, also within the time limited, paid the balance to the company. The company, after holding the money, amounting to $16,825.00 for some time, and until the time to subscribe had expired, returned the

money to Levy Brothers, and refused to deliver the stock. This suit is brought to recover the profits which Levy Brothers would have made if the stock had been duly delivered to them, as the stock subsequently went up from par—$5.00 a share to about $19.00 per share." Defendant has filed an answer setting out *inter alia* that on April 20, 1912, M. L. Parsons was not the actual owner of the 135 shares referred to, having transferred them a long time prior to that date. Plaintiff thereupon makes this motion to strike out all the parts of the answer which raise the defense that although by the books of the company M. L. Parsons was the apparent owner of the 135 shares of stock, yet he was not then the real and actual owner thereof.

Plaintiff rests his motion upon three grounds:

1. That M. L. Parsons, being the record holder of the stock on the books of the company, on April 20th, 1912, was the person and the only person who could exercise the right to subscribe for the new shares.

2. That Levy Brothers, having an assignment of the rights from a person who was the stockholder of record, on the books of the company, on April 20, 1912, the defendant company is estopped from raising the question as to the ownership of the Parsons' stock or as to the right of Parsons to subscribe or as to the right of the assignee of the record holder of the stock to subscribe for the new stock.

3. That Levy Brothers, having subscribed for the stock, signed the subscription agreement, wherein, they obligated themselves to take and pay for the new stock, and having complied with the terms of the offer, with regard to presentation of a duly executed assignment of rights,

and made a deposit on account, and the defendant company having accepted the subscription agreement and deposit, is bound by its terms.

I am clearly of the opinion "that, as between the parties, the delivery of the certificate, with assignment and power endorsed, passes the entire title legal and equitable, in the shares, notwithstanding that, by the terms of the charter or by-laws of the corporation, the stock is declared to be transferable only on its books; that such provisions are intended solely for the protection of the corporation, and can be waived or asserted at its pleasure, and that no effect is given to them except for the protection of the corporation; that they do not incapacitate the shareholder from parting with his interest, and that his assignment, not on the books, passes the entire legal title to the stock, subject only to such liens or claims as the corporation may have upon it, and except the right of voting at elections, etc. (Angell & Ames on Corporations, 8th Ed. S. 354; Bank of Utica v. Smalley, 2 Conn. 770; Gilbert v. Manchester Co. 11 Went. 627; Kortright v. Com. Bk. of Buffalo, 22 Went. 362 *id.;* N. Y. & N. H. R. R. Co., v. Schuyler 34 N. Y. 80, Rapallo, J. in McNeill v. The Tenth National Bank, 46 N. Y. 325. See also 3 Clark & Marshall on Private Corporations, p. 1,785, section 586. This question is examined by Vice Chancellor Pitney, in O'Connor v. International Silver Company, 68 N. J. Eq. 67, where he fully considered the title of an assignee of stock, which has not been transferred on the company's books and declares that such assignment without transfer on the company's books passes the complete legal and equitable title, and that such assignee has the right to intercept payment of dividends by the corporation to the assignor. At pages 72 to 74 he says:

"The next question raised by the demurrer is this: Can the owner of shares of stock in corporation A, which he has held for several years, and who is entitled, without question, at any moment, except when the books of transfer are closed preparatory to an election or a dividend, to have a certificate issued to him, but has never exercised that right, and whose shares stand on the books of the company in the name of his grantor, who, however, has no interest therein, have a standing in this Court to ask the Court to prevent corporation A, by its officers, from voting upon the shares in question?

"It may be admitted that the stockholder has not the right to vote in person on his shares. He may be content to permit his assignor to vote thereon because that assignor is willing to vote as he, the actual owner, directs, or, what is perhaps the more common practice, to give him a proxy to vote in his name, but such disability, if it be a disability, is the only one under which the actual owner labors. Should any dividend be declared his assignor will receive it for the actual owner's benefit, and I think there can be no doubt that the latter has the right in equity to intercept its payment by the corporation to his assignor. Except in these matters his title is absolute and complete.

"I am able to perceive little, if any, resemblance in the relations between the registered owner and the real owner of shares of stock and those which exist between the ordinary trustee of an express trust and his *cestui que* trust. In the later case the trustee is the actual legal owner and the *cestui que* trust the owner only in equity. In the case of a transfer of a certificate of shares of stock by an assignment in the usual form for

value received and a delivery of the certificate, which is the usual mode of making title to shares of stock, the complete legal and beneficial title passes, and the transfer on the books of the company is not necessary in order to make the legal title complete. The situation resulting from such an assignment, without transfer on the books of the company more nearly resembles that of the owner by actual common law conveyance in fee of real estate which he has not taken the trouble to have recorded.

"The status of the holder by legal assignment of a certificate of stock which has not been transferred on the books of the company is in some respects better than that of a real estate owner whose deed is unrecorded, because, in the absence of actual notice, the grantor of such a deed may make a good title to a purchaser in good faith for value.

"This subject was exhaustively dealt with by Chancellor Green, in Bank v. McElrath, 13 N. J., Eq. (2 Beas.) 24. He there gave the holder by assignment of certificates of stock who held them as collateral security for a debt, with the usual transfer in blank from the owner, to whom they were issued and in whose name they stood on the books of the bank, preference over an attaching creditor of the registered owner. He points out the true office of the rule that the transfer must appear on the books of the bank to be to protect the corporation from conflicting claims and to prevent disputes as to the right to vote and the like.

"I am unable to perceive why a clear title to the shares of stock, with the immediate right to have the stock transferred on the books of the company, does not give the owner a right to the

ear of this Court to protect his interest in the corporation and its management."

The Vice Chancellor then at page 78 approves of the case of Ervin v. Oregon Railway Co., 62 How. Pr. 490, where the Court speaks as follows:

"That the stock of the plaintiff has not been registered is no reason why he should not maintain this action. He is the legal and equitable owner of this stock. The possession by him of the certificate as owner, gives him a complete title. For certain purposes and for the enjoyment of specific privileges, such as to vote and receive dividends, it may be necessary, as between him and the corporation, that he be registered as a stockholder. But as the absolute owner of the stock he is, to the exclusion of every other person, entitled to prosecute an action for injury to it or to himself as the proprietor thereof."

The case of International Silver Co. vs. O'Connor *supra* was affrmed in our Court of Appeals, 68 N. J. Eq. 683. At page 682 Gummere, Chief Justice, says:

"We consider that the complainant, as the real owner of the stock of the International Company which he has acquired, has a sufficient standing to file the bill, notwithstanding that the stock has not been transferred to him upon the books of the company, and for the reasons which are given by the Vice Chancellor for his conclusion upon this point."

These provisions, then, being intended solely for the protection of the corporation, and being waivable or assertable at its pleasure, and having no effect given to them except for the protection of the corporation, must be considered as personal to the corporation, as much so as infancy is to the infant, and it is perfectly settled that

the privilege of infancy is personal to the infant, and he alone can take advantage of it during his life and sanity. If the assignor may vote the stock it is not because he owns it but merely to facilitate the business of the corporation and protect it in the due execution thereof; it is not to advantage him but to advantage it. All that the assignor has is the mere shadow of a right, but the substance from which this shadow is cast, (the shares themselves,) is the property of another. The law permits the corporation, for its protection, to treat the shadow as though it were the substance, but it does not, except in certain specified instances, created by the statute, authorize the possessor of the shadow, to act as if the substance were his. The present is not one of the specified instances of the maxim *expressio unius exclusio alterius* applies.

M. L. Parsons, therefore, was no stockholder. A stockholder is a stock-owner. He was not that. He owned no interest whatever in the stock. His whole claim is predicated upon the sham appearance of ownership arising from his name still remaining on the books of the company. That the company might have recognized him as the real owner in the absence of knowledge that he was not and been protected against its act in so doing is probably true, for that is the object of the rule contended for by the plaintiff, but that the company was compelled to so recognize him as a baseless claim, and gives no support either in reason or authority. See Reilly v. Absecon Land Co., 71 Atl. Rep. 248, and cases cited. Broadway Bank v. Elrath, 13 N. J. Eq. 24; Del. & Atl. R. Co. v. Jeick, 23 N. J. L. 321.

When the cases speak of the title of the unregistered holder being equitable it is not meant thereby to assert that as between him and his

assignor he has not obtained the legal title. It is simply meant to affirm that the title is complete against everybody but the corporation itself, and those who have the superior right to have the corporation make the transfer to them, and that being the real owner he must, if the corporation refuses to register him go into a Court of equity to compel them to do so." 10 Cyc. p. 599. He the real owner, has this equitable right against the corporation.

Plaintiff's second point, that the defendant is estopped from disputing the right of Parsons and Levy Brothers to subscribe, has no merit.

1st. The defendant did not and could not legally offer any right to subscribe to any person other than the real owners of stock, and Levy Brothers had no right to construe the offer as one made to them or to Parsons who was not a real owner. The assignment of Parsons to Levy Brothers is for the right to subscribe only, as a thing separate and apart from the ownership of stock, so that Levy Brothers knew that they were purchasing a right separate from the real ownership of the stock.

2d. The record as we have shown, was entirely for the protection of the company. Levy Brothers had no right to inspect the stock books and there is no claim in the complaint that Levy Brothers knew that the goods showed that the name of Parsons appeared as stockholder on the record, or that Levy Brothers relied upon anything of that kind in purchasing the alleged right.

There are no elements of estoppel in the case.

Plaintiff's third point is equally untenable.

The answer clearly states that there was no subscription by Levy Brothers accepted by the defendant, but that the offer to subscribe was refused.

These considerations lead me to refuse to strike out the parts of the answers to which it is moved to expurge and such will be the order.

I have considered these questions which are the real merits of the case as I gathered from what was said at the oral argument that both parties desired to have the matter disposed of on the merits. If I had not so understood, and if it had not seemed to me that the questions were too important to be shunted aside by a decision rested upon a merely technical ground, I might well have denied plaintiff's motion upon the ground that his notice was defective and insufficient in not stating as an objection that the answer does not disclose any defense to plaaintiff's complaint. Such action on my part would simply have postponed the inevitable consideration of the questions herein decided, and delayed justice, without substantial benefit to anyone.

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## Amended Complaint

HUDSON COUNTY CIRCUIT COURT

*(Filed, April 4, 1913)*

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| George W. C. Schmidt, Plaintiff, vs. Marconi Wireless Telegraph Company of America, a corporation of New Jersey, Defendant. | Action at Law. |

The plaintiff, residing at No. 586 Newark Avenue, Jersey City, N. J., says:

Amended Complaint

1. That the defendant, the Marconi Wireless Telegraph Company of America, is a corporation organized and existing under the laws of the State of New Jersey, with its registered office in the City of Jersey City, County aforesaid.

2. That on or about the 18th day of April, 1912, the stockholders of said company, at a meeting regularly called and held, authorized the increase of the capital stock of said company, from $1,662,500.00 to $10,000,000.00.

3. That on or about said 18th day of April, 1912, by virtue of the authority vested in them, the directors of said company offered to stockholders of record at the close of business on April 20th, 1912, the right and privilege to subscribe for 25 shares of said new stock, at par value ($5.00), for every share held by them respectively, upon the following terms, to wit:

(1) Subscriptions may be paid in full on or before May 6th, 1912, and thereafter, as soon as they can be prepared, certificates of stock will be issued for the same as of that date.

(2) If not paid, in full as above, the subscription shall be paid in installments, as follows: 40 per cent, that is $2.00 per share, to be paid at the time of making the subscription, or on or before May 6th, 1912; 60 per cent, that is, $3.00 per share, to be paid on or before June 10th, 1912.

(3) Receipts will be given as partial payments are made, and shall be endorsed and surrendered when the certificates of stock are issued.

(4) Rights to subscribe belonging to any number of shares may be assigned, and the subscription may be made by the holder but only upon presentation of a duly executed written assignment.

(5) The right to subscribe will cease on May 6th, 1912; subscriptions upon which said first payment is not then made will be declared forfeited. Any portion of the new issue of $7,000,000.00 not subscribed for on or before May 6th, will be disposed of as the Board of Directors shall determine.

All subscriptions and payments for the new issue of stock must be made to the Corporation Trust Company, the registered agent, at No. 15 Exchange Place, Jersey City, New Jersey. And that annexed hereto is a copy of the notice of said offer, sent out by said board of directors, which is made a part hereof and marked Exhibit "A."

4. That at the close of business on said 20th day of April, 1912, one M. L. Parsons was the holder of record of 135 shares of the capital stock of said company, and by virtue thereof became entitled to subscribe for 3,375 shares of the increased capital stock of said company, upon the terms and conditions of said offer, hereinbefore in paragraph 3 set forth.

5. That the by-laws of said defendant company at the times aforesaid, provided that shares of its capital stock were only transferable upon the books of said company, and that upon its certificates of stock issued to the said M. L. Parsons was printed a notice to the effect that the same were only transferable upon the books of said company.

6. That on said May 1st, 1912, said M. L. Parsons, for good and valuable consideration, by instrument in writing, a true copy of which is hereto annexed and made a part hereof, and marked Exhibit "B," transferred and assigned the right to subscribe for the shares of the in-

creased capital stock of said company, attaching to said 135 shares, to Herbert Levy, Guy Levy and C. Sedgwick Levy, partners, trading as Levy Brothers, and that the said Levy Brothers thereby became entitled to subscribe for said 3,375 shares of the increased capital stock of said company, the said Levy Brothers having first ascertained from the books of the said company that the said M. L. Parsons was the holder of record upon the books of said company of 135 shares of its stock, and relying upon said information so obtained.

7. That the said Levy Brothers, having ascertained from the books of the said defendant company that the said M. L. Parsons was a stockholder of record on the books of said company, of 135 shares of its stock, and relying thereon, did, thereupon, on May 3d, 1912, accept said offer and subscribe for said 3,375 shares of the increased capital stock of said company, and delivered said subscription agreement or acceptance, a true copy of which is hereto annexed and made a part hereof, and marked Exhibit "C," together with the sums of $6,750.00, in accordance with the terms of said offer at the office of the registered agent of said company, at No. 15 Exchange Place, Jersey City, N. J., which said subscription agreement and said sum of $6,750.00 was received and accepted by said company.

8. That on June 10th, 1912, said Levy Brothers paid to said company the sum of $10,125.00, being the balance due upon said subscription, which sum was received and accepted by said company.

9. That thereafter, and ever since, said com-

pany has refused and still refuses to deliver to said Levy Brothers, said 3,375 shares of said increase, although often requested to do so.

10. That by reason of the failure of said defendant company to deliver said stock to said Levy Brothers, the said Levy Brothers have sustained damage in the sum of $47,250.00.

11. That on December 6th, 1912, said Levy Brothers for good and valuable consideration, transferred and assigned their said claim against said defendant company to George W. C. Schmidt, by instrument in writing, a true copy of which is hereto annexed and made a part hereof and marked Exhibit "D."

12. That at and prior to the times hereinbefore mentioned, it was known to the said Levy Brothers that shares of stock of said company were transferable only upon the books of said company, and that the by-laws and certificates of stock of said company so provided, and that they, the said Levy Brothers, relied upon and were induced to enter into and upon the transactions hereinabove set forth and to take the assignment of the rights of the said M. L. Parsons and to make such subscription agreement by and because of their knowledge of provisions and in reliance thereon.

Plaintiff demands as damages the sum of $47,250.00, with interest.

AARON A. MELNIKER,
Attorney of Plaintiff.

## Exhibit A

MARCONI WIRELESS TELEGRAPH COMPANY OF AMERICA

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New York, April 19, 1912.

*To the stockholders of the Marconi Wireless Telegraph Company of America.*

At a meeting of the stockholders of the Marconi Wireless Telegraph Company of America, held on the 18th day of April, 1912, the authorized capital stock of the Company was increased from $1,662,500 to $10,000,000, and the par value of its shares was reduced from Twenty-five Dollars to Five Dollars a share. Of the total authorized capital stock of $1,662,500 there has heretofore been issued and now is outstanding $1,547,500. Your Board of Directors has recently made arrangements for entering actively into the business of trans-Atlantic wireless service between the United States and Great Britain, and is about to erect a high-power station at New York City or in that neighborhood. It has entered into a contract with Marconi's Wireless Telegraph Company, Limited, of London to erect a similar station at or near London, these two stations to be used in carrying on the business of the Company between the two countries named. In addition thereto, your directors have entered into arrangements for and have in contemplation the erection of a similar high-power station on the Pacific Coast to connect with a station on one of the Hawaiian Islands, which in turn will connect, if permission of the United States Government be secured, with another station in the Phillipine Islands. These Pacific stations, it is

expected, will eventually connect and cooperate with a station of high power on one of the Islands of Japan or with some point in China. Your directors also have in contemplation the erection at or near New York of another high-power station to connect southwardly with the West Indies and South America. It will thus be seen that a plan of very broad developments has been formulated and is intended to be carried out, the result of which, it is hoped, will be profitable to the stockholders.

The Board of Directors has resolved to offer for subscription to the stockholders of this Company $7,000,000, par value of the capital stock of the Company, represented by the recent increase, the proceeds of which are to be used to enable the Company to carry on the work of construction and development heretofore outlined, as rapidly as possible. There is now offered to stockholders of record at the close of business on April 20th, 1912, the right and privilege to subscribe for twenty-five shares of said stock at par value (five dollars) for every share held by them respectively, upon the following terms, to wit:

(1) Subscriptions may be paid in full on or before May 6, 1912, and thereafter, as soon as they can be prepared, certificates of stock will be issued for the same as of that date.

(2) If not paid in full as above, the subscriptions shall be paid in installments as follows:

Forty per cent, that is, two dollars per share, to be paid at the time of making the subscription, on or before May 6, 1912;

Sixty per cent, that is, three dollars per share, to be paid on or before June 10, 1912.

(3) Receipts will be given as partial payments are made and shall be endorsed and surrendered when the certificates of stock are issued.

Exhibit A.

(4) Rights to subscribe belonging to any number of shares may be assigned and the subscriptions may be made by the holder, but only upon presentation of a duly executed written assignment.

(5) The right to subscribe will cease on May 6th, 1912. Subscriptions upon which said first payment is not then made will be declared forfeited. Any portion of the new issue of $7,000,000 not subscribed for on or before May 6th, 1912, will be disposed of as the Board of Directors shall determine.

All subscriptions and payments for the new issue of stock must be made to the Corporation Trust Company, the registered agent, at 15 Exchange Place, Jersey City, New Jersey.

Blank forms for subscriptions are enclosed.

The stock transfer books were closed at twelve o'clock noon on April 15th, 1912, and will be opened on April 19, 1912, at ten o'clock a. m.

Checks must be drawn to the order of The Corporation Trust Company and be payable either in Jersey City or New York funds.

All subscriptions not fully paid for on or before the 10th day of June, 1912, will be null and void and any partial payments thereon will be forfeited to the Company.

Stockholders who have not heretofore exchanged the old certificates of the par value of $100 for those of $25 each, as directed by the amendment to the Charter made April 18th, 1910, may now exchange each share of $100 par value for five shares of $25 par value, and may either before or after such exchange subscribe for the new stock now offered on the basis hereinbefore stated for holders of $25 shares.

By order of the Board,
JOHN BOTTOMLEY,
Secretary.

Schedule B

N. B.—For each share of par value of $100 or $25 the holder may subscribe for and take 25 new shares of the par value of $5 each, requiring a payment at the time of subscription of $2 for each share subscribed to, and a further payment of $3 for each share on or before June 10th, 1912.

Stockholders may subscribe for a less number of shares than they are entitled to, but no subscription for a fractional part of a share will be accepted.

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## Schedule B

MARCONI WIRELESS TELEGRAPH COMPANY OF AMERICA

ASSIGNMENT OF RIGHTS .....Rights.

For value received, I hereby sell, assign and transfer to Levy Bros., the rights attaching to one hundred and thirty-five shares of the Marconi Wireless Telegraph Company of America, to subscribe for and pay for shares in the increase of the capital stock of said Company, under the provisions of the Company's circular dated April 19th, 1912.

Without recourse. May 1st, 1912.

M. L. PARSONS,

H. A. Pincott, LEVY BROS.

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To secure the benefit of these rights, formal subscription by the purchaser thereof must be filed with the Corporation Trust Co., Jersey City, N. J., before three o'clock, p. m. on May 6th, 1912.

Endorsed on side—Without recourse.

Schedule D

Endorsed—as to M. L. Parsons, "Signature correct—The Mechanics & Metals Nat'l Bank—J. Robinson, Ac."

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## Exhibit C

MARCONI WIRELESS TELEGRAPH COMPANY OF AMERICA

Subscriptions to new shares of capital stock.

May 3, 1912.

I hereby agree to take 3,375 shares of the increase in the capital of the Marconi Wireless Telegraph Company of America, and to pay for the same, at the rate of $5 a share, acording to the terms named in the Companies' circular dated April 19, 1912.

May 3, 1912. LEVY BROS.

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The right to make this subscription will expire at three o'clock p. m., on May 6th, 1912, after which no subscription can be accepted. Send this subscription with money order or banker's draft on New York for $2.00 for each share taken to the Corporation Trust Co., Jersey City, N. J.

Certified checks herewith for $6,750—being first installment.

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## Schedule D

Know All Men by These Presents, That we, Herbert E. Levy, Guy W. Levy and C. Sedgwick

Schedule D

Levy, partners, trading as Levy Brothers, of the City, County and State of New York, for the sum of One Dollar and other good and valuable considerations, the receipt whereof is hereby acknowledged, do hereby sell, assign, transfer and set over unto George W. C. Schmidt, his executors and administrators and assigns, to his and their own proper use and benefit, any and all sums of money due and owing to us, and all claims, demands, cause or causes of action, of any kind, whatsoever which we ever had, now have or may have against the Marconi Wireless Telegraph Company of America, by reason of the failure of said company to deliver to us thirty-three hundred and seventy-five (3,375) shares of the increase of the capital stock of the said company, which increase was authorized by a resolution of the stockholders of said company, adopted April eighteenth, nineteen hundred and twelve, which shares were subscribed on May third, nineteen hundred and twelve.

And we hereby constitute and appoint the said George W. C. Schmidt, his executors, administrators and assigns, our true and lawful attorney, with full power of revocation, for us and in our names but for his sole use, to ask, demand and sue for, in his name and right, collect, receive, compound and give acquittance for the said claim or claims or any part thereof.

In witness whereof, we have hereunto set our hands and seals this sixth day of December, nineteen hundred and twelve.

In presence of

Aaron A. Melniker

HERBERT W. LEVY (L. S.)

GUY W. LEVY (L. S.)

C. SEDGWICK LEVY (L. S.)

## Answer to the Amended Complaint

HUDSON COUNTY CIRCUIT COURT

*(Filed, April 22, 1913)*

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|---|---|
| GEORGE W. C. SCHMIDT, Plaintiff, vs. MARCONI WIRELESS TELEGRAPH COMPANY OF AMERICA, a corporation of New Jersey, Defendant. | Action at Law. |

Defendant, a corporation organized under the laws of New Jersey whose principal office is at Jersey City, in the County of Hudson and State of New Jersey, says that:

(1) Defendant admits the first, second, third and fifth paragraphs of the complaint filed in the above stated action.

(2) Defendant denies the fourth paragraph of said complaint wherein it is alleged that at the close of business on the said 20th day of April, 1912, one M. L. Parsons was the holder of record of 135 shares of the capital stock of said company, and by virtue thereof became entitled to subscribe for 3,375 shares of the increase capital stock of said company upon the terms and conditions of said offer in paragraph three of said complaint set forth. The defendant alleges that said M. L. Parsons was not the owner and holder of record of said last named shares of stock at the close of business on said 20th day of April, 1912, and defendant alleges that for a long time prior to the said 20th day of April, 1912, to wit, several years prior thereto, the said M. L. Par-

sons had sold, assigned, and conveyed all her right, title and interest in and to said shares of stock and, since said sale and assignment and conveyance thereof, had not held any interest whatever therein at any time thereafter and that the said M. L. Parsons was not at any time entitled to subscribe for any shares of the increase of capital stock of said company upon the terms and conditions of said offer.

(3) As to the statement made in the sixth paragraph of said complaint, that on May 1, 1912, said M. L. Parsons for good and valuable consideration, by instrument in writing, transferred and assigned the right to subscribe for the shares of the increased capital stock of said company attaching to said 135 shares, to Herbert Levy, Guy W. Levy and C. Sedgwick Levy, partners, trading as Levy Brothers, defendant has not any knowledge and information thereof, sufficient to form a belief, and defendant denies, that the said M. L. Parsons was the owner or holder of record or had any interest whatever in said 135 shares or any or either of them at any time after said offer to subscribe was made and defendant alleges that said Parsons had not had any such interest since her said sale, assignment and conveyance thereof as aforesaid; and defendant further alleges that the said Parsons had no right to transfer or assign the right to subscribe for the said shares of the increased capital stock of said company or any or either of said shares and the defendant denies that the said Levy Brothers by reason of said assignment or otherwise became entitled to subscribe for said 3,375 shares of the increased capital stock of said company or of any share or part thereof.

(4) As to the statements in the sixth, seventh

and eighth paragraphs of said complaint wherein it is alleged that said Levy Brothers first ascertained from the books of the defendant company that said M. L. Parsons was the holder of record upon the books of said Company of 135 shares of its stock before said M. L. Parsons transferred and assigned the alleged right to subscribe for the said shares of the said increased capital stock of said company attached to said 135 shares to said Levy Brothers and that said Levy Brothers relied thereon in taking said alleged assignment of said right to subscribe and accepted said offer to subscribe in reliance thereon, the defendant denies that said Levy Brothers first ascertained from the books of the defendant company that said M. L. Parsons was the holder of record upon the books of the said company of said shares before said M. L. Parsons assigned the said alleged right to subscribe to said increased capital stock to said Levy Brothers, and defendant denies that said Levy Brothers relied thereon in taking said alleged assignment of said right to subscribe or accepted said alleged offer to subscribe in reliance thereon, and defendant denies that said Levy Brothers had any right to rely thereon; and as to the statements in said last named paragraphs of said complaint wherein it is alleged that said Levy Brothers on May 3, 1912, accepted said offer and subscribed to said 3,375 shares of the increased capital stock of said Company and delivered said subscripton agreement together with the sum of $6,750.00 at the office of the registered agent of defendant and that the same were received and accepted by said defendant and that on June 10, 1912, said Levy Brothers paid to said company the sum of $10,125.00 the balance due upon said subscription which was received and accepted by this defendant, this defend-

ant alleges that neither the said registered agent of this defendant nor this defendant received and accepted said subscription agreement or said sums of money or either of them, and that neither said registered agent nor this defendant received said subscription agreement or said sums of money or either of them under or by virtue of any agreement of this defendant or its said registered agent that the same should be received or taken for said 3,375 shares of said increased stock or any share or part thereof. And defendant alleges, that neither this defendant nor its said registered agent, ever in anywise agreed that said Levy Brothers should subscribe for said increased capital stock, and never recognized any right on the part of the said Levy Brothers to make said subscription, and this defendant alleges that any subscription, agreement or any sum or sums of money received by this defendant or its registered agent from said Levy Brothers, as alleged in said last named paragraphs of said complaint, was deposited only temporarily with said registered agent and this defendant, pending the action which should thereafter be taken by the defendant with reference to said subscription; and the defendant further alleges that the defendant rejected said Levy Brothers' offer to subscribe to said stock, refused and still refuses to deliver to said Levy Brothers said shares of said increase; and the defendant at the time of such refusal returned to said Levy Brothers any money and papers temporarily left with the defendant or its registered agent, for the purpose of such subscription, and that said Levy Brothers received and have kept the same from thence until the present time.

(5) Defendant admits the ninth paragraph of said complaint.

(6) Defendant denies the tenth and twelfth paragraphs of said complaint.

(7) As to the statement in the eleventh paragraph of said complaint the defendant has not any knowledge or information sufficient to form a belief, but defendant alleges that said Levy Brothers did not on the sixth day of December, 1912, or any other time own or have any right, title or interest in or to said 135 shares of said stock formerly owned by said Parsons and had no right to transfer or assign the same or any interest therein to George W. C. Schmidt, the plaintiff, and the defendant denies that the said plaintiff had any right, title or interest whatever in and to said 135 shares of said stock or had any right whatever to subscribe for said 3,375 shares of said increase or any share or part thereof. Defendant denies that either said Levy Brothers or plaintiff has been deprived of any right or opportunity to which he is entitled, or sustained any damages whatever for which defendant is liable.

(8) The defendant further alleges that said offer made by this defendant to its stockholders to subscribe for said new stock was by its terms made only to the owners and holders of record of said stock at the close of business on April 20, 1912, and to persons to whom such holders and owners of record had assigned shares upon presentation of a duly executed written assignment thereof. And the defendant avers that the said Levy Brothers were neither holders or owners of record of said 135 shares of said stock or any part thereof nor did they hold the same or any part thereof by assignment from the holder of record and owner of said stock who held the same until the time of said assignment, and that the said Levy Brothers never gave or offered to the

defendant or its registered agent any reasonable or satisfactory proof or evidence that the said 135 shares of stock or any share or part thereof was held or owned by the said Parsons on the 20th day of April, 1912, or at any other time since said Parsons sold and assigned and transferred her stock as aforesaid, and the said Levy Brothers failed and refused to produce or submit to the defendant any certificate or certificates for said 135 shares or any share or part thereof assigned from any owner or holder of record thereof although requested so to do by the plaintiff.

(9) And defendant alleges that plaintiff's said complaint does not allege or disclose any cause of action against the defendant and defendant hereby and herein sets up and raises the objection that said plaintiff does not allege or disclose any cause of action against the defendant.

GRIGGS & HARDING,
Attorneys of Defendant.

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## Reply

HUDSON COUNTY CIRCUIT COURT

*(Filed, May 12, 1913)*

| | |
|---|---|
| GEORGE W. C. SCHMIDT, Plaintiff, vs. MARCONI WIRELESS TELEGRAPH COMPANY OF AMERICA, Defendant. | Action at Law. |

FIRST DEFENSE

1. Plaintiff has no knowledge or information as to the allegations in the second paragraph of

the answer, that for a long time prior to the 20th day of April, 1912, to wit, several years prior thereto, the said M. L. Parsons had sold, assigned and conveyed all her right, title and interest in and to said shares of stock of the defendant company, and therefore denies the same: Plaintiff further says that said allegation does not constitute or disclose a defense to the plaintiff's action, and hereby objects to the same for the reason that the same does not constitute or disclose a defense to said action.

2. Plaintiff denies that since said sale, assignment and conveyance of said stock, said M. L. Parsons has not held any interest whatever therein, at any time thereafter, and that the said M. L. Parsons was not, at any time, entitled to subscribe to any shares of the increased capital stock of the said defendant company, upon the terms and conditions of the offer referred to in the complaint.

3. Plaintiff denies the allegations of the third paragraph that said Parsons was not the holder of record and had no interest in said stock at any time after said offer to subscribe was made, and had no interest after the said alleged sale, assignment and conveyance of said stock, and that said Parsons had no right to transfer or assign the right to subscribe for the said shares of the increased capital stock, and that the said Levy Brothers did not become entitled to subscribe for said 3,375 shares of the increased capital stock of said company.

4. And the plaintiff denies that the subscription agreement and money received by the defendant from said Levy Brothers, was deposited only temporarily with said defendant, pending the action which should thereafter be taken by the de-

fendant with reference to such subscription, and denies that said subscription was rejected.

5. Plaintiff denies that said offer made by the defendant to its stockholders, for said new stock, was, by its terms, made only to owners and holders of record of said stock, at the close of business on April 20th, 1912, and to persons to whom such owners and holders of stock assigned shares, upon presentation of a duly executed written assignment thereof.

SECOND DEFENSE

1. Plaintiff will object to the allegations in the second paragraph of the answer, wherein defendant denies "that at the close of business on the said 20th day of April, 1912, one M. L. Parsons was the holder of record of 135 shares of the capital stock of said company," for the reason that said allegation is untrue.

2. Plaintiff will object to the allegation in the second paragraph of the answer, wherein the defendant alleges that said M. L. Parsons was not the owner and holder of record of said last named shares of stock, at the close of business on said 20th day of April, 1912, for the reason that said allegation is untrue, evasive and does not constitute or disclose any defense to the action.

3. Plaintiff will object to the allegation of the second paragraph of the answer, "that for a long time prior to the said 20th day of May, 1912, to wit, for several years prior thereto, the said M. L. Parsons had sold, assigned and conveyed all her right, title and interest in and to said shares of stock, and since said sale and assignment and conveyance thereof, had not held any

interest whatever therein, at any time thereafter, and that said M. L. Parsons was not, at any time, entitled to subscribe for any shares of the increase of capital stock of said company, upon the terms and conditions of said offer," for the reason that the same does not constitute or disclose any defense.

4. Plaintiff will object to the allegations of the third paragraph of the answer wherein "The defendant denies that said M. L. Parsons was the owner or holder of record, or has any interest whatever in said 135 shares or any or either of them, at any time after said offer to subscribe was made, and defendant alleges that said Parsons had not had any such interest since her said sale, assignment and conveyance thereof, as aforesaid," for the reason that the same is untrue, evasive and does not constitute and disclose any defense.

5. Plaintiff will object to the allegation of the eighth paragraph of the answer, wherein the defendant alleges "that said offer made by the defendant Company to its stockholders, to subscribe for said new stock, was by its terms, made only to the owners and holders of record of said stock, at the close of business on April 20th, 1912, and to persons to whom such owners and holders of record had assigned shares, upon presentation of a duly executed written assignment thereof," for the reason that the same is untrue, evasive and constitutes and discloses no defense.

6. Plaintiff will object to the allegation of the eighth paragraph of the answer wherein defendant avers "that said Levy Brothers were neither holders or owners of record of said 135 shares of said stock, or any part thereof, nor did they hold the same or any part thereof, by assignment, from the holder of record and owner of said

stock, and that the said Levy Brothers never gave or offered to the defendant or its registered agent, any reasonable or satisfactory proof or evidence that the said 135 shares of stock or any share or part thereof, was held or owned by the said Parsons on the 20th day of April, 1912, or at any other time since said Parsons sold, assigned and transferred her stock as aforesaid, and that said Levy Brothers failed and refused to produce or submit to the defendants any certificate or certificates for said 135 shares or any share or part thereof, assigned from any owner or holder of record thereof, although requested so to do by the defendant,'' for the reason that the same does not constitute or disclose any defense.

A. A. MELNIKER,
Attorney of Plaintiff.

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## Transcript of Testimony

HUDSON COUNTY CIRCUIT COURT

GEORGE W. SCHMIDT,
vs.
MARCONI WIRELESS TELEGRAPH Co.

Tried Thursday, November 20, 1913, before SPEER J. and a jury.

A. A. Melniker, Esq. for the plaintiff.
Griggs & Harding, Esqs. for the defendant.

Mr. Melniker: In this matter a motion was made some time ago to strike out certain parts of

the answer on the ground that they did not constitute a defense to this action. Your Honor determined that motion and decided against it and refused to strike out the parts of the answer objected to. I understand under this new practice act that that matter may be raised afterward on appeal of the whole case. Now I thought I might call the Court's attention to it at this time for the purpose of recording an objection to Your Honor's determination of that motion. Perhaps I ought to have some record of an objection to that decision on that motion in order to have it reviewed if it comes to that point.

The Court: Whatever you have done, it is on the record now. I am making no ruling now. I have ruled on the question.

Mr. Melniker: I wish to renew that motion at this time. In my reply to the answer I have raised that same objection.

The Court: Then it is there, and whatever it is you have the advantage of, but I am not going to re-open the entire proposition and pass upon it. That I will not do.

Mr. Melniker: Then I would like to enter an objection to Your Honor's refusal to entertain a motion to strike out at this time.

The Court: Whatever you have on the record, it is there. You see you want to understand that under the new practice act the design of the framers of that act, which has not been carried out in practice, at least not as they intended it, was to have all questions of pleadings determined before the case came on for trial in Court at all by a commissioner especially appointed for that purpose. Now desiring to save the State some money, I presume—I do not know the other

reason for it, if there was any—the Supreme Court appointed the circuit judges, all of them, you were not already Supreme Court commissioners, commissioners and permitted them to go on and determine these questions, but the design of the act and the intention of the framers of the act is carried out just exactly the same as if special commissioners had been appointed and the matter had now come up before me on the pleadings as adjusted and framed before this special commissioner, and therefore when I refuse to entertain your motion I refuse to entertain it because I think such ruling would be entirely in line with the design of the framers of the act and with the purpose and intention of the legislature in enacting the act, and that all I am to do with these things now, the pleadings having been settled, is to proceed with the determination of the issues raised under those pleadings in this Court.

I want you to understand I am not doing any arbitrary thing, but following out what I think to be the proper method under the new practice act.

Mr. Melniker: I understand that. You will understand we are more or less groping in the dark under this new practice act.

The Court: And the only way we can find the light is by making such rulings as I am making now.

Mr. Melniker opens to the jury.

Mr. Harding opens to the jury.

Recess.

Mr. Harding: In this case we are unable to determine from the opening of counsel whether he is now saying that Miss Parsons did not or did transfer these shares of stock as the defendant claims. You will remember on the argument before Your Honor that was assumed to be true, and I think we ought to know now what the contention of counsel is, what they actually contend.

The Court: That she did not transfer them to whom?

Mr. Harding: Whether Miss Parsons was the actual owner of this stock on the 20th of April.

The Court: You mean he has not opened on that point at all?

Mr. Harding: I say he has not disclosed that at all, and I think it is a thing we ought to know now. We assumed on the argument before Your Honor before that she was not the owner.

Mr. Melniker: I make no mention of that in my complaint. That defense is raised by the defendant in his answer; and furthermore I ask that that be stricken out, the statement that that was assumed in the argument. It had to be assumed for the purposes of argument and I had to assume the truth of the statements in their answer, but I do not assume it on the trial of the case. That is their defense. It is a defense of fact which they have to prove.

The Court: You may go ahead. I do not think you are obliged to disclose that. I think that is part of their defense possibly.

Mr. Melniker: There were one or two matters that I think I might call attention to that are admitted. There is a written admission here in answer to a demand for an admission made by me upon the defendant, with regard to the number

of shares standing in the name of M. L. Parsons on the books of this Company on the 20th day of April; in response to my demand the defendant by its counsel admitted that there were 135 shares of the capital stock of the defendant herein standing in the name of M. L. Parsons on the books of said company at the close of business on the 20th day of April, 1912.

I want to offer that stipulation.

Paper marked P-1.

H. A. PINCOTT, sworn:

Direct-examination by Mr. Melniker:

Q. What is your business? A. I am order clerk for Levy Brothers.

Q. How long have you worked for Levy Brothers? A. Three and a half years.

Q. Were you working for them on the 3d day of May, 1912? A. I was.

Q. I want to show you two checks, both dated May 3, 1912, on the Mechanics & Metals National Bank, signed by Levy Brothers, to the order of Corporation Trust Company, one for $5,000 and one for $6,250, and a paper which purports to be an assignment of rights, signed by M. L. Parsons, and which bears your name, H. A. Pincott, and a paper which purports to be a subscription for shares of the Marconi Wireless Telegraph Company, signed by Levy Brothers, and ask you if you ever saw those papers before? A. Yes, sir, I saw those papers.

Q. Where did you see them, and when? A. The checks I took over to the Corporation Trust Company; this subscription blank I took over—both of them I took over.

Mr. Harding: Will you speak a little louder?

A. Both subscription blank and checks I took over to the Corporation Trust Company of Jersey City.

Q. You took all these papers I have just shown you to the office of the Corporation Trust Company of Jersey City? A. I am not sure of this one (indicating), but this subscription here and the two checks I am positive of.

Q. Did you leave them there? A. I left them there for a receipt.

Q. Where did you get these papers? A. From Mr. Levy at the office.

Q. A member of the firm of Levy Brothers, for whom you were working? A. Yes, sir.

Q. Do you know the signature of M. L. Parsons? A. I do.

Q. Is that her signature on that paper (indicating)? A. Yes.

Mr. Harding: The paper shows that he is a subscribing witness to it. The question should be whether he saw her sign it, I suppose.

The Court: I suppose he can be asked if he knows her signature. I do not suppose the paper is inadmissible in evidence until it is shown that he did see her sign it.

A. That is her signature, yes.

Q. Do you know the signature of Levy Brothers? A. I do.

Q. Is that (indicating) the signature of Levy Brothers, on these two checks, and the subscription agreement? A. Both of them are Levy Brothers' signature.

Q. And on this assignment of rights? A. Yes.

Mr. Melniker: I offer those papers in evidence.

Mr. Harding: We wish to cross-examine to see if the witness saw them signed.

Mr. Melniker: I do not pretend that he saw them signed.

The Court: If you do not pretend he saw the paper signed, and his name appears on it as a witness, I will not admit it.

Mr. Harding: We object to it on the ground stated.

The Court: As I understand the law in this State, it is if you have a subscribing witness you must prove by him the fact of the signature having been signed in his presence.

Mr. Melniker: We do not pretend that the signature was made in his presence.

The Court: Then you have to show that it was not made in his presence by calling him and asking him if that is his name and proving that he did not witness it.

Q. Is that your name on there? A. That is my name, my signature.

Q. Did M. L. Parsons sign this paper in your presence? A. No, not in my presence.

Q. How did you come to put your name on that? A. I am familiar with her signature.

Q. How did you come to put your name on there? A. I was asked to put my name on it. I was asked if I knew her signature and I answered yes, and I was asked to sign.

Q. And you are familiar with the signature? A. Yes.

Q. Do you know where M. L. Parsons is now? A. No, that I do not know.

Mr. Melniker: I offer it now.

Mr. Harding: We object to it on the ground stated.

The Court: What is the ground now? I suppose if he was not the subscribing witness in the sense we generally understand a subscribing witness, and he knows her signature and he testifies that this is her signature, why the paper is proven. I think I will admit them.

Checks marked P-2 and P-3 respectively; subscription agreement marked P-4; assignment of rights marked P-5.

CROSS-EXAMINATION by Mr. Harding:

Q. How long have you worked for Levy Brothers? A. Three and a half years.

Q. What are the names of the Levy Brothers? A. Guy W. Levy, C. Sedgwick Levy, Herbert W. Levy.

Q. They are partners doing business as Levy Brothers? A. As Levy Brothers.

Q. And are you familiar with the signatures of all of them? A. I am.

Q. I show you a letter dated April 26, 1912, addressed to the Corporation Trust Company, which purports to be signed by Levy Brothers, and ask you— A. H. W. Levy's signature—Herbert W. Levy.

Q. Herbert W. Levy's signature, is it? A. Yes.

Paper marked D-1 for identification.

Q. I show you a letter dated May 6, 1912, purporting to be signed by Levy Brothers. A. That is signed by H. W. Levy.

Q. That is H. W. Levy's signature? A. H. W. Levy.

Paper marked D-2 for identification.

Q. I show you a letter dated June 13, 1912, addressed to the Marconi Wireless Telegraph Company of America, signed Levy Brothers, and ask you whose signature that is? A. That is H. W. Levy's signature.

Marked D-3 for identification.

Q. I show you another letter dated June 13, 1912, addressed to the Corporation Trust Company, Jersey City, N. J., purporting to be signed by Levy Brothers; whose signature is that? A. H. W. Levy.

Paper marked D-4 for identification.

Q. When you delivered the checks and subscription agreement to the Corporation Trust Company you spoke of getting a receipt? A. Yes, sir.

Q. Where is that? A. The blue receipt, I think that was turned into the Corporation Trust Company.

Q. What? A. I think it was delivered to the Corporation Trust Company. I know I got a blue receipt and I gave it to one of the members of the firm.

Mr. Melniker: That receipt was returned to the company when the second payment was made.

The Witness: We haven't that first receipt at all.

Q. When did you get this receipt you have spoken of? A. The day that I delivered the checks.

Q. And what did you say you did with it; you gave it to Levy Brothers? A. I returned it to one of the bosses.

Q. M. L. Parsons was a woman? A. Was a lady, yes, sir.

Q. And she was employed by the Levy Brothers, wasn't she? A. Not at that time.

Q. What? A. Not at that time.

Q. At what time? A. Not in May, 1912.

Q. She was not employed in May, 1912? A. Not by them.

Q. When did she leave their employ? A. That I do not know.

Q. How often had you seen her signature? A. Several times.

Q. And where did you ever see her write? A. On stock certificates.

Q. And when? A. Oh, years back.

Q. What year did you ever see her write on stock certificates? A. I do not remember, but as far back as I know, as far as seven years back—five to seven years back.

Q. And when did she leave the employ of Levy Brothers? A. That I do not know.

Q. Well, about how long? A. I don't know. I was not employed by Levy Brothers when she worked there, or was—

Q. Were you in their employ when she worked there? A. No.

Q. Did you know her while she was employed by Levy Brothers? A. I did.

Q. Where did you know her? A. In Levy Brothers' office at 84 Wall Street.

Q. How did you come to see her sign any papers there? A. Taking deliveries from Charles A. Stoneham & Company, down to Levy Brothers' office at 84 Wall.

Q. When did you see Miss Parsons last? A. About three years ago; maybe longer than that.

Q. Do you know where she lives now? A. I do not.

Q. Do you know anything about her, where she has lived since she left Levy Brothers' employ? A. No, sir, I do not.

Mr. Harding: We would like to recall this witness. We have mislaid a paper here that we wish to call his attention to.

RE-DIRECT-EXAMINATION by Mr. Melniker:

Q. You do not know that she ever worked for Levy Brothers, do you? A. I don't know that she ever worked for Levy Brothers, no.

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BENJAMIN F. WOLLMAN, sworn,

Direct-examination by Mr. Melniker:

Q. I want to show you a paper, a check dated June 10, 1912, on the Mechanics & Metals National Bank, to the order of Corporation Trust Company, signed by Levy Brothers, and ask you whether you ever saw that check before? A. I have.

Q. Where did you see it and when? A. I delivered that check to the Corporation Trust Company.

Q. In Jersey City? A. In Jersey City.

Q. And left it there? A. Left it there.

Q. Do you know whose check that is? A. Levy Brothers'.

Mr. Melniker: I offer that check.

CROSS-EXAMINATION by Mr. Harding:

Q. This check is dated June 10, 1912; whom did you represent at that time? A. Levy Brothers.

Q. In what capacity? A. Attorneys.

Q. You are an attorney? A. I am an attorney, yes.

Q. Had you seen Governor Griggs before that time with reference to the matter? A. I can not tell if I saw him before or after, but I saw him about several matters in the Marconi matter.

Q. And at the time when this check was dated, June 10, 1912, you knew, did you not, that the Marconi Company denied the right of Levy Brothers to subscribe for this stock? A. This was the situation in regard to this matter. I had charge—

The Court: Did you know at that time? A. I can't tell whether I did or not, and if you will permit me to explain—

Q. I am willing.

The Court: Do you want the explanation?

Mr. Harding: I think so.

A. I was not handling that matter; Mr. Cohn of our office was handling that matter. I had another matter for Logan & Brown and Mr. Cohn was tied up on the day this check was to be delivered, and I was requested to take care of that matter. He was in Court or something; and when I was talking to the judge about the other matter I think this matter came up.

Q. Talking with whom? A. Judge Griggs. This matter came up—this was another claim that we had against the Marconi.

Q. And in that conversation you learned, did you not, that the Marconi Company disputed the right of Levy Brothers to subscribe? A. That was my understanding, they disputed the right.

Q. Can you state when that was? A. I can not. I had forgotten about this whole situation. I

was just called up last night and had not thought about it for months. I haven't any connection with the suit at all.

RE-DIRECT-EXAMINATION by Mr. Melniker:

Q. You knew nothing about this particular matter of Levy Brothers, with regard to their business with the Marconi Company, did you? A. I did not know the history of it at all. I knew there was some matter in the office, but I did not know the facts.

Q. You had nothing to do with it yourself? A. I had nothing to do with it.

Q. And you were requested simply to take this check over and deliver it? A. I think that was so, and I think at some period when I discussed the other matter he asked me or I told him there was another claim in our office—Levy Brothers.

Q. But so far as Levy Brothers was concerned your only connection with it was—

Mr. Harding: He is asking leading questions here.

The Court: There isn't any question here, but that is a most excruciatingly leading question you have started to ask. All he has to do is to say "Yes" if he follows your lead.

Q. At the time you delivered this check did you have any connection with or knowledge of the Levy Brothers-Marconi transaction? A. I did not.

Q. Anything except that you were requested to deliver this check? A. That was all.

RE-CROSS-EXAMINATION by Mr. Harding:

Q. Your firm had such knowledge, didn't it? A. Yes, our firm had. Our firm had the case. I do not know just exactly the history of it. Our firm had the case, the claim or whatever it was—the matter.

RE-DIRECT-EXAMINATION by Mr. Melniker:

Q. Do you know whether this thing you call the case and this knowledge or conversation you had with Governor Griggs came up before you delivered this check or afterwards? A. Well, all I know is that our office—that I delivered that check.

Q. What I am asking you now is, do you know whether your firm's connection with this case, with this so-called case, or whether your conversation with Governor Griggs came up after you delivered this check or before? A. It was after.

Q. And the Corporation Trust Company took this check without any question? A. Without any question.

Mr. Harding: Isn't that rather leading?

Mr. Melniker: I will put it otherwise.

Q. Did they make any question about it?

Mr. Harding: He has already answered it.

Q. Did you ever see that check again after that until today? A. I never saw the check again after that.

Check designated Exhibit P-6.

EMANUEL COHEN, sworn:

Direct-examination by Mr. Melniker:

Q. What is your business? A. I am assistant manager to R. M. Tower, who represents a London Stock Exchange House in New York.

Q. What is the nature of the business of Tower & Company with whom you are the assistant manager? A. We buy and sell stocks in London on the London Stock Exchange—trade in London.

Q. Do you deal in Marconi Telegraph Company stock? A. We did.

Q. Did you deal in it about the 3rd of May, or between the 1st and the 15th of May of 1912? A. We did.

Q. Do you remember what the highest market price—

Mr. Harding: We object.

Q. Do you remember what the higest price of the Marconi stock was between the 3rd day of May and say the 1st day of June?

Mr. Harding: We object.

A. I could not tell you—

Mr. Harding: That is objected to as immaterial. If the Marconi Company should be liable at all in damages in this case the measure of damages would be fixed by the market value of the stock at the time when the certificates were deliverable under the terms of the offer.

Question allowed.

Question repeated.

Mr. Harding: On the New York market.

A. New York market, I could not tell you. I could tell you probably better on the London market.

Q. What was it on the London market? A. I think it was about two and a half pounds. They deal in pound shares; something between two and a half and two and three-quarter pounds.

Q. What was the New York equivalent of that? A. The New York equivalent would be around twelve dollars.

Q. Where was the biggest market for Marconi shares? A. London.

Q. I want to show you some papers, one dated May the 9th, 1912, and ask you what it is. A. That is a notice from our office to Levy Brothers of the sale of—

Mr. Harding: We object to that.

Q. Will that paper help you to refresh your memory as to the exact quotation of that stock on the day of the date of that paper? A. Yes, sir; it would tell me that on May 9th Marconi stock—

By the Court: Q. Did you make that paper? A. I signed it.

By the Court: Q. Were you conversant with the fact at the time you made it out that the paper purports to represent? A. Yes, sir.

The Court: Go ahead.

A. It tells me that on May 9th Marconi sold at two and a half pounds and two and fifteen thirty-second pounds in London.

Q. What is the New York equivalent of that? A. Twelve and three-sixteenths and twelve dollars, at the rate of exchange that date.

Q. And was the New York price the same as the London price? A. Probably. I could not tell you if this was before or after the New York opening. The market was about the same.

Q. It would not vary more than a few pennies? A. Well, it might vary an eighth to a quarter.

Q. Do you know what the lowest price of this stock was prior to June the 10th? A. I could not tell you offhand.

Q. Have you any idea?

Mr. Griggs: I do not think we want an idea; we want knowledge.

A. I could not tell you offhand; I could not give you exact data.

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H. A. PINCOTT, re-called:

Direct-examination by Mr. Melniker:

Q. Do your duties with Levy Brothers bring you in contact with the sale of stock? A. It does.

Q. So that you are familiar with the sale of stock, the prices of stock? A. It does.

Q. Are you familiar with the market price of different stocks traded in on the curb? A. Most of them.

Q. The Marconi stock was a curb stock? A. Yes, sir.

Q. Do you know what the New York market price of Marconi stock was between the 3rd day of May and the 10th day of June?

Mr. Harding: That is objected to on the same ground.

Mr. Griggs: We don't object to the 10th of June.

The Court: I will admit that and you may note the objection.

Q. What was it? A. Well, around—it varied from 12 3/4 dollars and went lower.

Q. It what? A. As well as I could remember, 10 5/8—10 1/2, 10 5/8, something like that.

Q. Do you say it was any lower than 10 1/2 before the 10th of June? A. Not as far as my memory goes back.

Q. I want to show you a book which contains a lot of clippings and ask you what this book is. A. This book contains the prices of stocks, New York, San Francisco, Toronto, Salt Lake.

Q. Does it contain the quotations of Marconi? A. Yes, sir.

Q. Can you by looking at those quotations refresh your memory so that you can tell us exactly what the lowest price of Marconi was between the 3rd of May and the 10th of June? A. From the 10th of May to the 10th of June?

Q. From the 3rd of May to the 10th of June. Just look through it.

Mr. Griggs: I think if you will look on the 10th of June you will find it the lowest.

Mr. Melniker: I think that is so.

A. From 11.35, high sale—

Mr. Griggs: Not London—New York.

Mr. Harding: The answer will get confused. What date are you talking about now?

The Witness: May 3rd. May 3rd the low price, $11.35 a share.

Q. What was it on June 10? A. $8.50.

Q. It was not any lower in between those two dates? A. No—just a second; wait till I go through the book. Yes, on May 29, $7.75.

Q. May 29, $7.75? A. Right.

Q. Is that the lowest price you can find? A. $8.50 low on the 22nd.

Mr. Harding: Q. Of what?

The Witness: Of May.

Mr. Harding: $8.50 on the 22nd of May?

The Witness: That is the low price. $8.50.

Mr. Griggs: We want to reserve the right to recall him.

Mr. Melniker: I offer the assignment from Levy Brothers to George W. Schmidt, plaintiff in this case. I understand there is no objection.

Paper marked Exhibit P-7.

Plaintiff rests.

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## Defendant's Testimony

JOHN W. GRIGGS, sworn:

Direct-examination by Mr. Harding:

Q. You are connected, I believe, with the Marconi Wireless Telegraph Company? A. I am.

Q. In what capacity? A. President, and general counsel.

Q. How long have you been such? A. Over three years last past.

Q. And do you recall the offer made to the stockholders of the Marconi Company to subscribe for a new issue of stock? A. Yes.

Q. That offer was made in April, 1912? A. April, 1912.

Q. At that time did you have some personal supervision over the question as to who were entitled to subscribe?

Mr. Melniker: I object to that question as entirely immaterial, irrelevant and incompetent. The right to subscribe would be determined by law and not by the witness' idea of it, and was circumscribed by the offer which the company made in writing.

The Court: The objection is overruled. I suppose this is merely preliminary. I will permit it.

Mr. Harding: That is all.

A. Yes.

Mr. Melniker: I think I ought to note my objection.

The Court: Yes, it may be noted.

Q. And in performing that duty for the company did you have occasion to consider the case of this alleged subscription of the Levy Brothers?

Mr. Melniker: I object to that—

A. Yes, as to what—

Mr. Melniker: —as immaterial, irrelevant and incompetent; that the rights of Levy Brothers are determined by their agreement and by the agreement of the company, and those agreements and all those rights are included in the writings that passed between them, and the witness' construction of the rights is of no consequence.

The Court: Objection overruled.

Mr. Melniker: I ask that my objection be noted.

A. Yes; the matter was brought to my attention.

Q. Just state the facts in connection with that.

A. It was brought to my attention by some officer, I think the Treasurer of the company, that among other persons that had exercised, or assigned a claimed right to subscribe without being actual owners of the stock was M. L. Parsons, who has assigned to Levy Brothers. I investogated the matter and subsequently saw one, if not two, members of the firm of Levy Brothers in connection with one

or more of their counsel; one I remember was Mr. Wollman, who was just on the stand, and the other was some one else from their office, I suppose it was the Mr. Cohn that he mentioned. They came to see me and confer with me relative to the objections that had been conveyed to them against their right to subscribe. I questioned Mr. Levy and his attorney as to whether M. L. Parsons or they actually owned this stock at the time they subscribed and informed them that our information was that they had sold and parted with all right to the stock in 1905. They said, yes, that was true, but that the persons that had bought the stock were in South America and inasmuch as they were in a measure clients of theirs they thought they ought to make this subscription to protect them. I asked them whether they had had any request from their clients to do it, and they said, no. I asked them if they had any agreement with them to turn over the stock or the benefits of the stock to them, and they said, no, but they were doing it on the broad principle that if they made anything out of it they would do what was right by those that had been their clients. There was considerable conversation between Levy Brothers' attorney and myself as to the right of a person whose name appeared on the stock book of the company, but who had parted with his stock and had no further interest in it or in the company, to subscribe, I taking the view that such a person had no right to subscribe and they contending that they had. However, ultimately I informed them that the company did not think—that I did not think they had a right to this stock because they were not actual owners of stock, and that we would refuse to issue the stock to them. I think that conversation occurred some time—

the first conversation—the first notice to them—about the middle of May, and since Mr. Wollman was on the stand I am inclined to think that my conversation with him was before the 10th of June and that his delivery of that check was made in order simply to legalize the claim which they notified us they were going to bring in the shape of a lawsuit.

Q. Was Mr. Sol Meyers one of the counsel—

Mr. Melinker: This answer was so long that I lost track of it. I want to enter an objection and move to strike out this answer on the ground that it is hearsay and not binding on the plaintiff in this case, and that it is not the best evidence of what the witness attempts to prove by it, and that it is incompetent, and that the rights of the plaintiff and of the Levy Brothers are determined entirely by the written agreement between the parties.

The Court: Why, the very object of this suit is to determine whether there is any legal written agreement. That is the very purpose of the suit, and you can not claim that the thing which is challenged is unchallengeable. The thing would be absurd. And so far as the hearsay is concerned, I see absolutely no hearsay. This evidence that the governor has been giving is evidence with respect to conversations had between Levy Brothers, or Levy Brothers' authorized representatives, who were the predecessors in title of your plaintiff, with respect to the subject-matter of the contract here. Manifestly it is not a matter of hearsay; it is a matter of admissions on their part with respect to the ownership,

title and other things incidental to the transaction itself, and I overrule the objection and you may have it noted on the record.

Mr. Melinker: Note my objection, please.

Q. Now upon these facts which you learned, gotten from these statements that were made to you by Levy Brothers and their counsel, what action did the Marconi Wireless Company take with reference to their subscription? A. They rejected it and refunded to them their money.

Q. And their subscription agreement? A. Well, I do not remember whether we gave them back their subscription agreement or not.

Q. Was one of the counsel Mr. Sol Meyers that talked to you with reference to the matter?

Mr. Melinker: I object to that. I do not think this witness is competent to characterize the relationship between Mr. Sol Meyers and Mr. Levy.

The Court: I think I shall overrule the question in its present form. Unless it is shown that he was an attorney for them or had some authority to speak for them I do not think what he said is evidence.

Q. Well, in the course of those negotiations with Levy Brothers I will ask you whether or not Mr. Sol Meyers took up the subject with you?

Mr. Melniker: I object to that. Suppose he did? He might have done so on his own initiative without any authority.

The Court: I will permit the fact that he took it up to be testified to—

A. He did.

The Court: —but unless it is shown he had some authority to speak, what he said is not evidence.

Q. When was that with reference to the conversations that you have previously stated you had? A. Oh, I should say that was six months afterwards, after the money had been refunded.

Q. In your conversation with Levy Brothers was anything said with reference to Mr. Meyers negotiating in the matter? A. No.

Q. There was not? A. No. Mr. Harding, I can not connect Mr. Meyers with Levy Brothers except by what Meyers said.

Q. I see. I will ask you this question: Did Mr. Meyers come to you purporting to act on behalf of Levy Brothers in connection with this subscription?

Mr. Melniker: I object to it.

The Court: Objection sustained. I think under the authority of Livingston vs. Gifford, 10 Stew. and all the other cases on the subject, you can not prove agency by the declarations of the agent.

Q. You knew, I believe, the quotations, the market price of Marconi stock on the 10th of June? A. I did know, and I have refreshed my recollection since.

Q. You had pretty good reason to know what it was? A. Yes.

Q. What was it from June 10th on?

Mr. Melniker: I object to what it was from June 10th on.

Q. Well, from June 10th, from that on for a week or two? A. My recollection is that on June 10th it was about 8 1/2 to 8 3/4.

Q. And how did it continue?

Mr. Melniker: I object to that. I do not think it makes any difference what it was afterwards. I am willing to concede that it never was any higher than it was on June 10th.

Q. The stock kept going down after that, and at the present time it is below par, isn't it?

Mr. Melniker: I object to that.

The Court: I do not see the relevancy of that. I do not think I will permit it.

CROSS-EXAMINATION by Mr. Melniker:

Q. Mr. Griggs, you say you are the president and the general counsel of this company? A. Yes.

Q. And I suppose are interested in the stock to some extent? A. Yes; I had to be to be a director of the company under the law of New Jersey.

Q. And the extent of that interest is sometimes one share? A. What?

Q. Sometimes that interest is only one share? I assume you had more than that. A. I'll tell you how much I have got if you want to know. Your assumption is right. I have more than one share.

Q. I am not curious about that. Now your company refused to deliver stock to persons who actually had certificates of stock on the 20th day of April but who had not transferred the stock on the books of the company, did it not? A. I do not recall any such cases.

Q. I refresh your memory by recalling the case to you of Louis Brass, which is now pending in the Courts of this State. A. Yes, that is true.

Q. That is a case where the plaintiff, Mr. Brass, actually had the stock— A. But did not record it.

Q. And your company refused to deliver the new shares to him; is that so? A. Yes.

Q. And the reason that your company gave for the position took at that time was because Mr. Brass had not recorded his transfer on the books and he was not entitled— A. Do you want me to state the reason or to accept your statement?

Q. Isn't that so? A. Not exactly, no.

Q. Wasn't the position your company took that no person was entitled to the new stock except they actually had the stock and their names appeared on the books of the company as the actual owner of the stock? A. Yes, sir.

Q. So that any person whose name appeared on the books of the company as the owner of stock, who did not actually have the stock in his possession, your company refused to issue— A. Did not actually own the stock.

Q. Sir? A. Any person whose name appeared on the books of the company but who did not own the stock, we held had no right to subscribe. Any person who owned stock but did not have it registered in his name so that his name did not appear on the company's books we held was not entitled to the subscription.

Q. And in that manner your company eliminated a great number of stockholders, didn't they? A. No; very few.

Q. This offer of subscription provided that in all cases where stock was not subscribed for, the board of directors had a right to do with it as they saw fit, didn't it? A. That is my recollection.

Q. And by the means of this freezing out process the board of directors got control of a great deal of stock which they used for speculative purposes; isn't that so? A. Not at all; there is not a word of truth in that. No director of the Marconi Company speculated in its stock or had any advantage from it whatever, sir.

Q. Wasn't this stock, this stock that was not delivered, the stock that caused so much trouble and talk in England in regard to the speculation

by members of the British Government? A. That is a matter of news, but it had nothing to do with the American directors or officers and their names were never mentioned in connection with it.

Q. That is the stock, is it, the stock that was withheld? A. It was the American Marconi stock that was bought and sent over and traded in in London, as your witness testified.

Q. Now you say that after these talks that you had, the subscription of Levy Brothers was rejected and the money was refunded. When was the subscription rejected? A. Why, I think I notified them in May that we would not accept their subscription, as nearly as I can recall.

Q. Isn't it a fact that the first information that came was by means of this letter from the Corporation Trust Company, dated June the 12th? A. No, because I had told Mr. Levy and his counsel before that time that we would not accept their subscription. That is the first formal notice, perhaps—in writing.

Q. This is the first formal notice? A. So far as I know, yes.

Q. June 12th—in which Levy Brothers were notified by the Corporation Trust Company that their money would be returned to them? A. I think so; at least I do not know of any earlier than that.

Mr. Melniker: I ask you, Mr. Harding, to produce a letter dated June 13, 1912, to the Marconi Wireless Company from Levy Brothers.

Mr. Harding: I have it. (Produces letter.)

Q. Now, Governor, this letter of June 13, to the Marconi Wireless Company, by Levy Brothers, did you ever see that letter? A. I do not remember now whether I did or not.

Q. Do you know what was done with this letter; do you know what if anything was done with this letter? A. You mean immediately after its receipt?

Q. Yes. A. No, I do not remember.

Q. Wasn't all the correspondence in this case referred to you? A. No, not originally; not until you brought your suit did I try to collect it all.

Q. Wasn't it on your advice that this company rejected this subscription? A. Yes.

Q. Didn't you have all the data and correspondence before you when you gave your advice? A. No.

Q. Then you did not see this letter of June 13th in response to the letter of June 12th? A. I doubt it, that I saw it at the time.

Q. Before you gave your advice? A. I donbt if I did. That was the formal carrying out of verbal instructions.

RE-DIRECT-EXAMINATION by Mr. Harding:

Q. For the purpose of refreshing your memory with reference to the dates when Levy Brothers were notified that their subscription would not be allowed, I show you this paper. A. Yes, I see this.

Q. Does that refresh your memory as to whether or not there was any notification given to Levy Brothers prior to June? A. Well, my recollection, as I have stated, was it was about the middle of May that I saw their counsel. This letter is dated May 17th, which confirms my memory very closely.

Q. What was the relation between the Corporation Trust Company and the Marconi Company? A. They were mere agents to whom these subscriptions might be sent and payments be made.

Q. How is that? A. They were mere agents to whom the stockholders might send their subscriptions to the new stock.

Q. Yes? A. Many thousands of subscriptions were sent from all over the country by mail, and the last two or three days there was a crowd around their window there that reached across to the street, being people present to put in their subscriptions.

Q. And in what way did they take these subscriptions and money? A. Oh, they took them and issued a receipt for the mere—acknowledging what they had received and stating that it was received for examination.

Q. And then was it referred to the Marconi Company? A. Yes, it was referred to the Marconi Company.

Mr. Melniker: Don't lead.

A. And if there was a case of any doubt it was referred to me as counsel. I passed on many hundreds of cases.

Q. And that was for the purpose of passing upon the validity of the subscriptions? A. That was it, the right of the subscriber to have his new shares.

Q. And that was all the authority they had, just to take it that way? A. That was all they had.

Q. I omitted to ask at what time you could have delivered this stock physically? A. It would have ben impossible to make delivery of the stock subscribed until after the 10th of June. The certificates in a large number could not have been prepared and signed—there were many thousands of them called for—before that time. While it may have been that there were a few issued as a favor in exceptional cases before that, where we got

them in a large bulk they were not issued until long after the 10th of June.

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SIDNEY A. ANDERSON, sworn:

Direct-examination by Mr. Harding:

Q. Where do you live? A. Jersey City.

Q. And what is your business? A. I am assistant auditor of the Corporation Trust Company.

Q. Were you such in the year 1912? A. I was.

Q. All of that year? A. All of that year.

Q. Do you recall the time when the Marconi Wireless Company made an offer to its stockholders to subscribe? A. I do.

Q. In April, 1912? A. Yes, sir.

Q. The Corporation Trust Company acted in some cases to receive subscriptions? A. Yes, sir.

Q. Do you remember when Levy Brothers, who have been mentioned in this suit, made an offer to subscribe for stock as assignee of the shares of M. L. Parsons? A. I do not remember that particular subscription. Levy Brothers were continually coming in there with subscriptions. I do not remember that particular subscription.

Q. Levy Brothers had other subscriptions, did they? A. Oh yes, many.

Q. Other than the Parsons case? A. Many, yes, sir.

Q. And do you recognize this paper, which purports to be a subscription of Levy Brothers? A. I have seen it.

Q. You have seen that paper? A. Yes, sir.

Q. And do you recall that assignment of rights? A. Yes, sir, I have seen it.

Q. You have seen those before? A. Yes, sir.

Q. Were those subscriptions taken to the Corporation Trust Company? A. They were received.

Q. And how were they received? A. For examination.

Mr. Melniker: I object to that and ask to have it stricken out. The offer of subscription provided that all subscriptions and payments for the new stock must be made to the Corporation Trust Company, the registered agent, at 15 Exchange Place, Jersey City, N. J. Now I think that anybody dealing with this company, who had a right to deal with them at all, had a right to deal with them in accordance with the provisions of this offer and had a right to go there to this registered agent just the same as though it were to the company itself, and I do not think this witness can say that there was some understanding between agent and principal other than what this offer purports to be.

The Court: What was the relation between them? Do you mean to say that in any case at all the Corporation Trust Company had the right to pass upon the validity of it and to accept the subscription?

Mr. Melniker: Yes.

The Court: I do not think so. I think that it is ambiguous to say the least about it, and therefore what the extent of their authority was I will permit to be proved.

Mr. Melniker: I ask that my objection be noted.

Q. And how were those subscriptions taken, and the check, you say? A. They were received for examination.

Q. And then what was done? A. Checked with our books and if there was any question we referred them to our principal.

Q. And the principal of course was the Marconi? A. And they would advise us.

Q. I will ask you if at that time you gave to the subscribers a receipt for their subscriptions? A. We did.

Q. I show you another paper and ask you if that is the receipt that was given to the subscribers? A. It is the form of receipt.

Mr. Melniker: Is that the receipt or the form of the receipt?

A. The form of receipt.

Mr. Melniker: I object to it.

Q. Was the same receipt given to every subscriber? A. It was.

Mr. Melniker: I object and ask that it be stricken out as immaterial and incompetent what was given to other subscribers.

The Court: If it was given to every subscriber the presumption would be very clear it was given to this subscriber. If that was the uniform practice with respect to every subscription that came in, then the presumption would be that this subscriber got it also.

Q. This paper is a printed blank form? A. Yes, sir.

Q. Do you recall the time when the money was refunded to Levy Brothers for their subscription? A. Yes, I recall the time.

Q. And can you state whether or not you asked for a return from Levy Brothers of the receipt that you gave them? A. I did not write the letter; I read the letter, and it was asked for in the letter that I read.

Q. Was it ever returned? A. Not to my knowledge, no.

Mr. Griggs: You have looked to see if you have it?

A. I have looked and I can not locate it.

Mr. Harding: I offer this receipt in evidence.

Mr. Griggs: We have asked the plaintiffs to produce it also.

Mr. Melniker: I do not think you have. I object to that receipt on the ground it is not the best evidence of the receipt that was given to us.

The Court: Well, you haven't the receipt yourself?

Mr. Melniker: No.

The Court: And you have been called on to produce it?

Mr. Melniker: We have not been.

The Court: Well, if there is any question about it I will adjourn this case till Monday and give them an opportunity to give you the regular notice.

Mr. Melniker: I don't know that that receipt is a copy of the receipt we got.

The Court: You do not have to know, Mr. Melniker. The proposition is whether you insist on saying that you haven't received, and insist on receiving, a notice to produce as a foundation for offering secondary evidence of the contents of this receipt which you say you received when you deposited your subscription with the Corporation Trust Company.

Mr. Melniker: I will waive it.

Paper marked D-5.

Mr. Harding: This receipt is as follows, in printed form.

"The Corporation Trust Company, 15 Exchange Place, Jersey City, N. J. Re-subscription to new stock of Marconi Wireless Telegraph Company of America. Subscription agreement for (blank) shares. Received for examination. Assignment of rights. Cash; check, etc." And signed, "The Corporation Trust Company." It further says, "If papers are in order, permanent receipt will be delivered upon surrender of this receipt."

I ask you to produce the two letters from the Corporation Trust Company to Levy Brothers.

Mr. Melniker: Here is one of June 12th, and here is one of June 26th.

Q. I show you a letter dated June 14, 1912, addressed to the Corporation Trust Company—

Mr. Griggs: Those have been marked for identification and identified by the other witness.

Mr. Harding: The signatures were. They have not been offered in evidence.

Q. I show you a letter dated June 14, 1912, signed by Levy Brothers and addressed to the Corporation Trust Company, and ask you whether or not you received that letter? A. I did.

Q. You brought that here with your files, did you? A. Yes, sir.

Q. And D-3 for identification, dated June 13, 1912; that is to the Marconi Wireless Telegraph Company of America, signed by Levy Brothers; was that among your files also? A. It was.

Q. I show you a letter dated June 12, 1912, addressed to Levy Brothers, 44 Broad Street, New York City, purporting to be signed by the Corporation Trust Company, and ask you if that is

the letter which the Corporation Trust Company sent to Levy Brothers?

Mr. Melniker: Will you let me look at those? I may let them all in without any question.

Mr. Harding: Look it over. This is your own letter. I am only asking about the letter which you produce.

A. That letter was written by the Corporation Trust Company.

Mr. Harding: I will offer that letter in evidence, D-6.

Q. I also show you a letter dated June 26, 1912, purporting to be signed by Corporation Trust Company, addressed to Levy Brothers, and ask you if that is a letter sent by the Corporation Trust Company. A. It is.

Q. It is the letter sending back their check for their subscription? A. Yes.

Mr. Harding: I offer it in evidence, D-7.

Q. I show you letter which was marked for identification, dated April 26, 1912, addressed to the Corporation Trust Company, Jersey City, signed by Levy Brothers, and ask you if you received that letter from Levy Brothers? A. I did.

Mr. Harding: I offer it in evidence.

Mr. Melniker: Put them all in. That will save time.

Q. Also a letter dated May 6, 1912, addressed to the Corporation Trust Company, signed by Levy Brothers, and ask you if you received that letter? A. I did.

Mr. Harding: Have you the original reply to this letter?

Mr. Melniker: I think you have that. You have all my letters now.

Q. I ask you if you wrote a letter dated April 27, 1912, to Messrs Levy Brothers, in reply to their letter of April 26, 1912? A. We did.

Q. I now show you a paper purporting to be signed by the Corporation Trust Company, dated April 27, 1912, being a letter addressed to Messrs. Levy Brothers, and ask you if that was the letter sent to Messrs. Levy Brothers in reply to their letter of April 26 which has been referred to? A. Yes.

(Marked in evidence D-8.)

CROSS-EXAMINATION by Mr. Melniker:

Q. You state you were the treasurer of the Corporation Trust Company? A. No; Assistant auditor of the Corporation Trust Company.

Q. Did you ever see these checks (indicating)? A. I think I did.

Q. You think you did? A. Yes.

Q. They went through your company's account in the bank? A. No, they didn't go through—

Mr. Harding: Are they exhibits?

Mr. Griggs: In order to keep the record straight, I suggest that you state which exhibits they are.

Mr. Melniker: Referring to Exhibits P-2, 3 and 6.

Q. They were deposited by your company, were they not? A. Yes, sir.

Q. They bear the endorsement of your company? A. Yes, sir.

Q. And were put into the funds of your company? A. Yes, sir.

Q. Do you know when it was that Levy Brothers' money was returned to them? A. When it was returned to them?

Q. Yes. A. I have a copy of a letter written them with it there, I do not remember the date.

Q. Will you refer to the letter so that you can refresh your memory? Is this (indicating) the letter of June 26th (showing witness D-7)? A. Yes, sir.

Q. Then you kept Levy Brothers' money, $16,875, until the 26th day of June? A. Yes, sir.

Q. Were you the person in your company, or in your company's employ, to whom was sent advice by the Marconi Company that the stock was not to be delivered to Levy Brothers? A. No.

Q. Do you know to whom that direction came? A. I believe it came to our treasurer.

Q. Do you know when that instruction or direction was received from the Marconi Company or its counsel? A. No.

Q. Was it about the time that you returned this money? A. I don't know; I was away.

Q. What makes you think it came to your treasurer? A. Because he was in the habit of receiving such instructions.

Q. Do you know whether or not your company held up this money and these papers for any length of time after they received instructions to return them? A. I do not believe we did.

Q. So that you think that within a day or two after instructions were received to return this money and papers that the papers and money were returned to Levy Brothers? A. Yes, sir.

Mr. Harding: I have now found the original receipt we gave.

Mr. Melniker: Well, this puts me in a somewhat difficult position. I do not know anything about this. I never saw it before.

The Court: He is not asking you to admit it, I understand.

SIDNEY A. ANDERSON, re-called:

By Mr. Harding: Q. I show you a paper, Mr. Anderson, dated May 4, 1912, and ask you what that is. A. That is a temporary receipt, given to the subscribers to Marconi Wireless where they made part payment for their subscription—the first payment. Upon surrender of this receipt with the final payment we issued the other receipt that I presented before.

Q. And was this one that was given to all the subscribers?

Mr. Griggs: Not that one.

A. Part payment.

Q. I mean one like that. A. Yes, sir.

Q. Same form, printed form? A. Same form.

Mr. Harding: I offer it.

Mr. Griggs: That is the one given to Levy Brothers for this subscription.

Q. Oh, this is the Levy Brothers' subscription? A. Yes.

Mr. Harding: I offer it in evidence.

Mr. Melniker: I will object to it at this time.

Q. I show you the signature there, which is partly canceled, and ask you whose it is? A. B. S. Mantz, our treasurer.

Mr. Harding: I offer it in evidence.

Mr. Melniker: I object to it at this time.

Q. You just found this last paper? A. Yes, sir.

Mr. Melniker: I withdraw the objection.

(Marked Exhibit D-9.)

Mr. Harding: I will read the last clause of this receipt. It says: "The giving of this receipt does not evidence the right of the subscriber to make such subscription

as all rights to subscribe shall be finally determined by the Marconi Wireless Telegraph Company of America."

CROSS-EXAMINATION by Mr. Melniker:

Q. Now this receipt, Exhibit D-9, was returned to your company when the final payment was made, wasn't it? A. This pink one I just had.

Q. This last paper? A. Yes, sir.

Q. And you then gave in place of that this receipt, D-5? A. Yes, sir.

Q. And this last receipt that you gave when the final payment was made does not contain any such provision as Mr. Harding read? A. Subject to examination. There is a provision on there that it is subject to examination.

Q. Where does it say "Received subject to examination" on this? A. Received for examination.

Q. Does it say "subject to examination"? A. Not "subject to examination," no.

Q. And it contains no such stipulation as contained in the Exhibit D-9, that the rights acquired are subject to be finally determined by the Marconi Company? A. No.

The Court: What is the date of that one?

Mr. Melniker: June 10th. This is the one received when the final payment was made.

The Court: That one is posterior in date to the notification to Cohn and Woollman that the subscription woud not be received?

Mr. Melniker: No; that letter is dated June 26th.

The Court: That letter is dated the 17th of May, the tentative letter that Governor Griggs said his memory was refreshed by,

that he had talked with the attorneys for Levy Brothers and had notified them that the subscription would be refused. The first formal notification was in accordance with that letter. He had talked with the attorneys and notified them in the middle of May. Then Governor Griggs was shown a press copy of a letter dated May 17th and said that refreshed his recollection and confirmed him in the testimony he had given that the notification of an informal character, if you may call it so—because it was not in writing—was given to Cohn and Wollman as he had testified on the 15th of May or thereabouts.

Mr. Griggs: Have you the original of that letter? We called for it.

Mr. Melniker: I haven't the original. I never saw it.

Mr. Griggs: Will you admit that was sent, signed by Mr. Bottomley?

Mr. Melniker: I just merely want to fix the date.

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JOHN BOTTOMLEY, sworn:

Direct-examination by Mr. Harding:

Q. At the time when the rights to subscribe for stock in April, 1912, were granted to stockholders were you the secretary of the Marconi Wireless Telegraph Company? A. I was vice-president, treasurer and secretary.

Q. And I ask you if you have a copy of a letter dated the 17th of May, 1912? A. I have, sir, in my hand.

Q. Addressed to Messrs. Levy Brothers. A. Levy Brothers.

Q. And that purports to be signed by the Marconi Wireless Telegraph Company by J. Bottomley? A. Signed by me as secretary.

Q. Was that letter mailed to them? A. It was mailed to them, yes, sir.

The Court: Addressed to them at their post office address and postage prepaid on it?

A. Yes, sir.

Mr. Harding: I offer it in evidence.

(Marked D-10.)

Q. I also show you a letter dated June 19, 1912, addressed to Messrs. Levy Brothers, 44 Broad Street, City, purporting to be signed by Marconi Wireless Telegraph Company J. Bottomley, secretary. Is that a copy of the letter? A. That is a copy of letter signed by me as secretary on behalf of the company.

Q. Was it mailed, properly prepaid? A. It was mailed prepaid.

Q. Postage prepaid? A. On that very day.

Q. That purports to be in reply to the letter of June 13, which has been referred to, signed by Messrs. Levy, to you? A. Yes, sir.

(Marked in evidence, D-11.)

Q. Did you ever hear from Levy Brothers after that in response to that letter? A. They never offered any stock to us, or showed us any stock.

By Mr. Melniker: Q. Didn't you get an answer to that letter? A. Not that I know of, and no answer producing the stock.

Q. You know that Levy Brothers wrote to your firm and your agents and told them to deliver all the stock that you admitted that they were entitled to and reserved the right without prejudice

as to their rights to these shares that you disputed. A. There would be no question about delivering any stock to which they were entitled.

Q. Do you know there was such a letter written? A. I believe there was, but I haven't it before me. I do not see it. If you show it to me I will tell you.

(Defendant rests.)

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## Rebuttal

SIDNEY A. ANDERSON, re-called:

By Mr. Melniker: Q. I show you Exhibit D-5 and ask you whether that is the form of receipt which was delivered on payment of the balance. A. Yes; that is the form of receipt.

(Testimony closed.)

Mr. Harding: If the Court please, in this case we ask Your Honor to direct the jury to bring in a verdict for the defendant. It is unnecessary to go over at this time the points of law which are involved and which were discussed before Your Honor.

The Court: No; I am perfectly familiar with them. I will call upon the other side. I am familiar with what your points are. They were raised on his motion to strike out your answer.

Mr. Melniker: In the first place, the obvious objection I can see to the direction of a verdict at this time, or at any time, is that the defendant has altogether failed to prove that M. L. Parsons

was not the owner of the stock on the 20th of April, 1912. The only proof is that on that day, according to the books of the defendant, M. L. Parsons was the holder of record of the—

The Court: I guess you did not hear the testimony of Governor Griggs on that subject.

Mr. Melniker: Governor Griggs testified that he had a talk with Levy Brothers.

The Court: Yes, and that they admitted that M. L. Parsons was not the owner of it.

Mr. Melniker: No; his testimony was that he told them that M. L. Parsons was not the owner of it and they said they knew it.

The Court: They knew it, yes.

Mr. Melniker: It appears to me that is not proof of that fact.

The Court: It is their admission of it, and their admission is very strong proof when coupled up with the proposition that they were called upon to produce the stock and receive their proportion of the additional issue and that they did not do it. Take the two facts together and there is absolutely no evidence that I can see that M. L. Parsons was the owner of it.

Mr. Melniker: But according to the terms of the offer they were not required to produce stock. If they were required to produce the stock that was an arbitrary ruling as to that.

The Court: I understand that, but these parties had admitted to Governor Griggs that they knew that M. L. Parsons was not the owner of these shares, and it was upon that admission that they were requested if they wanted their proportion of the new issue, to produce the shares, and they did not do it. Now that is some evidence bearing upon the proposition, or is confirmatory of the admission made by them that they were not the

owners of it, because anyone would say offhand, if they were the owners or had the shares—why, they would simply produce the stock and get their additional stock.

Mr. Melniker: But we do not claim Levy Brothers ever were the owners of the shares.

The Court: You claim M. L. Parsons was the owner of the shares.

Mr. Melniker: Yes; and all this evidence goes to show is that Parsons was not the holder of the stock.

The Court: But unless M. L. Parsons was the owner of the shares, why the legal point that is to be determined here is, as I understand it, whether or not M. L. Parsons had any right to subscribe at all. Now if Levy Brothers, attempting to act for M. L. Parsons, whether as agent or attorney or whatever it was, were informed that M. L. Parsons was not the owner of the shares, and they admitted that fact, and then they were told, "Now if you insist upon your subscription you must produce these shares," it is some evidence at least, when they do not produce them, that M. L. Parsons was not the owner of the shares.

Mr. Melniker: It would hardly appear to be enough evidence to make it an indisputable fact.

The Court: Their own admission is practically conclusive evidence on the proposition so far as they are concerned. They were the predecessors in title of the plaintiff in this case, and they admitted when the question came up that they distinctly knew, acting as the agent of M. L. Parsons, that M. L. Parsons was not the owner of those shares. That is their admission.

Mr. Melniker: Well, they took the position that even admitting that Parsons was not the owner of title at that time, that they were entitled—

The Court: No; they took the legal position that even admitting it, that was so; but they took the position in fact that M. L. Parsons was not the owner. That is the position they took.

Mr. Melniker: As I say, the first proposition is, there is no evidence in this case—Your Honor finds against me now—there is no evidence that Parsons was not the owner; in fact the only binding evidence is that Parsons was the owner, and appearing on the books at that time to be the owner presumably she was the owner of the stock.

The Court: At the time that admission was made Schmidt was not in this case at all. At that time Levy Brothers were the owners of whatever rights M. L. Parsons had, and Levy Brothers were admitting against their own interest when they talked with Governor Griggs, and admitting against their own interest they admitted that so far as ownership could confer any title on them they hadn't any title, but that their title must depend, insofar as it was dependent upon anything, upon the proposition that they were entitled to maintain their claim to the subscription even though M. L. Parsons was not the owner. That was their attitude. They said, in effect, "We don't claim M. L. Parsons owned it; we know (s)he didn't own it. What we claim is that M. L. Parsons didn't have to own it because she was what we claim in legal phraseology a stockholder of record on the 20th of April, 1912." That was their attitude.

Mr. Melniker: Now suppose, for the sake of the argument, that Levy Brothers were mistaken about Parsons not being the owner of the stock; suppose even they thought she was not and it developed afterwards that she was the owner of the stock, Levy Brothers certainly would not be precluded from claiming all rights under it.

The Court: Not a bit of it. You would be permitted to produce them here and show it was a mistake. You do not make the slightest pretext of any such evidence as that.

Mr. Melniker: But I do not think we would be obliged to actually produce the certificates in order to show that Parsons owned them.

The Court: No one would contend you would have to. The certificates may be evidence of ownership or they may be of some legal character, Their character is rather problematical, under some of the decisions in this State; but if Levy Brothers had come forward on the demand that the stock be produced and said "We are unable to produce the certificates, but we will produce affidavits by M. L. Parsons or something to indicate she is still the owner," it would have been the easiest thing in the world to have maintained their right.

Mr. Melniker: But there isn't any law or regulation that they would have been bound by, that would have bound them to produce affidavits or any further proof.

The Court: Absolutely none, but I am simply saying that the fact that they did not do it is at least some evidence confirmatory of their own admission that M. L. Parsons was not the owner of the shares.

Mr. Melniker: Now, after having made that statement, which Your Honor thinks is an admission against interest, we come into Court and show the books of this company, which show that at that time Parsons was the owner of so many shares of stock. There is nothing in the records of the company to show that anything happened after that to change that situation.

Now the legal presumption is that having appeared to have been the owners of the stock on the 20th of April, in the absence of any other proof to the contrary, that situation continued and that Parsons was not only the record holder but the legal and real holder of the stock.

The Court: Those presumptions are only indulged in where the facts are not apparent. The presumption is an aid to the situation where the facts do not appear, but in this case the facts do appear, and the admission of the parties to them, after the 20th of April, when she claimed to be the owner, and their admission was that although that appeared on there she was not the owner. That is what the admission amounts to. You produce the book and what does it amount to? In the absence of any proof at all it would be *prima facie* evidence of ownership, but in the face of the admission that she was not the owner it would not amount to anything, in my judgment.

Mr. Melniker: Then I submit that a direction of a verdict would be improper for the further reason that this company accepted the subscription agreement of Levy Brothers and took their money, deposited that money in their account, kept their money from the 3rd of May until the 26th of June. Now when they accepted the subscription of Levy Brothers for 3375 shares of this stock they got an absolutely binding agreement from Levy Brothers to buy this stock and pay for it a total of $16,875. If that stock had gone down to a dollar a share the Marconi Company could have sued Levy Brothers for four dollars a share for every share of stock for which they agreed to subscribe; so that when they took that agreement and took the money they entered

into an independent and binding agreement between them independent of the rights of the parties—

The Court: The difficulty with that argument is that it contains a false premise; it contains a premise that the offer which you are now talking about as a contract was accepted by the Marconi Company. The proposition you are maintaining is not established by the facts. What the Levy Brothers did was to make a proffer or make an offer to take the stock, and until that offer was accepted by the Marconi Company it was no contract at all, and neither could the Levy Brothers have held the Marconi Company nor the Marconi Company have held the Levy Brothers on that contract; but the case supposed by you simply amounts to this, that if the Marconi Company had brought a suit upon that contract, the shares having gone down, the Marconi Company might have prevailed. I will agree to that proposition, because the fact of the bringing of the suit itself would have amounted to an acceptance of the offer which was made to take this stock at that price; but that, the offer plus the acceptance, makes the contract. In this case the defect in your argument is this, that the evidence shows no acceptance whatever, simply an offer, a deposit made with the company which hadn't any authority to accept the offer. The evidence on that point is plenary; and when you look at the times of the various transactions, why it is as manifest as it is possible to be that there never was an acceptance, that there never was intended to be an acceptance. I direct your attention then, just for the sake of the argument, for a moment—

Mr. Melniker: I want to say this: Your Honor's conclusion that the act of bringing a suit by the Marconi Company would be an acceptance of the contract leaves the Marconi Company in this position, that they can hold this money and this subscription agreement indefinitely and they are neither bound nor is anyone else bound until they choose to bring a suit to establish their rights, and then by the act of bringing the suit their rights are established and the other party is obligated. Manifestly that would be an unfair thing, because it must be that by some act of theirs in that interval it is possible for them to have bound themselves; and I say in this case, having received the money the first time and the second time, and having deposited it, and having received and accepted this subscription agreement, it is a question of fact—

The Court: In whose bank was the money deposited?

Mr. Melniker: The bank account of the agent.

The Court: Yes, the agent to receive. You have not shown any authority. And furthermore, the argument you make, while it sounds plausible, is denied by innumerable analogies in the law.

Mr. Melniker: I say by their offer in which they say that all subscriptions and payments for stock must be made to the Corporation Trust Company that they vested the Corporation Trust Company with power to receive and accept the subscriptions.

The Court: Precisely; as a depository. They state they must be made with the Corporation Trust Company—left there; and they were left there. And what receipt was given? Why, you take the preliminary receipt and it recites dis-

tinctly—the receipt dated May 4—it recites distinctly that the deposit is not at all binding but that the whole thing has to be consented to or agreed in by the Marconi Company.

Mr. Melniker: That might have been very well if they had stopped there or if that had been the only receipt, but when the second payment, or the payment of the balance, is made they take away this receipt and give them another receipt in which that stipulation does not appear at all.

The Court: No; that stipulation persists until the Marconi Company by some act have indicated their acceptance of the offer of subscription; and furthermore, taking the second receipt by itself, it simply indicates, not that the second payment was received to complete a contract, but it says on the face of the second receipt that it was received for examination, just in so many words clearly indicating it did not bind anything, that it was not intended to complete anything, that it was not meant to fasten the rights of the parties, for suppose the examination should prove unsatisfactory was there no *locus poenitentiae*? no time when anybody could back out of it? no time when any body could avail himself of what the examination disclosed. Why, the very face of the paper indicates it was not intended to be a binding thing.

Mr. Melniker: The face of the paper indicates to me that what was meant by "receiving it for examination" was an examination of the papers to see if the papers were regular, not an examination of the law governing the situation. It says "Received for examination," and then it says, "If the papers are found regular a permanent certificate will be issued."

The Court: Yes, "if papers are in order, permanent receipt will be delivered upon the surrender of this receipt." Now there is no evidence that the papers were in order; there is no evidence that this receipt ever was surrendered up or that it was ever intended that the permanent receipt should be given by these parties or that it ever was given.

Mr. Melniker: There was no occasion for that because these people notified my people that they would not deliver this stock and there was an anticipatory breach so it did not require giving up the papers; but what is meant by that receipt is an examination of the regularity of the papers.

The Court: You want to remember this thing too: This, it seems to me, is a conclusive answer to the thing you are attempting to assume now. This receipt is dated the 10th of June, 1912. On the 15th, or the 16th, or the 17th of May, 1912, one month prior to the giving of this receipt by the mere depository, Governor Griggs had informed the representatives of Levy Brothers that the subscription would not be taken and informed them the reason therefor, and this depository was simply receiving money in the ordinary course of events and giving an evidence of the fact that they had received it, in apparent ignorance of the fact that the Marconi Company itself had determined not to go on with the contract and conclude it.

Mr. Melniker: I submit that that sort of cuts both ways. If, after the Marconi Company had told Levy Brothers, "We won't accept your subscription," they long after that take their money, $10,000, it seems to me they waive that right they may have had.

The Court: That is a charming and a plausible argument, but it contains this fallacy, that you

have got to assume that the Corporation Trust Company had authority to do that thing, whereas that is the very thing you have not in any measure established, but on the contrary have shown they did not have authority to do.

Mr. Melniker: My proposition now is that by the terms of this offer they had full authority to do everything in connection with the subscription.

The Court: The construction of that offer, it being a paper writing, is for the Court and not for the jury, and I haven't the slightest hesitancy in coming to the conclusion it does not mean any such thing as that; it simply constitutes these parties the depositories of these moneys and these offers of subscription, and the question as to whether or not they should be received and accepted was a matter that depended upon the Marconi Company itself and was settleable by them and not by the Corporation Trust Company. I haven't any doubt that that is what that offer means, and I so construe that.

Mr. Melniker: I submit that it is at most a question for the jury to determine from all these facts, the receipt of this money, the character of the receipts, the retention of the money, the time of its return—all these circumstances make it a question for the jury to determine whether or not there was a contract entered into between the Marconi Company, through its agent, and Levy Brothers.

The Court: If there is evidence of a contract it is for the jury to determine whether it existed or not, but to my mind there is no evidence of any contract; therefore it is the duty of the Court to say so and to control the jury in that matter.

Mr. Melniker: That then brings us to the last question, which is largely a question of law, and

that is I maintain it is a matter of no consequence whether Parsons was the actual owner of the stock at that time, that the only question is whether Parsons was the owner of record; that this offer is not to the owners-and-holders of record, as their answer reads. The word "owner" does not appear anywhere in this offer. The offer to subscribe is made to the stockholders of record. Now "stockholder of record" has a definite, fixed meaning; it means the person whose name appears on the books of the company as a stockholder, the only person the company has to recognize. As Governor Griggs testified, they would not recognize anyone who was ~~not~~ the real owner of the stock, whose name did not appear on the books.

The Court: Certainly not, because he did not come up to the definition, a "stockholder of record." Now if "stockholder of record" means, as I have held already it means in one of the preliminary stages of the case—if "stockholder of record" means a stock owner of record, then manifestly your client did not come within that definition, because he was not a stock owner of record or did not have the rights of assignment of a stock owner of record, and manifestly the other class of people of whom you are just now speaking were not entitled to subscribe because they were not stock owners of record; they were stock owners, but not of record, and the first class of people were of record but not stock owners. That is the situation as I see it. It seems to me as plain as a pikestaff.

Mr. Melniker: If Your Honor holds that "stockholder of record" means a stock owner of record, that settles it.

The Court: I have not seen anything yet to shake my conclusion. When I wrote the opinion striking out the answer I went into the whole question with a great deal of care and wrote a long opinion about it, probably of little worth but great length; but there is the opinion and that is my conclusion on it, and I have not seen anything in the case to shake in the slightest degree my conviction of the correctness of the conclusion I arrived at then; and I think it would be a monstrous proposition in commercial transactions for a moment to hold that a person who had disposed of his stock about seven or eight years ago and simply happened fortuitously to have his name upon a book of a company without a vestige or a shred of a right existing in him at all, except that his name was on the book, that he had a right to come in and grasp valuable rights after he had received the full value of his stock from the person to whom he sold it. That would seem to me to be a most extraordinary situation.

Mr. Melniker: Your Honor must not overlook the fact that this "grabbing" of these rights was accompanied by a check for $16,875—all the company was entitled to in any event—$5 a share.

The Court: Precisely, but it was a grabbing of rights, and that it was a grabbing of rights is manifested by your urgent appeal here that those rights be vindicated here and you be paid more than $16,000 because you happened to have your name on a book annexed to stock which you did not own.

Mr. Melniker: The reason we ask that is because the company did not carry out what we claim is a term of the contract. We offered to pay them all that they were entitled to, all that they asked for.

The Court: And I claim that your clients had no capacity to make such contract. They were only capacitated to make such contract by the existence of the fact of stock ownership of record, and that capacitation was conspicuously absent.

(Jury excused by the Court.)

Mr. Melniker: I do not think we want to prolong this academic discussion.

The Court: I am only to glad to hear it. If I am wrong I am the first man to admit it, but I want to see it.

Mr. Melniker: In this offer of subscription there is a clause which reads as follows: "Rights to subscribe belonging to any number of shares may be assigned." Now I think that language is peculiarly significant. It does not say "rights belonging to any person may be assigned," but it says, "belonging to any number of shares." In other words, it attaches the right to subscribe to the shares, and the purpose of that is this, and the effect of it is this, that it protects the company against ever having to answer twice, to two different people, for these new certificates. All it has to do is to look at its books.

The Court: That would seem to me to be open to an argument very much the reverse of the one you are making, very much more antagonistic to you than you seem to think. It is "rights belonging to any number of shares."

Mr. Melniker: As they appear on the books of the company.

The Court: It does not say so. "Rights belonging to any number of shares." Now if they belong to the shares, then you haven't them. They may be exercised by the person who has the shares because they are an incident of the shares.

Mr. Melniker: But they have qualified that before, because they say they go to the person whose name appears on the books of the company.

The Court: No, they say "the stockholder of record," and I claim that a stockholder of record is a stock owner whose shares are recorded on the books of the company. That is the point about it. In other words, I think the law had a very wise notion, or the law-givers had a very wise notion, and that they meant just what that phrase that you have quoted to me now indicates, that the right to subscribe for this new issue of shares belonged to the shares and was to be exercised by the person in whose name the shares were and who owned those shares. It was incident to the shares. In other words, the right to go on and subscribe followed the shares wherever the shares went. Of course these people had a right to say—the company did— a right growing out of the nature of the corporation law with respect to how it may determine who are shareholders—they had a right to say that those persons who are to be entitled to exercise this right belonging to the shares shall be only such persons owning shares whose names appear on the books of the company to be the owners of shares; and that is a situation that is made, not for your client's protection; that is the situation that is made for the protection of the corporation. The corporation has a right to be protected by what appears on its own books; but the appearance of that thing on the books is entirely within the control of the share owner. Now the man who bought these shares had the indubitable right, and the corporation was under a corresponding duty, of having those shares entered on his name. Then

every incident that attached to shares and every prerogative or right exercisable by the owner of shares attached to those shares and went to the man who owned them; but what you are trying to do, it seems to me, is to have me decide that the beneficent effect of that rule inures to the share holder and that the object of the legislative policy was intended for the benefit of the share holder, whereas I think every case that has been decided on the subject has determined that that policy was adopted for the benefit of the corporation and its protection against the share holders themselves.

Mr. Melniker: But the company could have effected the very situation that Your Honor refers to by using appropriate language for that purpose. They could have said "owners and stockholders of record;" but they don't.

The Court: But they did not have to. If a stockholder, a stockholder—can a man be said to hold stock that he does not own?

Mr. Melniker: They do not simply say just "stockholder;" they say "stockholder of record."

The Court: Yes, and make it stronger. They not only say he must be a stockholder, but he must be a stockholder of record. A mere stockholder won't do, because that would be the second class of persons of whom you inquired of Governor Griggs when you said, "Would you let a man who owned the stock but had not recorded it, subscribe?" and he said, "No." He is a stockholder, but that is not enough. He must be a stockholder, and in addition to that he must be of record. When he occupies that position and has those records, then he can go on and subscribe for the new issue of stock. It seems to me to be so almost absurd to call a person who has dis-

posed of his stock years ago in any sense a stockholder because his name appears on a book that for the life of me, as a matter of plain common sense, outside of the law, I can not see it. What does he hold?

Mr. Melniker: There is not a case—

The Court: Just answer me. What does he hold? He manifestly does not hold the stock. He has not the evidence of ownership, except so far as his name appears on the book. The evidence which is accepted everywhere in the commercial world, except so far as his relations to the corporation are concerned and his right to vote and perform various functions in the corporation—that evidence is the certificate. He hasn't that. He does not hold the stock because he has disposed of all that by selling it to somebody. What he holds is a position of appearing of record, that is all, but he does not hold the stock and can not be said to hold the stock.

Mr. Melniker: In this case it is admitted in the pleadings that the by-laws of this corporation provide that shares of stock are only transferrable on the books of the company.

The Court: And what is the object of that rule? It is to protect the company against somebody moseying in at odd and inopportune moments and insisting that the company shall do some certain thing or recognize him in some certain way. The whole object of that rule is to protect the company; and that case I cited in the decision that I rendered, of some Silver Company—the International Silver Company—by Vice-chancellor Pitney, and affirmed in the Court of Errors, was to the effect that for all practical purposes the person, whether his transfer is recorded or

not, who holds the shares, is the legal and equitable owner of that stock; and when you read of many, many cases talking about the person who appears of record being the equitable owner, all that means is that he has a mere equity to come into Court for certain purposes to indicate his position with respect to certain things in regard to that stock but not that he owns it or can exercise any control over it, but merely his relation to the company growing out of the appearance of his name on the books.

Mr. Melniker: The person to whom that term, "equitable owner" applies—

The Court: I did not say "equitable owner;" I said he was a person who had a right to go into a Court of equity and insist upon certain things with respect to his status, so far as the company was concerned, in relation to that stock.

Mr. Melniker: That refers to the man who gets stock and has it but it is not transferred on the books of the company, and he is referred to as the equitable owner because he has a right to go into equity and compel the corporation to transfer it on their books.

The Court: How do you whistle down the wind with this splendid urbanity the suggestion of both the Chief Justice in the Court of Appeals and of Vice-chancellor Pitney and the Chief Justice speaking through a unanimous Court on the proposition that whether the man is recorded or not he is the legal and equitable owner of the stock?

Mr. Melniker: I haven't that case clearly in mind, but I do remember that that was an equity case, and the Court of Equity would naturally deal with that differently than a Court of common law.

The Court: But the Court of Appeals decided the case. And then I cited another case, Ervin vs. Oregon Railway Co., 62 How. Pr., where the Court said:

"The fact that the stock of the plaintiff has not been registered is no reason why he should not maintain this action. He is the legal and equitable owner of this stock. The possession by him of the certificate, as owner, gives him a complete title. For certain purposes and for the enjoyment of specific privileges,, such as to vote and receive dividends, it may be necessary, as between him and the corporation, that he be registered as a stockholder. But as the absolute owner of the stock he is, to the exclusion of every other person, entitled to prosecute an action for injury to it or to himself."

In other words, if the man who has the stock and it is not registered is called the equitable owner it simply puts him in this posture: he is the man who holds the stock, which he is entitled to have the corporation do certain things with respect to. One of the things is to permit him to vote; another thing is to have it recorded, and so on; and in order to vindicate those privileges he has a right to resort to a Court of equity, and therefore in common parlance and in the parlance of some of the Courts they say that such a person has an equitable ownership because he has a right to resort to the Court of Equity to vindicate everything with respect to the stock which he is not entitled to do by reason of the fact that the stock is not registered or recorded.

Mr. Melniker: Well, he is not entitled to do those things when the person in whose name the stock stands is entitled to do those things.

As regards the company, he has a right to vote and to receive dividends and to subscribe for stock.

The Court: That is a proposition which I doubt, as a broad legal proposition. You say the other person is entitled to do that. I very much doubt that. I think the corporation might stop him from doing that thing. I think that the object of the rule that such a person may do such a thing is to protect the corporation against him if he does do it, or against anybody else who claims other rights with respect to it.

Mr. Melniker: I submit that that is not a mere privilege which the company can extend or withdraw as they please, but it is a right incident to the ownership of the stock.

The Court: I admit that, and once you say that I think you decide the case.

Mr. Melniker: And once a man buys stock and puts it on the books of the company, he remains the owner to all intents and purposes and has all the incidents of ownership until some act is done that completely divests him of ownership, and that act is the transference on the books of the company; and until there is a complete divestige of such ownership he continues to have all the rights of ownership.

The Court: In England, where they had a similiar provision to this, a man stole some stock once and was indicted for larceny, and the person who held the ownership of the stock, as I hold him to be, who had taken his transfer of it and had not recorded it, was the prosecuting witness, and the Court held that the person who stole the stock was guilty of larceny. Now unless the title to that stock rested in the man from whom he

stole it, it would be impossible to hold any such thing as that.

Mr. Melniker: I do not understand that.

The Court: You can't steal anything if the property remains in you. You can not steal any such thing as that. It was the person who had sold the stock who took it back, and he became the larcener and was convicted of it. Now I say if he retained the title, a man can not steal his own property, and it was held in the case that he was guilty of larceny. Now it seems to me that that same thing would be so here. Suppose in this case that this woman, Parsons, had gone to the person to whom she had sold the stock, whoever that may have been, and had stolen this stock from them, don't you think she could have been indicted for larceny?

Mr. Melniker: I think so.

The Court: Well, why, if the stock still belonged to her? She could not steal her own property.

Mr. Melniker: Well, I would have perhaps an anomalous situation there. You might have a case where the stock certificates belong to some other person, but the stock certificates are not the stock in the company, they are only evidence of it.

The Court: Precisely; but the whole thing anyway has to be under the statue, because at the common law you could not have any such action as that. Under the common law you could not be indicted for stealing a chose in action; but we have such a statue here. In this state to take bills and notes. and things of that kind, which are mere choses in action, is larceny. Now I say if this woman who originally owned this stock had gone and taken this certificate from the person

to whom she had sold it, she would not have been indicted, as she would have had to be at common law, for stealing a piece of paper, as paper; she would have been indicted under the statue for having stolen a right of action that did not belong to her. Now if your argument is good she would not have been indictable at all because it would have been her right of action and not his because he had not completed his title by registering it on the books of the company.

Mr. Melniker: It does seem to me as though such person might be guilty of larceny in selling those certificates and yet still be vested with certain incidents of ownership which flow from the existence of a certain situation like having her name registered as the owner and it requiring a transfer on the books to divest her of all incidents of ownership.

The Court: I think the whole case depends upon the legal construction of the words "stockholder of record." That is the whole case; that is all there is in it. Now these incidents that you are speaking about as attaching to her because of her remaining on the books as the record owner of the stock, I do not think you can find a case—I have not found any—I do not think you can find a case that holds that such a person can avail herself of a right that belongs to the stock as an incident of the stock. These incidents you talk of grow out of the mere appearance of the name on the book; the incident of the right to subscribe grows out of the ownership of the stock. It is an incident to the stock; that is a common law incident that does not arise out of the statute at all, that you must first submit the new issue of the stock to the old stockholders before you can sell

it abroad in the market, and that is an incident of the stock.

Mr. Melniker: But the cases hold that a right to subscribe is the same as a right to a dividend, and where a person would have a right to a dividend they would have a right to subscribe.

The Court: With respect to the dividend proposition, the corporation would be protected if it had paid the dividend to the person who appeared on the books as the owner, but I doubt very much in this State whether a person whose name appeared on the records as a stockholder would have the right and could vindicate the right in Court to collect that dividend by a suit if a defense was interposed that he did not own the stock at all but had parted with all his right to it. I think the real decision in all the cases you speak about was a decision where the corporation was protected for having paid the dividend even though the person whose name appeared on their books was not the actual owner of the stock.

Mr. Harding: If they do it without notice. If they do it with notice they are liable.

Mr. Melniker: No attempt was made by any other person to subscribe or to claim any right.

The Court: But I do not think the happy solution of the difficulty is arrived at by assuming that it might have worked out well in this case, because the beauty of the rule is that it is a stable rule and applies to all cases. The question is, how must it be applied in all cases?

I haven't any doubt, Mr. Melniker, what I ought to do in this case—if you have concluded the argument. My clear notion is that I should direct a verdict.

Court's Decision

First of all, I think that it is established to demonstration in this case that the person from whom Levy Brothers obtained the assignment of rights was not the owner of the stock at the time those rights were endeavored to be transferred, and that person could only transfer what she had; that she hadn't anything therefore to transfer, and that consequently the Levy Brothers got nothing from her.

I am quite clear, furthermore, that in the construction of the subscription offer, the term "stockholder of record" means stock owner of record, and that by no wild stretch of the imagination even could Levy Brothers be considered as coming within that category as stockholders or stock owners of record. They were simply of record, but they were not stock owners; nor even taking the word "stockholders" in its ordinary sense were they stockholders. They did not hold any stock; they did not have any ownership in any way in any stock, and consequently they were not within the class of persons who were invited by the Marconi Company to subscribe, and not being within the class of persons who were invited to subscribe, the Marconi Company was not obliged to receive them, and the Marconi Company, not being obliged to receive them, had a right of course to repudiate the situation and to refuse to accept the offer; and in my judgment it is perfectly clear that is what they did.

Now the chronology of these events is rather illuminative when you look at it. The first check from these people is dated the 3rd of May, 1912, and it is quite manifest that the check was handed over a day after it was dated, because the pre-

liminary receipt which has been offered in evidence is dated the 4th of May, 1912; and *prima facie* an instrument was delivered on the day that it bears date. Of course that might be applied also to the check, but inasmuch as the receipt bears date on that day and is for the reception of the check, and inasmuch as we know that checks are sometimes some time in passing from place to place and are not delivered until a day or so after they are made, and the receipt ordinarily is given instantly at the time the money is paid, it is more natural to suppose that the transaction took place on the 4th of May, 1912, than it is that it took place on the 3rd of May, 1912. Now that receipt is a most interesting document, because it contains express notice to the Levy Brothers that the Marconi Company must eventually pass upon the proposition, and it was a clear notice to Levy Brothers that the Corporation Trust Company in effect was a mere depository and that the acceptance or making of a contract was a matter that must be completed by the judgment and action of the Marconi Company and not by the Corporation Trust Company itself. Now then, the Corporation Trust Company, as I say, took this money and gave the receipt on the 4th of May, 1912. The evidence of Governor Griggs, which is without contradiction in this case, is that about the middle of May—certainly not later than the 17th of May, 1912—he informed the representatives of Levy Brothers that the Marconi Company repudiated the transaction and would not accept the offer because the Levy Brothers had a claim which did not rest upon a basis of stock ownership, and that this woman did not own the stock; and these

people informed him that it was true that this lady who originally owned the stock did not own it any longer, and that their claim was not that they had the stock and would at any time produce it and indicate their right along that line, but their statement was, and their whole posture in the case was, that they were entitled to the subscription notwithstanding the fact that they simply held the bare right, whatever it might be, that grew out of the fact that this woman who had disposed of her stock still remained of record the evident, or the ostentatious, or the apparent owner of the stock on the books of the company. Now that I say happened not later than the 17th of May. Now this other receipt bears date the 10th of June, 1912, which is pretty near a month after the 17th of May, and it is a long time after these two important events had occurred: First, that the Levy Brothers had been informed that the Marconi Company must pass upon the contract, and secondly, after the Levy Brothers had been informed through their representatives that the Marconi Company would not accept the contract, and then, apparently to pursue what they considered was their right along the lines indicated to Governor Griggs, to wit: that they intended to pursue the matter on the theory that they were entitled to subscribe because they held an assignment from a person who merely appeared on the books of the company as the owner—they then made this payment which is evidenced by the receipt of June 10, 1912, and that receipt indicates that is was received for examination, and it says: "If papers are in order, permanent receipt will be delivered upon surrender of this receipt." Now it does not appear at

all that the papers were considered to be in order. It does not appear that a permanent receipt ever was demanded or offered to be given, and it does not appear that any change in the mental attitude of Levy Brothers, through their representatives, and the Marconi Company, through Governor Griggs was ever reached between these parties. They simply stood off as in a position where one side would assert and the other vigorously defend the right of the Levy Brothers to obtain this subscription upon the ground that they held an assignment from a woman who had once been the owner of the stock but had ceased to be the owner when she gave the assignment. Now I say those things are so perfectly plain that it appears to me that even on the theory you apparently desire to invoke, that even if there was not any right in the first instance to make the subscription, still it was accepted, it seems to me there is not the slightest scintilla of evidence in the case that it ever was accepted. There is nothing to raise an estoppel; there is nothing to indicate in any way that the Marconi Company ever occupied any other attitude with respect to this case at all except that evidenced by Governor Griggs in his conversation on the 17th, or earlier, of May, that the Marconi Company would not receive any such subscription, because it rested upon a legal basis.

Now under those circumstances it seems to me there is nothing for me to do but to direct a verdict, and I will accordingly do that; and in order to have the matter properly on record I suppose you will consent—you of course will want to review the decision, and you will consent, I suppose, that the verdict be considered as directed just as though the jury were here, although they have been dismissed and discharged.

Mr. Melniker: Yes, sir; and Your Honor will note my objection to the direction.

The Court: You may note an objection to my ruling.

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## Rule for Judgment

*(Filed, November 28, 1913)*

HUDSON COUNTY CIRCUIT COURT

GEORGE W. C. SCHMIDT,
Plaintiff,
vs.
MARCONI WIRELESS TELEGRAPH COMPANY OF AMERICAN,
Defendants.

This action having been tried before Judge William H. Speer, with a jury, in the presence of the counsel of the respective parties, and the judge having charged the jury, and the jury having returned a verdict against the plaintiff and in favorof the defendant,

It is ORDERED that judgment final be and the same hereby is entered in favor of the defendant and against the plaintiff, with the defendant's costs, to be taxed.

WM. H. SPEER,
Judge.

Actually entered this 28th day of November, 1913.

## Exhibit P-1

HUDSON COUNTY CIRCUIT COURT

| | |
|---|---|
| GEORGE W. C. SCHMIDT, Plaintiff, vs. MARCONI WIRELESS TELEGRAPH COMPANY OF AMERICA, Defendant. | Action at Law Admission of Facts. |

*To the above named plaintiff and Aaron A. Melniker, his attorney:*

Sirs:

Pursuant to your notice served upon us herein for the purposes of the trial of this cause only, we admit that 135 shares of the capital stock of the defendant herein, were standing in the name of M. L. Parsons on the books of said company, at the close of business on the 20th day of April, 1912, which admission is required by paragraph 1 of your said notice.

We refuse to admit any other matters required by your said notice, *viz:* paragraphs 2, 3, 4, 5 thereof.

Respectfully yours,
GRIGGS & HARDING,
Attys. of Deft.

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## Exhibit P-2

No. 21102 $500 New York, May 3, 1912.

THE MECHANICS & METALS NATIONAL BANK
of the City of New York

Exhibit P-3

Pay to the order of Corporation Trust Co. $500.00
Five Hundred and 00/100 .....Dollars
LEVY BROS.

(*Endorsed*)
Pay to the order of
The Commercial Trust Company
of New Jersey,
The Corporation Trust Company,
Special Account,
B. Stafford Mantz,
Treasurer.

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**Exhibit P-3**

No. 21100 $6250 New York, May 3, 1912.

THE MECHANICS & METALS NATIONAL BANK
of the City of New York

Pay to the order of Corporation Trust Co.
$6250.00
Sixty-two hundred fifty and 00/100.....Dollars
LEVY BROS.

(*On side*)
Levy Bros.—Stocks & Bonds—44 Broad St.

(*Endorsed*)
Pay to the order of
The Commercial Trust Company
of New Jersey,
The Corporation Trust Company,
Special account,
B. Stafford Mantz,
Treasurer.

**Exhibit P-4**

MARCONI WIRELESS TELEGRAPH COMPANY OF AMERICA

Subscription to new shares of capital stock

May 3, 1912.

I hereby agree to take 3375 shares of the increase in the capital of the Marconi Wireless Telegraph Company of America, and to pay for the same, at the rate of $5 per share according to the terms named in the Company's circular dated April 19, 1912.

May 3, 1912.

LEVY BROS.

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The right to make this subscription will expire at three o'clock p. m., on May 6th, 1912, after which no subscription can be accepted. Send this subscription with money order or banker's draft on New York for $2.00 for each share taken to the Corporation Trust Co., Jersey City, N. J.

Certified checks herewith for $6,750—being first installment.

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**Exhibit P-5**

MARCONI WIRELESS TELEGRAPH COMPANY OF AMERICA

ASSIGNMENT OF RIGHTS. .....Rights

For value received, I hereby sell, assign and

transfer to Levy Bros., the rights attaching to one hundred and thirty-five shares of the Marconi Wireless Telegraph Company of America, to subscribe for and pay for shares in the increase of the capital stock of said Company, under the provisions of the Company's circular dated April 19, 1912.

without recourse. May 1st, 1912.

M. L. PARSONS.

H. A. Pincott. LEVY BROS.

To secure the benefit of these rights, formal subscription by the purchaser thereof must be filed with the Corporation Trust Co., Jersey City, N. J., before three o'clock, p. m., on May 6th, 1912.

(*Endorsed on side*)
Without recourse.

(*Endorsed*)
As to M. L. Parsons, "Signature correct—The Mechanics & Metals Nat'l. Bank—J. Robinson Ac."

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**Exhibit P-6**

No. 21600. $10125. New York, Jun. 10, 1912.

THE MECHANICS & METALS NATIONAL BANK

of the City of New York

Pay to the order of Corporation Trust Co.

$10,125.00

Ten Thousand one hundred and twenty-five Dollars.

LEVY BROS.

(*Endorsed*)

Pay to the order of
The Commercial Trust Company,
of New Jersey
The Corporation Trust Company,
Special Account,
B. Stafford Mantz,
Treasurer.

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**Exhibit P-7**

KNOW ALL MEN BY THESE PRESENTS, that we, HERBERT W. LEVY, GUY W. LEVY and C. SEDWICK LEVY, partners, trading as LEVY BROTHERS, of the City, County and State of New York, for the sum of One Dollar and other good and valuable considerations, the receipt whereof is hereby acknowledged, do hereby sell, assign, transfer and set over unto GEORGE W. C. SCHMIDT, his executors, administrators and assigns, to his and their own proper use and benefit any and all sums of money due or owing to us and all claims, demands, cause or causes of action, of any kind, whatsoever, which we ever had, now have or may have against the MARCONI WIRELESS TELEGRAPH COMPANY OF AMERICA, by reason of the failure of said company to deliver to us thirty-three hundred and seventy-five (3375) shares of the increase of the capital stock of the said company, which increase was authorized by a resolution of the stockholders of said company, adopted April eighteenth, nineteen hundred and twelve; which

shares were subscribed on May third, nineteen hundred and twelve;

And we hereby constitute and appoint the said GEORGE W. C. SCHMIDT, his executors, administrators and assigns, our true and lawful attorney, for us and in our names but for his sole use, to ask, demand and sue for, in his name and right, collect, receive, compound and give acquittance for the said claim or claims or any part thereof.

In witness whereof, we have hereunto set our hands and seals this sixth day of December, nineteen hundred and twelve.

HERBERT W. LEVY (L. S.)
GUY W. LEVY (L. S.)
C. SEDGWICK LEVY (L. S.)

In the presence of
Aaron A. Melniker.

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**Exhibit D-5**

676.

THE CORPORATION TRUST COMPANY,

15 Exchange Place, Jersey City, N. J.

Re: Subscription to new stock of Marconi Wireless Telegraph Company of America.

Received for examination.
- Subscription agreement for 3375 shares
- Assignment of rights
- Check for $10,125.00 Bal. Payment.

Dated, Jersey City, June 10, 1912.

Exhibit D-6

THE CORPORATION TRUST COMPANY

If papers are in order, permanent receipt will be delivered upon surrender of this receipt.

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**Exhibit D-6**

THE CORPORATION TRUST COMPANY

Incorporated under the Trust Company Law of the State of New Jersey

15 Exchange Place, Jersey City

Reply to 15 Exchange Place, Jersey City

June 12, 1912.

Re: Marconi Wireless Telegraph Company of America

Levy Bros.,
44 Broad Street,
New York City.

Gentlemen:

Referring to your subscription for 3375 shares of Marconi stock based upon an assignment of the rights attaching to 135 shares of stock of the Marconi Company executed by M. L. Parsons, we beg to say that we have referred this subscription to the Marconi Wireless Telegraph Company of America and that company instructs us that the subscription can not be allowed as M. L. Parsons was not an actual holder of stock on

April 20th, 1912, when the rights accrued, and that persons not actual owners and holders of stock were not entitled to subscribe for new stock or to sell their rights.

We are, therefore, prepared to return to you the $16,875.00 paid to us on account of this subscription and the assignment executed by M. L. Parsons if you will send to this office for the same.

GCH/CB Yours very truly,

THE CORPORATION TRUST COMPANY,

George C. Holton,

Attorney.

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**Exhibit D-7**

THE CORPORATION TRUST COMPANY

Incorporated under the Trust Company Law of the State of New Jersey

15 Exchange Place, Jersey City

Reply to 15 Exchange Place, Jersey City

June 26, 1912.

Re: Marconi Wireless Telegraph Company of America

Levy Bros.,
44 Broad Street,
New York City.

Gentlemen:

At the request of the above company, we are instructed to return you herewith your subscrip-

tion to 3375 shares of its new issue of stock with accompanying assignment by M. L. Parsons.

We are also enclosing our check to your order for $16,875.00, representing the payment made to us in connection with this subscription.

At your convenience, will you kindly return our window ticket #676 given you in connection with your payment upon this subscription?

BSM/CB Yours very truly,

THE CORPORATION TRUST COMPANY,

R. W. Mintz,

Treasurer.

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**Exhibit D-8**

THE CORPORATION TRUST COMPANY

Incorporated under the Trust Company Law of the State of New Jersey

15 Exchange Place, Jersey City

Reply to 15 Exchange Place, Jersey City

April 27, 1912.

Re: Marconi Wireless Telegraph Company of America

Messrs. Levy Bros.,
44 Broad Street,
New York City.

Gentlemen:

Replying to your favor of the 26th inst., we have indicated below the number of shares set

opposite the names given us, as shown by the books in this office at the close of business on the 20th inst.

We trust this is satisfactory for your requirements.

THE CORPORATION TRUST COMPANY,
BSM/CB Yours very truly,

R. W. Mintz,
Treasurer.

| | |
|---|---|
| G. W. Levy, | 14 |
| Levy Bros., | 77 |
| M. L. Parsons, | 135 |
| Harry Pincott, | 2 |
| A. C. Brady, | none |
| Frederick Daily & Co. | 4 |
| H. W. Levy, | 5 |
| M. W. Levy, | 4 |
| John R. Watson, | 135 |
| H. A. Pincott, | none |
| E. F. Butler, | none |

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**Exhibit D-9**

(*Copy*)

MARCONI WIRELESS TELEGRAPH COMPANY OF AMERICA

Office of

THE CORPORATION TRUST COMPANY

15 Exchange Place, Jersey City, N. J.
No. 413.

Exhibit D-9

THE CORPORATION TRUST COMPANY has received from Levy Bros. (hereinafter called the subscriber) Sixty-seven hundred fifty Dollars ($6750.00) being first payment of Two Dollars ($2.00) per share upon subscription of the subscriber to Thirty-three hundred seventy-five shares of Capital Stock of MARCONI WIRELESS TELEGRAPH COMPANY OF AMERICA of the issue offered for subscription by circular of said Company dated April 19, 1912, and pursuant to the terms and conditions of said circular.

This receipt *endorsed* by the subscriber must be presented *with the final payment on said subscription on or before June 10, 1912,* in order to entitle the subscriber to receive certificates for the shares so subscribed for.

The giving of this receipt does not evidence the right of the subscriber to make said subscription, as all rights to subscribe shall be finally determined by the Marconi Wireless Telegraph Company of America.

Dated, Jersey City, N. J., May 4, 1912.

THE CORPORATION TRUST COMPANY,
By R. W. Mintz,
Treasurer.

NOTICE: Under the terms of the circular within referred to all subscriptions not fully paid for on or before June 10, 1912, will be null and void, and any partial payments thereon will be forfeited to the Marconi Wireless Telegraph Company of America.

**Exhibit D-10**

(*Copy*)

May 17, 1912.

Messrs. Levy Brothers,
44 Broad Street, City.

Gentlemen:

The issue of stock recently put out by this Company was offered to stockholders of record April 20th, 1912. Persons not actual owners and holders of stock were not entitled to subscribe for new stock or to sell their rights.

In every instance where this Company has reason to believe that application for new shares has been made or rights sold by persons who were not actual holders of stock on April 20th, 1912, the production of the stock certificate will be required before acceptance of subscription to new stock.

The above applies to stock standing the name of M. L. Parsons, A. Steinhardt and others, or any man in the same position, of which you are perfectly aware.

Yours very truly,
MARCONI WIRELESS TELEGRAPH
COMPANY OF AMERICA,
By J. Bottomley,
Secretary.

**Exhibit D-11**

*(Copy)*

June 19, 1912.

Messrs. Levy Brothers,
44 Broad Street, City.

Gentlemen:

In reply to your letter of June 13th, if you will produce the stock under which M. L. Parsons undertook to sell you the assignment of rights, the rights will at once be delivered to you under such assignment. No person knows better than yourselves that M. L. Parsons had no right to subscribe for any rights and you further know perfectly well that M. L. Parsons parted with his shares at least eight to ten years ago. You can sue or not just as you elect.

Yours very truly,
MARCONI WIRELESS TELEGRAPH
COMPANY OF AMERICA,
By J. Bottomley,
Secretary.

Exhibit"D 1".

LEVY BROS.
44 Broad Street
New York.

April 26, 1912.

Corporation Trust Co.,
Jersey City, N. J.

Gentlemen:

Will you kindly advise us as to the number of shares of American Marconi standing in the name of each one of the following at the close of business, April 20th;

G. W. LEVY
H. W. LEVY
LEVY BROS.
M. W. LEVY
M. L. PARSONS
JOHN R. WATSON
H. A. PINCOTT
A. C. BRADY
F. F. BUTLER
FREDERICK DAILY & CO.

We regret to trouble you for this information but because of the singular policy of the Marconi Company in not sending out certificates for rights, we must get this information in order to protect the present holders of certificates in question.

Thanking you, we are,
Yours truly
Levy Bros.

# New Jersey
# Court of Errors and Appeals

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| | |
|---|---|
| George W. C. Schmidt,<br>Plaintiff-Appellant,<br>vs.<br>Marconi Wireless Telegraph Company of America,<br>Defendant-Appellee. | Action at Law. |

## BRIEF FOR APPELLANT

### Facts

The defendant, a corporation, authorized the issuance of an increase of its capital stock. The offer was made to all stockholders of record on April 20th, 1912. On that day, M. L. Parsons appeared on the books of the company to be the holder of 135 shares of its stock. One of the terms of the offer was that the rights to subscribe belonging to any number of shares were assignable, and the assignee could subscribe upon presentation of a duly executed assignment. M. L. Parsons assigned her right to subscribe upon a blank form provided by the company, to Levy Brothers, who within the time limited in the offer, subscribed for 3,375 shares and paid the required deposit. Levy Brothers, afterwards also within the time

New Jersey State Library

limited, paid the balance of their subscription. The company, after holding the money, amounting to $16825, until the 26th of June, 1912, and after the time to subscribe had expired, returned the money to Levy Brothers, and refused to deliver the stock. This suit is brought to recover the profits which Levy Brothers would have made if the stock had been duly delivered to them, as the stock subsequently went up from par, $5.00 a share, to $12.00 a share. The defendant filed an answer, setting up that on April 20th, 1912, M. L. Parsons was not the actual owner of the 135 shares referred to, having transferred them a long time prior to that date, and that consequently, she had no right to subscribe which she could assign to Levy Brothers.

It is admitted, that on April 20th, 1912, M. L. Parsons appeared on the books of the company as the holder of 135 shares.

A preliminary motion was made to strike from the defendant's answer all allegations setting up the non-ownership of the stock by Parsons, on the said 20th day of April, 1912, on the ground that such allegations constitute no defense to this action. The question involved in this ruling, which constitutes the first ground of appeal, as well as those questions raised by the second and third grounds of appeal, are so closely co-related to the questions raised by the direction of the verdict for the defendant, that they can all be conveniently considered together.

## The Trial Court Erred in Directing a Verdict for the Defendant Because

(1) *The question whether M. L. Parsons had transferred her stock prior to April 20, 1912, was for the jury.*

The defense was that even though M. L. Parsons appeared on the books of the company to be the holder of 135 shares of stock on April 20th, 1912, that in fact M. L. Parsons had transferred and assigned such stock in 1905. This the plaintiff denied, and an issue of fact was thus raised, upon which the plaintiff was entitled to go to the jury.

Plaintiff proved, by an admission in writing, made pursuant to notice, under the Practice Act of 1912, that M. L. Parsons appeared on the books of the company on April 20th, 1912, to be the holder of 135 shares. This raised a presumption that she was the owner thereof, until the contrary was proven.

> "It is a presumption that one is a subscriber or stockholder when his name appears on the books of the corporation in either of these capacities."
>
> 1 Cook Corp., Sec. 55.
>
> "When it is shown that certain property belongs to a particular person, the law presumes that the ownership remains unchanged until the contrary appears."
>
> 16 Cyc., 1054 (*n*).

And that presumption continues until it is overcome by proof. The burden was on the defendant to prove that M. L. Parsons was not the owner of the stock in question on April 20th, 1912. Conceding for the moment, for the purpose of the argument that the question of the real ownership of the stock as distinguished from the record ownership, was material, how did the defendant sustain that burden? It sought to do it by the testimony of its president, who is also its general counsel and attorney of record and a large stockholder (p. 69) that someone (or two), vaguely described as members of the firm of Levy Brothers (p. 70) had told him that they (?) had sold and parted with the (?) stock in 1905, or

rather, that when he had asked such person or persons if that was true, that he or they had answered in the affirmative. This was all the proof there was in the case that M. L. Parson was not the owner of the stock in question on April 20th, 1912, and upon this testimony the Court directed a verdict for the defendant.

**In the first place this testimony was incompetent. The books of the company were the best evidence of tha ownership of the stock of the company.**

"Where the books of a corporation are in existence and can be obtained, parol evidence is inadmissible to show who are members of the corporation."

Coffin vs. Collins, 17 Me., 440.

"The books of a corporation are, for many purposes, the primary evidence of membership as between the corporation and the members, and in the payment of dividends, without notice of an adverse claim, a corporation is protected by payment to the holder of record on its books."

Campbell vs. Perth Amboy B. & L. Assn., 74 Atl., 144.

"As between a corporation and a corporator, the stock book is primary and the certificate is secondary evidence of their relation."

Appeal of Bank of Commerce, 72 Pa. State, 59.

"One whose name appears as stockholder on the corporation books, is presumably a stockholder, and the books are admissible to show the fact."

Pittsburg, etc., R. R. Co. vs. Applegate, 21 W. Va., 172.

> "The books are *prima facie* evidence of ownership of stock. The burden of proof is on one who asserts the contrary."
>
> Hoagland vs. Bell, 36 Barber, 57.

Even if this evidence was competent and conceding, for the moment, that proof of the non-ownership of the stock by M. L. Parsons on April 20th, 1912, was determinative of all the issues in this case, it is submitted that there was no proof of that fact before the Court of such a conclusive nature as to warrant a direction of a verdict for the defendant. The testimony referred to, of an alleged admission, was not conclusive.

Sir John Romily, in the case of *Greenslave vs. Dare,* in 20 Beav., 284, at page 289, said:

> "I pay very little attention to the affidavit of one party that the adverse party has admitted the whole question in the controversy between them to be against himself."

> "Evidence of admissions must always be received with great caution and should invariably be subjected to the most rigid scrutiny. Even when it proceeds from the mouth of an honest and disinterested witness, it is liable to much imperfection and error. Sometimes, a word misunderstood or a look or action misrepresented, will produce upon the mind of the hearer an impression so entirely different from that which the speaker intended that if the statement or admission subsequently becomes the subject of investigation, each party in consequence of the misunderstanding, will be forced to distrust the integrity of the other."
>
> Jones vs. Knauss, 39 Eq., 616.

"It appears to be an accepted rule that verbal admissions should be received with great caution. It frequently happens that the witness, by unintentionally altering a few expressions, really used, gives an effect to the statement completely at variance with what the party actually did say."

Wolfinger vs. McFarland, 67 N. J. E., 696.

"Testimony of oral declarations of any persons, including admissions of a party, is regarded not only as unreliable, but dangerous, and is invariably received with caution because of the danger both of misunderstanding and of misrecollection of what was said."

Moore on Facts, Sec. 1138.

There are two kinds of admissions:

(1) Formal admissions, which are made for the purpose of trial, are a substitute for evidence and do away with the need of evidence. These are sometimes known as judicial admissions;

(2) Statements, admitted on the theory of discrediting present claim. The latter go to the jury like the inconsistent statements of a witness, and the party is not prevented from disputing their truth in any way he can. They never bind, in the sense that he is held, as a matter of law, to the fact thus stated. The theory that an admission is substituted for and serves in the place of evidence is open to the objection that it is not founded on the facts of the law, for the party's extra-judicial admissions simply go to the jury with the other evidence and do not, by any means, relieve the other party from producing evidence or allow him to take for granted the fact referred to in the admissions.

1 Greenleaf Evidence, Sec. 169.

"Judicial or formal admissions made, during the course of a trial, take the place of evidence. Not so *quasi* admissions. The latter is only an item of evidence and available as a self-contradiction. It is not conclusive."

Wigmore Evidence, Sec. 2588.

Judicial admissions are conclusive proof of the facts admitted and serve in place of evidence thereof. Extra-judicial admissions are not conclusive. They have certain probative force, but do not stand in place of the facts which are sought to be proved by them.

Chamberlayne, Sec. 1236.

"In the absence of estoppel, extra-judicial admissions are not conclusive."

Chamberlayn, Sec. 1383.

"The Court must not assume that a fact is conceded by one party merely because he has not repudiated his adversary's testimony respecting it."

Palmer vs. McMaster, 10 Mont., 390; 25 Pac., 1056.

"There are numerous circumstances which have been deemed sufficient to deprive of probative force either the testimony of declarations and admissions or statements themselves. Among the circumstances which have raised a cloud of suspicion are the following:

"If a slight variation in the words used would have changed the sense;

"If there was another subject-matter to which all that is alleged to have been said might readily apply;

"That the statement was inconsistent with the purposes and conduct of the declarent;

"That the conversation as narrated by the witness was suspiciously formal, forced and unnatural;

"That the forms of questions and answers in an alleged dialogue were not such as would be expected under the circumstances."

Moore on Facts, Sec. 1172.

"Whether a statement or admission has reference to the issue, is a question of fact for the determination of the jury, the duty of the Court being to admit proof of the statement or admission, if there is evidence tending to show that it referred to the controversy in hearing."

Van Reeden vs. Evans, 52 Ill. App., 209-211.

"Construction of a statement either oral or written, which is introduced as an admission, is for the jury."

60 Ga., 185-188.

"What admissions mean is a question for the jury."

Phillips vs. Ford, 26 Mass., 38.

"The probative force of an extra-judicial statement, dependent upon many circumstances is for the jury and not for the Court."

Chamberlayn, Sec. 1236.

"It is for the jury to consider under all the circumstances, how much of the whole statement they deem worthy of belief in-

cluding as well the facts asserted by the party in his own favor as those making against him."

1 Greenleaf Evidence, Sec. 201.

"It is for the jury to say whether the admission as made, established to their satisfaction, the fact in issue."

Michigan Carbon Works vs. Schad, 38 Hun, 7175.

Moore on Facts, Sec. 102.

"For the purpose of determining the particular facts admitted by the defendant, by the body of evidence, as given by these witnesses, the same must be scanned, scrutinized, reconciled, the meaning of words and phrases considered, and all the facts and circumstances under which the conversation took place, must be weighed and reflected upon, with a view of determining the particular fact which the defendant did admit. This was the province of the jury, not of the Court."

Michigan Carbon Works vs. Schad, *supra.*

"The weight of an admission is for the jury."

Chamberlayn, Sec. 1390.

"It was so held, although the testimony was uncontradicted."

Abbott's Civil Jury Trials, 611, note.

"If there is any question respecting the meaning of an admission, it is for the jury."

Dampf vs. Greener, 11 N. Y. St., 90.

Mr. Griggs testified (p. 70) "I saw one, if not two, members of the firm of Levy Brothers in connection with one or more of their counsel." It is a little difficult to say from this just whom Mr. Griggs saw. He speaks of seeing one if not two members of the firm of Levy Brothers. There are three members of the firm of Levy Brothers. He does not state which one or two he saw. It does not appear that he knew them or any of them. It does not appear how he knew that the persons he spoke to were members of the firm of Levy Brothers, or that they were members of the firm of Levy Brothers. It does not appear that they were members of that firm. He refers to Levy Brothers' counsel, and says he "supposed" one of the men who called to see him was a Mr. Cohn, who was mentioned in the testimony. He then goes on to say that "*they* came to see me." Who came to see him? He then goes on to say "I questioned Mr. Levy and his attorney." Which Mr. Levy? The answer might be "the one that came to see me." But there were two who came to see him. Which one did he question? And which attorney did he question? He said there were two attorneys, Mr. Wollman and one whom he supposed to be Mr. Cohn. Which one did he question?

> "An admission made by the party or by another, the evidence leaving it uncertain by whom, is incompetent."
>
> Butterfield vs. Kirtley, 114 Iowa, 520; 87 N. W., 407.

He says:

> "I questioned Mr. Levy and his attorney as to whether M. L. Parsons or they actually owned this stock at the time they subscribed and informed them that our information was that they had sold and parted with the right to the stock in 1905, and that they (?) said it was true."

Who are "they"? Which Mr. Levy and which attorney said yes, it was true. And whom did the witness mean when he said "they" had sold and parted with all right to the stock in 1905? Surely not M. L. Parsons, for if he had, he would have said "she" had parted with all the stock in 1905. "They" evidently referred to Levy Brothers, but it is not Levy Brothers' stock upon which this action is based, but upon the stock of M. L. Parsons. It might very well have been that the witness was discussing stock belonging to Levy Brothers, and for that reason used the word "they," for as appears from Exhibit "D-9" (p. 129) G. W. Levy was the holder on the books of the company of 14 shares, Levy Brothers of 77 shares, H. W. Levy, 5 shares and M. W. Levy, 4 shares, and evidently, there was a controversy about stock other than that of M. L. Parsons, for in the letter to Levy Brothers from the Marconi Company, under date of May 17th, 1912, Exhibit "D-10" (p. 131), the Marconi Company wrote that the objection to the subscriptions for stock extended not only to the stock standing in the name of M. L. Parsons, but to that standing in the name of A. Steinhardt and others, in which Levy Brothers had an interest. This letter, evidently, was written prior to the conference to which the witness testified. Can it be said that the witness' testimony with regard to this so-called admission made it absolutely clear that M. L. Parsons had transferred and assigned, in 1905, all her interest in the stock standing in her name on April 20th, 1912?

> "Admissions must be certain, definite and clearly proven."
>
> Chamberlayn, 1265, *et seq.*

> "An alleged admission should not be considered where the subject-matter to which it refers is left uncertain."
>
> 16 Cyc., 1038.

> "An admission must possess the same degree of certainty as would be required in the evidence which it represents, and mere conjecture, suggestions as to what might have happened if certain circumstances had not occurred, what was the understanding, and the like, are not competent."
>
> 16 Cyc., 941.

Is it an admission at all of such a fact, and if it is an admission at all, is it of such a nature as to make it conclusive proof of the facts sought to be proved by it? Is it such proof as conclusively establishes that fact and overbalances the presumption arising from the books of the company that M. L. Parsons was the owner of such stock on April 20th, 1912? The plaintiff would have a right to argue to the jury that if the transfer of this stock really was made in 1905, it would probably have appeared on the books of the company before 1912, and the fact that it did not so appear to have been transferred for seven years after its alleged sale, would permit an inference that such sale had never taken place.

There was a sharp conflict of testimony as to when this conference testified to by Mr. Griggs took place. Mr. Griggs testified it was in the middle of May (p. 78, l. 34). Mr. Wollman testified that it was about June 10th (p. 64); that it was after the check for $10,125.00 (Exhibit "P-6") was delivered to the Corporation Trust Company, on June 10th, 1912.

It does not appear anywhere in the case, even if it were true that M. L. Parsons had transferred

stock in 1905, that the stock which was in her name in 1912 was the same stock which was transferred in 1905. It was not impossible or improbable that she bought and sold stock during the seven years intervening. There is nothing in the case to indicate when this stock which was standing in her name on April 20, 1912, was transferred to M. L. Parsons on the books of the company, although the defendant had possession of the books and could have put in that proof.

It is conceivable and not at all improbable, that the stock which M. L. Parsons is alleged to have sold in 1905, was transferred to the purchaser on the books of the company, and that subsequently, M. L. Parsons bought other stock, which was transferred to her on the books of the company. She may have bought the stock which was standing in her name on April 20th, 1912, and had it transferred to her on the books of the company a few days before that date. The books of the company would show whether this stock which she had on April 20th, 1912, belonged to her in 1905, when she is alleged to have sold it. The books were not produced, although the defendant could easily have produced them.

> "Where the only evidence sufficient upon an essential point is the testimony of the party in his own favor, or of a witness interested in his favor, it is error to refuse to submit the case to the jury."
>
> Abbott's Civil Trials, p. 611.

> "It does not follow that because there is no contradictory testimony, the Court must take the question from the jury, and determine it as one of law. On the contrary, if different results would be reached by different minds, the question must go to the jury."
>
> Abbott's Civil Trials, p. 609.

"The facts, and not simply the evidence, must be clear in order to make it a question of law for the Court."

Ditto.

"So if a witness is contradicted by circumstances, the question should go to the jury."

Ditto (note).

"The Court can only direct a verdict when there is an undisputed state of facts."

Ditto.

"Testimony can not be said to be undisputed when inconsistent with some other fact or circumstance, either established or regarding which testimony has been admitted."

Hagan vs. Chic., D. & C. G. R. Co., 86 Mich., 615; 49 N. W., 509.

"A fact is legally in dispute, so as to require its submission to the jury, when its affirmation and denial are each supported by competent evidence of the same probative force, or such evidence as, standing alone, would naturally and legitimately lead a reasonable mind to a definite conclusion as to the existence or non-existence of such fact."

Rauber vs. Sundback, 1 S. Dak., 268; 46 N. W., 927.

"On motion for direction, the opposite party is entitled to the benefit of all legitimate inferences from the evidence and assumption of its truth."

(2) *Aside from the question of the ownership of stock by M. L. Parsons, there was a binding contract of subscription between Levy Brothers and the defendant.*

The company in its offer of stock (p. 10) said:

> "Rights to subscribe belonging to any number of shares may be assigned, and the subscription may be made by the holder, but only upon presentation of a duly executed written assignment."

The company provided forms for assignments of rights (Exhibit "B," p. 11), and subscription blanks (Exhibit "C," p. 12). M. L. Parsons, using the form provided by the company, assigned the rights attaching to the 135 shares of the stock standing in her name, to Levy Brothers. Levy Brothers, on the form provided by the company, subscribed for and agreed to take 3,375 shares of the stock and delivered the written assignment, together with the subscription agreement, signed by them, together with a check for $6,750.00, to the Corporation Trust Company, which received the money and the papers and gave Levy Bros. a receipt therefor. The company's offer (Exhibit "A," p. 10), provided:

> "All subscriptions and payments for the new issue of stock must be made to the Corporation Trust Company, registered agent, at 15 Exchange Place, Jersey City, N. J. Checks must be drawn to the order of the Corporation Trust Company and must be payable either in Jersey City or New York funds."

The receipt given by the Corporation Trust Company (Exhibit "D-9," p. 130) contains the clause:

> "The giving of this receipt does not evidence the right of the subscriber to make

such subscription, as all rights to subscribe shall be finally determined by the Marconi Wireless Telegraph Company of America."

When Levy Brothers made the final payment of $10,125.00, on June 10th, 1912, this receipt was taken up and a new receipt given (Exhibit "D-5," p. 125) which contained no such provision.

It was a fair, proper and permissible inference that the Marconi Company had determined the question and when its agent accepted from Levy Brothers the balance due and took up the receipt containing this clause and gave them a receipt without any such restriction or qualification, a binding agreement was consummated.

It could very well be argued that the Marconi Company had waived any right which it might have had to object to the subscription and had determined to accept it. What other inference could be drawn from the acceptance of the balance of the money and the cancellation of the old receipt and giving of the new.

The subscription agreement and the $16,875.00 was held until the 26th day of June, 1912, when it was returned to Levy Brothers.

It is submitted, that irrespective of the rights of M. L. Parsons, Levy Brothers had entered into a valid and binding agreement with the Marconi Company, to subscribe for and take 3,375 shares of the stock, or, in any event, the acceptance of the money and the subscription agreement, their retention by the company, the character of the receipts, and all the other circumstances surrounding the transaction, made it a question for the jury whether or not such an agreement had been entered into.

It is urged that the Corporation Trust Company had no authority to enter into any agreement with Levy Brothers for this stock. Whether it did or not was a question for the jury.

"It is for the jury to determine whether the relation of agency existed or whether an agent had a given authority."

Abbott's Civil Trials, p. 513, and cases cited.

"It is also for the jury to determine whether an act amounts to a ratification, and generally, whether a servant's act was in furtherance of his master's interest and within the scope of his employment."

Ditto, p. 514.

There is no question but what Levy Brothers had bound themselves to take this stock and to pay for it, and there is no question but what, if the price of the stock had fallen, that the Marconi Company would have held Levy Brothers for any loss. Nor is there any question that if Levy Brothers had failed to make the final payment on the stock that the Marconi Company would have forfeited the initial payment. The agreement on the part of Levy Brothers to take this stock was unconditional, and undoubtedly was binding upon them, and if it was binding upon Levy Brothers it was binding upon the Marconi Company.

In any event, it was a question for the jury whether a contract existed or not.

Abbott's Civil Jury Trials, p. 609, *supra.*

"If the intention of the parties to an oral contract is doubtful, although there may be no conflict in the evidence, the jury are to determine what the contract was."

9 Cyc., 592.

And even if there was no question of fact or mixed fact and law for the jury, it was error for the Court to determine, as a matter of law, that there was no contract. It is respectfully submitted that there was a valid and binding contract be-

tween the Marconi Company and Levy Brothers, arising from the conduct of the parties, and the manifest intention, legally inferred from such conduct, to contract.

*3. Even if Parsons had assigned the stock prior to April 20th, 1912, she was the holder of record on that date and was entitled to subscribe.*

The offer is, by its terms, made to stockholders of record on April 20th, 1912. It is admitted that on that day M. L. Parsons appeared on the books of the company to be the holder of 135 shares. Even were it true that Parsons had assigned the stock before that date, yet, such assignment not having been registered on the books of the company, the transfer was not consummated, and, as between Parsons and the company, Parsons was still the holder of the stock; Parsons was not divested of the incidents of ownership as against anybody except her assignee, nor was her assignee invested with the incidents of ownership, except as against Parsons. Neither was Parsons relieved from the obligations and liabilities of ownership, nor was Parsons' assignee burdened with the liabilities or obligations of ownership, as long as the stock was not registered on the books of the company.

This position is sustained by the overwhelming weight of authority.

Under the corporation law of New Jersey, the right to vote and the right to dividends belongs to, and the liability for assessments on stock, falls upon the holder of record on the books of the company. This statutory enactment is merely declaratory of the universal holding of the Courts. The statute also provides that the stock of a corporation is transferable upon its books, and the by-laws of the defendant company provide that such transfer shall be made only upon the books of the company, and there was a notice printed

upon its certificates of stock that its shares were only transferable on the books of the company (p. 33, Vol. 5). That being so there was no valid, consummated transfer of the stock prior to April 20th and on the date M. L. Parsons was still the holder of the stock.

Parsons wolud have been liable for calls. She was subject to all the liabilities of a stockholder, why not the privileges except as to her assignee? As to the assignee, Parsons might be held a trustee of any benefits or profits received, just as in the case of dividends paid to an assignor of stock after an assignment, such assignor can be made to account by the assignee, but that would be a proceeding between the assignor and assignee, to which the corporation would not be a party. The corporation, in a legal proceeding, must recognize the legal owner. That is, the person whose name appears upon its books to be the owner.

Possession of the certificate of stock does not constitute one a stockholder. What makes one a stockholder is the rightful entry of his name upon the books of the company. The placing of a person's name upon the books of the company rightfully, invests such person with the liabilities and consequently with the rights of part-ownership of the corporation. The possession of a certificate of stock without such entry does not have that effect.

The general rule is that in order to pass the full legal title, the assignment must be made on the books of the company. It is, therefore, held, that a contract to sell and deliver shares of stock is satisfied by transferring the shares to the vendee upon the books of the company, without delivering the certificate of stock to him, the certificate being merely additional evidence of title.

10 Cyc., 599.

A stock certificate is only *evidence* of the ownership of shares in a corporation, it is not the shares themselves.

78 Atl., 1135; 69 Atl., 528.

The general rule is that between the corporation on one hand and its shareholders and third persons, on the other, for the purpose of determining who its shareholders are, the corporation looks only to its books. This rule, we have seen, obtains for the purpose of determining who are entitled to vote at corporate elections, who are entitled to receive dividends, who have such standing as shareholders as will entitle them to petition for a dissolution of the corporation, for failing to pay an annual dividend, and who has such a standing as a shareholder as will enable him to prosecute a suit in equity to restrain the corporation from increasing its indebtedness.

Subject to qualifications elsewhere considered, a transfer of shares not registered on the books of the corporation in accordance with the governing statute, or its by-laws, is not binding upon it, either with or without notice aliunde of the transfer.

10 Cyc., 597.

The duty of a corporation is to recognize the registered holder shown on the transfer books.

Canadian Importation Co. vs. Lea, 74 Eq., 231; 69 Atl., 455.

A transfer of shares not perfected on the company's books, passes only an equitable title. In line with this theory, and unrecorded assignment of shares is sometimes called an equitable assignment, and it is even said with reference to cases where the governing statute provides that the stock of a corporation shall be assignable only on the books of the company, that an assignment

not entered on the books of the company in conformity to the statute, will not pass a legal title, although it may pass an equitable title.

10 Cyc., 599.

A certificate of stock accompanied by the power of attorney, authorizing the transfer of the stock to any person, is *prima facie* evidence of equitable ownership in the holder, and renders the stock transferable by the delivery of the certificate.

The holder of the certificate may insert his own name in the power of attorney and execute the power, and thus obtain legal right to the stock.

Mount Holly etc. Co. vs. Ferree, 17 N. J. Eq., 117.

Under a provision requiring registry, the transferrer does not cease to become a stockholder subject to the liabilities thereof, and the transferree does not become a member or stockholder or acquire the rights thereof, until the transfer is entered upon the books of the corporation or a sufficient demand made for the transfer.

Thompson, Sec. 4361 and cases cited.

The term (stockholder) as used in statutes fixing the liability of stockholders, applies not only to such persons as appear on the books of the corporation to be stockholders, but also to the equitable holders of the stock, although the same appears on the books in the name of another.

Thompson, Sec. 4460.

A stockholder is one who has a proportionate interest in the assets of the corporation and is entitled to take part in its control and receive its dividends, and his liabilities can not be terminated short of a transfer.

Thompson.

Stockholders of record are subject to stockholder's liabilities.

Thompson, Secs. 4880, 4884.

The legal owner of stock is liable to the corporation for calls, though he be a trustee for a third person. The reasons for this are that he is the contracting party and the only one known to the corporation. The corporation can not look to the beneficiary nor can it hold him responsible, because not a party to the contract, from which the liability for calls arise.

Thompson, Sec. 3787.

Such trustee is the person in whom the legal title to the stock is vested, and the only person whom the corporation can recognize as the holder of the stock.

Thompson, Sec. 3787.

On September 12th, 1901, a resolution was passed levying a call of $10.00 a share on the holders of record on September 16th, 1901. An action was commenced against defendant. Defendant pleaded that before September 16th, he sold and transferred his shares and delivered the certificate thereof, properly assigned to the purchaser, and gave the company notice thereof, and has not since been the owner of any of said stock. Plaintiff demurred. Judgment for plaintiff on demurrer.

HELD: 1. The provision in the certificate of incorporation of a company organized under our present act concerning corporations to the effect that stockholders of record on the books of the company when assessments or calls for the unpaid amount of subscription for stock are made, shall be liable therefor, is not inconsistent with the statute.

2. Such a provision is binding upon a person who became a stockholder after the company was organized, and who, when the assessment was made, had sold his stock and given the company notice of the sale, but had not surrendered his certificate of stock to the company, or given to the company the name of the purchaser, so as to enable the company to record the transfer.

Brown vs. Morton, 71 N. J. L., 26; 58 Atl., 95.

Because the transferrer ceases to have a voice in the management of the company, and has no longer any interest or ownership in the property, he is freed from further liability and the transferree is substituted and subject to future calls by the corporation for further aid to carry on its business, and fulfill its corporate ends.

Both at common law and under the statutes of New Jersey a stockholder in a corporation is liable for assessments on calls lawfully made, after he has been accepted by the corporation as a stockholder, and while he stands registered as such on its books, and he is not released from such liability by a transfer of the stock after the call has been made, and before it becomes payable.

Campbell vs. American Alkali Co., 125 Fed., 207.

The complainant claims membership by acquiring corporate stock by transfer, but, not having registered his stock and obtained recognition by the corporation as a stockholder, he can claim no other rights than those which the assignment vests in him. Undoubtedly, as between himself and his assignors, the purchase of the certificates gives him all the rights of ownership, and entitled him to demand that he shall be registered by the corporation; until he has caused a trans-

fer to be made upon the books of the corporation, his title as between the corporation and himself, is not perfected, and he neither has the rights nor is subject to the liabilities of membership.

Brown vs. Duluth, etc. R. R. Co., 53 Fed., 889.

A stockholder is one who appears on the books of a corporation as owner of shares, and is therefore, entitled to a voice in the management of its affairs, and is burdened with the liabilities incident to the relation, which can only be thrown off by transfer of stock.

*In re* Argus Printing Co., 48 N. W., 347.

It is pretty well settled that the assignee of stock certificates in a corporation by assignment from persons to whom the certificates were originally issued, are not, by virtue of such assignment, shareholders, when the transfers of shares are required to be made upon the books of the company. The mere assignment gives the assignee an equitable title only, except as against the assignor.

The certificates do not constitute property in the corporation, they are muniment of title, but it is the shares of stock which constitute the property, and the persons whose names appear upon the books of the corporation are presumed to be the stockholders. They have the right to vote and participate in directing the policy of the company.

Beecher vs. Wells Flouring Co., 1 Fed., 276.

A transfer of stock, until entered upon the books of the company, confers upon the transferree as between himself and the company, no

right beyond that of having such transfer properly entered. Until that is done, or attempted to be done, the person in whose name the stock is entered on the books of the company, is as between himself, and the company, the owner to all intents and purposes, and particularly for the purpose of an election.

People vs. Robinson, 64 Cal., 373.

Where the stock of the corporation is, by the terms of the charter or by laws, transferrable only on the books of the corporation, a *bona fide* purchaser of stock not so transferred is not entitled to the rights of a shareholder.

Schuyler vs. N. Y., N. H. & H. R. R., 34 N. Y., 30.

Until actual transfer, the title of the purchaser of stock is only equitable.

Wood vs. Maitland, 10 Phila., 84.

An assignment of stock, unaccompanied by a transfer on the books of the company, vests in the assignee only an equitable title as against the company.

Grymes vs. Hone, 49 N. Y., 17.

When stock is, by its terms, transferrable only on the books of the company, the legal title does not pass until it is actually transferred on the books.

Brown vs. Adams, 5 Biss., 181.

Additional stock issued by the corporation, follows the title recognized by it, and does not pass to the buyer of stock under an executory contract, without an express stipulation to that effect.

Currie vs. White, 31 N. Y. Super Ct., 166.

It seems to us that it is impossible to hold that shares which are assignable only on the books can be assigned so as to pass the legal title by assignment, neither made nor recorded in the books.

Lippit vs. American Wood Paper Co., 23 Atl., 111, and numerous cases cited.

In the absence of statutes or valid by-laws changing the rule, the right to vote ordinarily rests in those in whose names the shares stand registered on the corporate books, although in point of fact, they may have transferred them by a blank power of attorney to some other party, who has not seen fit to execute the power and to have himself registered as a shareholder for the purpose of exercising the voting power attached to the shares; in other words, the right to vote follows the legal title in the shares, and this is especially true where the charter, governing statute or a valid by-law provides that the shares shall be transferred only on the books of the corporation, in which case an unregistered transferee has only an equitable title, the legal title remaining in the transferrer and the right to vote follows the legal title. The right to vote his shares at corporate elections is an incident to the ownership of shares; it inheres in the legal holder of them under the principles of common law, and is in the nature of property.

10 Cyc., 331.

One not having a voice in the control of a corporation nor participation in its profits, is not a stockholder.

Hill vs. Nautilus Insurance Co., 4 Sanford's Chancery, 577 (N.Y.)

In a suit against a corporation, by a stockholder, the objection that a transfer of stock to

him was not made on the books of the company, is cured by the intervention of the person from whom he received the stock.

Houston Cemetery Co. vs. Drew, 13 Tex., 536; 36 N. W., 802.

The certificate is not the stock, for a stockholder may be the equitable owner of shares, although the same appear in the corporate books in another's name.

Cincinnati etc. Ry. Co. vs. Third National Bank, 1 Ohio Cir. Ct., 199.

A certificate of stock, though not the title, is an authoritative declaration that such a title exists.

Willis vs. Fry, 13 Phila., 33.

It is unquestionably the law that a certificate is merely evidence and does not itself constitute the right of a stockholder.

N. Y. and Eastern Telegraph and Telephone Co. vs. Great Eastern Telephone Co., 89 Atl., 531.

This Court will exercise jurisdiction to compel a transfer on the books of the corporation in a case of this nature, on the theory that complainant is the equitable owner and seeks to consummate a legal title.

Reilly vs. Absecon Land Co., 71 Atl., 249.

It is the general rule that as between a corporation and its shareholders and third persons, for the purpose of determining who its shareholders are, the corporation looks only to its books.

Gray vs. Portland Bank, 3 Mass., 364.

This is true, even for the purpose of determining who are entitled to vote at corporate elections, and who are entitled to receive dividends.

Brisbane vs. Delaware R. R. Co., 25 Hun., 430.

Smith vs. American Coal Co., 7 Lansing, 317.

*In re* Glen Saw Co., 45 N. Y. Sup., 567.

Who is a stockholder? See 12 Am. Dig. Century Ed., Sec. 754.

The general rule is that the legal owner, *i. e.*, he whose name rightfully appears as owner on the books of the corporation, is to be regarded as the shareholder, both as to the corporation and as to the public.

10 Cyc., 696, and cases cited.

M. L. Parsons was therefore a stockholder of record on April 20, 1912 of 135 shares of the stock of the defendant company and was entitled to subscribe for 3,375 shares of the new stock and to assign that right, and her assignees upon presentation of a duly executed assignment were entitled to subscribe for the new stock. They did subscribe, complied with the terms of the offer, were entitled to receive the 3,375 shares and for the defendant's failure to deliver the same it should respond to such assignee in damages.

The judgment should therefore be set aside and a new trial granted.

Respectfully submitted,
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# New Jersey Court of Errors and Appeals

GEORGE W. C. SCHMIDT,
Plaintiff-Appellant,

vs.

MARCONI WIRELESS TELEGRAPH COMPANY OF AMERICA,
Defendant-Appellee.

## BRIEF FOR APPELLEE.

### Statement.

On April 18th, 1912, the defendant company offered to its stockholders of record at the close of business on April 20th, 1912, the right to subscribe for 25 shares of new stock to be issued at par value ($5) for every share held by them respectively.

By the terms of the offer rights to subscribe belonging to any number of shares might be assigned and the subscriptions might be made by the holder, but only upon presentation of a duly executed written assignment, and the subscriptions and payments for the new issue were to be made to the Corporation Trust Company, the registered agent of the defendant at Jersey City.

The Trust Company was authorized to receive the same as a depository merely for examination to

await the approval of the defendant and the right of the subscriber to make subscription was to be finally determined by the defendant.

At the close of business on April 20th, 1912, 135 shares of stock stood on the books of the defendant in the name of a woman named M. L. Parsons, a stenographer formerly employed by Levy Brothers, a New York firm of brokers. On May 1st, 1912, said M. L. Parsons executed an instrument purporting to assign the right to subscribe *"attaching to"* said 135 shares to Levy Brothers. On May 3rd, 1912, Levy Brothers, by virtue of said assignment, offered the Corporation Trust Company to subscribe for 3,375 shares of the increased stock. Levy Brothers signed the subscription agreement, and on May 4th, 1912, the Corporation Trust Company received the subscription agreement, together with checks for $6,750, being the first instalment, and the Corporation Trust Company then issued the receipt marked Exhibit D-9 (Case, p. 130).

On June 10th, 1912, the Corporation Trust Company, as such depository as aforesaid, received from Levy Brothers a check for $10,125, the balance due on said subscription for the purpose aforesaid, and the Trust Company gave a receipt to Levy Brothers which referred to the subscription agreement, assignment of rights and balance payment, and also stated "Received for Examination" (Case, pp. 125, 126, Ex. D-5).

After the Corporation Trust Company received the subscription of Levy Brothers on May 4, 1912, and before the middle of May, 1912, it was brought to the attention of John W. Griggs, who was the president and general counsel of the defendant, that said M. L. Parsons was not the actual owner of the stock on April 20th, 1912, but had sold and assigned the same many years before. Mr. Griggs

then investigated the matter, and objections having been conveyed to Levy Brothers against their right to subscribe, about the middle of May, 1912, one or two of the firm of Levy Brothers and two of their attorneys went to see Mr. Griggs relative to these objections. Mr. Griggs questioned them as to whether M. L. Parsons or they actually owned this stock at the time they subscribed, and informed them that the defendant had been informed that M. L. Parsons had sold and parted with all her right to the stock in 1905. Said Levys and their attorneys then said to Mr. Griggs, that neither they nor said M. L. Parsons then actually owned said stock, and that said Parsons had sold and parted with all right to the stock in 1905, but, they further said, that the persons that had bought the stock were then in South America, and inasmuch as they were in a measure clients of said Levy Brothers, they, said Levy Brothers, said that they ought to make this subscription to protect their clients. Mr. Griggs then asked them whether they had any request from the owners to do so and they said they had not. Mr. Griggs then asked them if they had any agreement with the owners to turn over the stock or the benefits of the stock to them, and they said no, but that they were doing it on the broad principle that if they made anything out of it they would do what was right by those that had been their clients (Case, pp. 70, 71).

The defendant, acting upon these facts stated by Levy Brothers and their counsel, rejected the subscription of Levy Brothers and refunded to them their money (Case, p. 73).

The claim for this alleged right to subscribe assigned by M. L. Parsons to Levy Brothers was assigned to plaintiff, who brought this action.

The important questions involved were raised by

motion to strike out defendant's answer and were decided by Judge SPEER on that motion (see Decision, Case, pp. 23-31).

Upon the trial of the case, after the case was closed, upon motion of the defendant, the Judge directed the jury to render a verdict for defendant.

The grounds of plaintiff's appeal are involved in the following propositions:

## I.

**Under the evidence the fact was conclusively established that M. L. Parsons had assigned her stock and that other persons were the owners thereof as stated by Levy Brothers.**

This statement of Levy Brothers to Mr. Griggs was an admission of plaintiff's assignors, made while the assignors were owners of the alleged right to subscribe, and the predecessors of the alleged right or title, through whom the plaintiff now claims. In such case admissions of the assignor bind the assignee.

1 *Greenleaf on Evidence,* 16*th Ed.*, pp. 315, 316, 319, 320, Secs. 189, 190.
1 *Am. & Eng. Ency. of Law,* 2*nd Ed.*, pp. 680-685.
16 *Cyc.*, 991, 993.

In New Jersey it is well settled that such admissions are binding with respect to successive holders of real and personal property.

See cases in *New Jersey Digest Annotated, Vol.* 3, p. 5,000, etc.

*Westbrook* v. *Eager,* 1 *Harr.*, 81, 83, 84.
*Reed* v. *Van Cleve,* 3 *Dutch.*, 352.

The effect of the admission was twofold.

FIRST: It operated as an estoppel against Levy Brothers and their assignee from denying the truth of the admission, inasmuch as the defendant acted upon the statement and relied upon the truth of the statement in refusing to accept the subscription. The harm done to the defendant, if plaintiff should be allowed to deny these admissions upon which defendant acted, makes an estoppel *in pais*, which is a defense at law.

> *Martinez* v. *Runkle*, 28 *Vr.*, 111.
> 11 *Am. & Eng. Ency. of Law, 2nd Ed.*, p. 421.

The undisputed evidence upon that subject is that of Mr. Griggs, as follows:

> "Q. Now, upon these facts which you learned, gotten from these statements that were made to you by Levy Brothers and their counsel, what action did the Marconi Wireless Company take with reference to their subscription?
> A. They rejected it and refunded to them their money" (Case, p. 73).

SECONDLY: Irrespective of the effect of the admissions as an estoppel, they were uncontradicted and the Judge properly held them to be conclusive. It may be admitted that, in the absence of an estoppel, plaintiff could prove that such admissions were in fact untrue, so that there would have been a question for the jury; but in this case, where there was no contradiction of the truth of the admission, the Judge properly held that it was conclusive.

In addition to the fact that there was no evidence offered to dispute the admissions, the Trial Judge

properly deemed as confirmatory of the truth of the admission the fact that the defendant in its letter of June 19th, 1912, to Levy Brothers, asked Levy Brothers to produce the certificates for the stock. The letter also stated:

> "No person knows better than yourselves that M. L. Parsons had no right to subscribe for any rights, and you further know perfectly well that M. L. Parsons parted with her shares at least eight or ten years ago."

(See reference of the Trial Judge, Case, pp. 93 and 94, also Ex. D-11, p. 132.)

Additional circumstances confirmatory of the truth of the admissions are, that while defendant's answer expressly alleged the fact so admitted, the defendant did not take issue thereon, but admitted the fact on his motion to strike out the answer, from which the inference is natural that plaintiff could not successfully deny the fact admitted.

Moreover, the decision of Judge SPEER on the motion, holding that M. L. Parsons was not entitled to subscribe, if she had assigned her stock, was rendered and filed March 22nd, 1913 (Case, p. 23).

The trial of the case was November 20th, 1913 (p. 51). The plaintiff, therefore, knew in March that the Judge had decided that if Parsons had assigned her stock she was not entitled to subscribe and that his right to recover would depend upon the question of this assignment.

The fact that he moved his case for trial eight months after this decision, without offering any evidence denying or explaining the fact admitted, although M. L. Parsons had been a stenographer in the employ of Levy Brothers, from whom he could presumably have learned the facts, and by whom he could have contradicted them, if they

were untrue, is further confirmation of the truth of the facts admitted.

If the truth of these admitted and uncontradicted facts had been left to the jury, and one or more verdicts had been rendered thereon against the defendant, such verdicts would have been set aside. In such case the Judge properly directed a verdict for the defendant.

In *Baldwin* v. *Shannon,* 14 *Vr.,* 596, the Supreme Court, at pages 602 and 603, laid down the rule as follows:

> "The power of a Court to order a non-suit or direct a verdict does not depend upon the absence of all testimony in opposition to the case in favor of which the direction is given. The view that a mere scintilla of evidence was sufficient to carry a case to the jury is completely exploded in the English courts.
>
> The cases are reviewed in the opinion of WILLES, *J.,* in the case of *Ryder* v. *Wombwell,* heard in the Exchequer Chamber and reported in *L. R.,* 4 *Exch.,* 32. The rule deduced from them and applied to the cause then under consideration was this: Is there evidence from which the jury could reasonably come to the conclusion that the facts sought to be proved are established?
>
> In the case of *Giblin* v. *McMullen, L. R.,* 2 *P. C.,* 317, 335, LORD CHELMSFORD approved the rule enunciated in the last-named case in the following words: A course of recent decisions, most of which are referred to in *Ryder* v. *Wombwell,* has established a more reasonable rule, viz., that in every case, before the evidence is left to the jury, there is a preliminary question for the Judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed.
>
> The rule laid down in these cases is

adopted by the Supreme Court of the United States in the following cases: *Improvement Co.* v. *Munson,* 14 *Wall.,* 442, 448; *Pleasants* v. *Fant,* 22 *Wall.,* 116; and in the courts of New York and Maryland, in the following cases: *Deyo* v. *N. Y. Central R. R. Co.,* 34 *N. Y.,* 9, and *Davis* v. *Davis,* 7 *Harr. & J.,* 36.

This rule is the equivalent, as I understand it, of the statement in the opinion in the case of *Hartman* v. *Alden's Ex'rs,* 5 *Vroom,* 518, that the test is whether the verdict, if rendered otherwise than as ordered, would have been set aside, or the more specific, and probably more accurate, statement in the case of *Denny* v. *Williams,* 5 *Allen,* 1, that if the case is such that the Court would set aside any number of verdicts, then the Court should instruct.

I do not think that under this rule the defendant was entitled to go to the jury."

This rule is recognized in this court in *Hartman* v. *Alden's Ex'rs, &c.,* 5 *Vr.,* 518.

*McGrath* v. *North Jersey St. Railway Co.,* 37 *Vr.,* 312, 314, 315.

*Meyers* v. *Birch,* 30 *Vr.,* 238.

*D. L. & W. R. R. Co.* v. *Shelton,* 26 *Vr.,* 342, 345.

Even if there had been no admission that Parsons no longer owned the stock, we contend that the plaintiff did not prove that Parsons owned it so as to entitle her to subscribe or assign any right to subscribe when the offer was made. Since the offer was made and legally could be made only to those who then actually owned the stock, and since the right of plaintiff to recover damages depends solely upon the right of Parsons to subscribe, it was encumbent upon plaintiff, in order to make out

his case, to show affirmatively that Parsons was the owner of the stock on April 20, 1912. This the plaintiff did not do, but relied entirely upon the fact that the stock books of the company showed that the name of Parsons remained on the books as stockholder on April 20, 1912. The bare fact that Parsons' name appeared on the books on April 20, 1912, at most merely indicates that Parsons had been at some time holder of the stock, but does not indicate how long before April 20, 1912, she was such owner. We admit that if plaintiff had shown affirmatively that Parsons had been *owner at any particular time,* such ownership would be presumed to continue for a *reasonable* time afterwards, unless the contrary were shown, but the presumption does not go backwards to fix the fact of ownership at any particular time (22 *Am. & Eng. Encyc. of Law, 2nd Ed.,* 1239). The ownership of M. L. Parsons, so far as the mere appearance of her name on the record is concerned, may be supposed to have been any number of years before, so that a change of ownership by death of Parsons or by sale, may as well be presumed as that Parsons continued to hold it. It is hardly necessary, however, to discuss this question, because, if the record raised any presumption of ownership in Parsons on April 20, 1912, it was clearly overcome by the admissions and facts already referred to which were undisputed.

We note the numerous cases cited in the brief of plaintiff's counsel upon the general rule that admissions, if they are not an estoppel, are not conclusive, and may be disputed. We are not disputing the soundness of this rule. It has no pertinency to our contention that the admissions, whether true or not, are an estoppel, but if not an estoppel, that they were uncontradicted and conclusive, so that

the truth of the admissions was not a question for the jury, inasmuch as no verdict for plaintiff could have been sustained thereon.

We also notice, on pages 12 and 13 of the brief of plaintiff's counsel, the suggestion of the possibility that Parsons consistently with the admission may have sold her stock in 1905 and repurchased the stock before April 20, 1912. Such a supposition cannot stand with the admissions. The admissions were with reference to the very 135 shares concerning which Levy Brothers claimed the right to subscribe by assignment from Parsons. Mr. Griggs says that he questioned them as to whether M. L. Parsons or they actually owned *this* stock at the time, and they admitted that this stock was owned by their clients in South America, and that they, Levy Brothers, thought that they ought to make this subscription to protect them. They said that they had no requests from their clients to do so and had no agreement to turn over the stock or the benefits of the stock to them, but they were doing it on the broad principle that if they made anything out of it they would do what was right by those who had been their clients, and then Levy Brothers took the view that they had the right to subscribe, because Parsons' name appeared on the books, even if she had parted with that stock. The admission, therefore, and the whole conversation, was with reference to this particular stock (and no other), which, as they admitted, had been sold in 1905. *This very stock* which Levy Brothers admitted was sold by Parsons, is the same stock from which the plaintiff claims that Levy Brothers had the right to subscribe by assignment from Parsons. Since plaintiff does not claim or show any right to subscribe through any stock that Parsons may be conceived to have repurchased, but only

through the stock which *they admitted was sold in 1905* and now held by clients in South America, it is difficult to see how any such possibility of Parsons' purchasing *other* stock, as counsel suggests, can extricate plaintiff from the admission.

In this connection, we also notice the suggestion made on page 11 of counsel's brief, that Mr. Griggs in the conversations may have misunderstood the Levys and that they may have meant to admit only that Levy Brothers had parted with their stock, and not that Parsons had parted with her stock. This suggestion is made because Mr. Griggs in his testimony, on page 71, says that he questioned Mr. Levy whether *M. L. Parsons* or "they" actually owned this stock, and informed them that defendant had been informed that "they" had parted with it in 1905, to which they said yes, that was true (p. 71). When Mr. Griggs asked Levy Brothers whether Parsons or "they" then actually owned the stock, and stated that his information was that they had parted with all right to that stock in 1905, which they acknowledged to be true, his evident design by the use of "they" was to learn not only whether Parsons had sold this particular stock in 1905, but also whether "they," Levy Brothers, had acquired it, and when Mr. Griggs continues to say that Levy Brothers said yes, it was true, to his question that "they" had sold it in 1905, Mr. Griggs, of course, means that Levys said that Parsons had sold it in 1905. It would be absurd to suppose that Levys could possibly have referred to their selling any stock of their own, because any stock which they may have owned was never referred to or questioned, and was never in any respect a subject for the conversation. The only stock mentioned was the Parsons stock. The use of the word "they" by Mr. Griggs in that connection is not un-

usual. Having testified that he had asked Levys whethers Parsons or "they" then owned the stock, he recites that he then informed them that defendant's information was that "they" had sold the stock in 1905, to which they said, "Yes, that was true." Mr. Griggs, in thus reciting their admission that "they" had sold the stock, uses the word generally to express the sale by Parsons and uses the word "they" from the fact that "they," that is, those who claimed through Parsons, admitted that they had sold it, inasmuch as Parsons had sold it. The expression is not unusual or unnatural in such connection.

## II.

**Inasmuch as M. L. Parsons had sold and assigned her stock prior to April 20th, 1912, she had no right to subscribe, and, therefore, her alleged assignment of such right was merely an attempt to assign something that she did not own.**

This proposition is maintained with such force and reason in the decision of the Trial Judge, on the motion to strike out the answer and the motion to direct a verdict, that we hereby refer to it without repetition in this brief (Case, pp. 23 to 31, and pp. 92 to 119).

The "stockholders of record" at the close of business on April 20, 1912, who were given by the offer the right to subscribe, were the persons who were, in fact, then owners of stock and who then appeared as such owners on the company's books.

By established usage, the actual owner of stock of a corporation is called a "stockholder," which means stock owner.

The offer, therefore, of the defendant to "stockholders of record" at the close of business on April 20, 1912, gave the right to subscribe for the increase to persons only who, in fact, were then owners and who appeared as such on the record.

Such is not only the clear meaning of the offer according to its terms, but it was the only offer which the defendant could legally make.

It is clear that the defendant could not legally give the right to subscribe to any person other than stockholders, since existing stockholders were exclusively entitled thereto.

1 *Cook on Stockholders* (*4th Ed.*), § 286, and numerous other cases cited in footnote.

*Gray* v. *Portland Bank,* 3 *Mass.,* 364.

2 *Clark & Marshall on Private Corporations,* p. 1290, § 408, and cases cited.

It follows that any person who may have been a stockholder prior to April 20, 1912, but had sold all his interest in the stock before that time, and then had no interest therein, had no more right to the offer than he would have had if he never had been a stockholder.

The right to subscribe belongs only to the person who in fact owns the stock at the time of the offer.

In *Real Estate Trust Co.* v. *Bird,* 44 *Atl.,* 1048, decided in the Court of Appeals of Maryland, it was held that a stockholder who has transfererd his stock prior to an increase was not entitled to participate therein, and that where such stockholder before a contemplated increase was voted signed an agreement with the other stockholders waiving his right thereto, and thereafter assigned the stock to plaintiff, the plaintiff or such assignee was en-

titled to have the stock transferred to him on the books and to have the right to subscribe.

BOYD, *J.*, in the opinion, at page 1049, says:

> "There can be no doubt that the general rule is that when the capital stock of a corporation is increased by the issue of new shares, authorized by the charter, the holders of the original stock are entitled to the new stock in the proportion that the number of shares held by them bears to the whole number before the increase. *Gray* v. *Bank*, 3 *Mass.*, 364; *Eidman* v. *Bowman*, 58 *Ill.*, 444; 1 *Cook, Stocks & S.*, § 286; *Ang. & A. Corp.*, § 554; *Jones* v. *Morrison*, 31 *Minn.*, 140; 16 *N. W.*, 854; *Biddle's Appeal*, 99 *Pa. St.*, 278; *Jones* v. *Railroad* (*N. H.*), 30 *Atl.*, 614. * * *"
>
> "In the charter of this company (§ 2) it is provided, 'And, should the capital stock be at any time increased, the stockholders *at the time of such increase* shall be entitled to a *pro rata* share of such increase, upon the payment of not less than the par value of the same.' That provision is, in substance, just what the cases above referred to decided; for none of them to go to the extent of holding that one who was an original stockholder was entitled to a proportion of the increased stock, notwithstanding *he had disposed* of his stock before such increase was made. The charter certainly did not mean to confer on the original subscribers the right to the increased stock, irrespective of the question whether they retained their stock; for it expressly said that 'the stockholders at the time of such increase' shall be entitled, etc. Mr. Brocks' right to the new stock was therefore dependent upon his holding his original stock until the capital was increased. * * *"
>
> "But it is said on the part of the appellant that an original subscriber has the right to

> the proposed increase from the time of his subscription, and the act of the stockholders in formally determining upon the increase only brings the pre-existing right into action. We can only adopt that view in a qualified sense, for, especially with a provision in the charter such as we have before us, that right must be dependent upon the question whether the subscriber continues to hold his stock until the time of the increase. It is not the original subscriber, but the *then holder* of the original stock, that is entitled to the increase. It is not the person who was the stockholder when the increase was proposed, but the one who was such when it was determined on in the method required by the charter. If Mr. Brooks had agreed on November 1, 1898, to take the 100 shares, instead of waiving his right to do so, can it be said that he, and not the appellee, would have been entitled to the increase? Most assuredly not. He could not have demanded it from the company, for it was an incident to the stock which the *appellee* then owned, and the right to the increase belongs to the latter, by reason of the fact that he owned the stock at the time of such increase."

In *Currie* v. *White,* 45 *N. Y.,* 822, it was held that where a contract effects a sale *in presenti* at a price which was to be payable and the stock to be delivered at the seller's option, the vendee was entitled to all dividends and the benefit of the right to subscribe for an increase of shares made after the sale.

The right to subscribe for new stock as between a vendor and vendee resembles the right to a stock dividend or a cash dividend. Each of these rights is incidental to and belongs to the person only who actually owns the stock when the right accrues.

> "As between vendor and vendee of shares of stock, it is a settled rule that the vendee is entitled to all dividends on the stock which

> are declared after the sale of stock. *Even though the transfer has not been recorded, the transferee has a right to the dividends as against the transferrer.* The law, moreever, refuses to investigate the question when the dividend was earned. In contemplation of law the net profits are earned at the instant the dividend is declared."
>
> 2 *Cook on Corporations* (*4th Ed.*), § 539, and numerous cases cited in footnote.
> 2 *Clark & Marshall on Corporations,* p. 1612.
> 3 *Ibid.,* pp. 1785, 1786.

The claim of the plaintiff, plainly stated, is that an assignor of stock who has parted with all interest therein still has the right to subscribe for an increase of stock made years afterwards, merely because his name appears on the books as a stockholder; that the company is *compelled* to grant this right to subscribe to such assignor or his assignees of that right, and that such result follows from the expression found in certain cases that the assignee of stock not transferred on the company's books has an equitable title as between the assignee and the company.

An examination of those cases which refer to the assignee's title as equitable will show that they apply the expression merely to the equitable *right* of the assignee to compel the company to transfer the stock to the assignee on the books, if the company refuses.

Another line of cases expresses the assignee's title as legal and equitable, but, however expressed, all cases agree that the *whole interest* passes to the assignee, and that the only respect or sense in which the assignee's interest may be equitable is in the

sense that as between the company and the assignee the assignee has the equitable right to compel the company to transfer the stock on the company's books upon the company's refusal.

The difference in the expressions between the two lines of cases is thus merely one of expression, and not of real meaning, as is shown in 10 *Cyc.*, page 599, and cases cited.

At page 599 of *Cyc.*, various cases are cited asserting that the assignment of shares, though unrecorded, pass to the assignee both the legal and equitable title in the stock.

Among the various cases so cited in footnote 10 in *Cyc.*, page 599, is the case of *McNeil* v. *The Tenth National Bank of the City of New York*, 46 *N. Y.*, 325, which may be taken as typical of all.

In that case RAPALLO, *J.*, speaking for the New York Court of Appeals, says:

> "It has also been settled, by repeated adjudications, that, as between the parties, the delivery of the certificate, with assignment and power endorsed, passes the entire title, legal and equitable, in the shares, notwithstanding that, by the terms of the charter or by-laws of the corporation, the stock is declared to be transferrable only on its books; that such provisions are intended solely for the protection of the corporation, and can be waived or asserted at its pleasure, and that no effect is given to them except for the protection of the corporation; that they do not incapacitate the shareholder from parting with his interest, and that his assignment, not on the books, passes the entire legal title to the stock, subject only to such liens or claims as the corporation may have upon it, and excepting the right of voting at elections, etc. (*Angell & Ames on Corporations*

[8*th Ed.*], § 354; *Bank of Utica* v. *Smalley*, 2 *Cow.*, 770; *Gilbert* v. *Manchester Co.*, 11 *Wend.*, 627; *Kortwright* v. *Com. Bank of Buffalo*, 22 *Wend.*, 362; *N. Y. & N. H. R. R. Co.* v. *Schuyler*, 34 *N. Y.*, 80.)

In the case of *Kortwright* v. *Com. Bank*, Chancellor WALWORTH, in a dissenting opinion, strenuously maintained, in conformity with his previous decision in *Stebbins* v. *Phoenix Ins. Co.* (3 *Paige*, 356), that by a transfer not on the books, the transferee acquired only an equitable right to or lien on the shares; and that, having but an equitable right or lien, he took subject to all prior equities which existed in favor of any other person from whom such assignment was obtained. (22 *Wend.*, 352, 353, 355.) But his view was overruled by the majority of the Court. The action was at law *in assumpsit*, brought by the holder of the certificate and power, for a refusal to permit him to make a transfer on the books, and the question of his legal title was necessarily involved in the case. The judgment therein must therefore be regarded as a direct adjudication that, as between the parties, the legal title to the shares will pass by delivery of the certificate and power. (*See* 20 *Wend.*, 362.)

This was reasserted in this court in the *New Haven Railroad* case (34 *N. Y.*, 80). notwithstanding what was said in the *Mechanics' Bank* case (13 *id.*, 625).

By omitting to register his transfer, the holder of the certificate and power fails to obtain the right to vote, and may lose his stock by a fraudulent transfer on the books of the company, by the registered holder, to a *bona fide* purchaser (34 *N. Y.*, 80); but in this respect he is in a condition analogous to that of the holder of an unrecorded deed of land, and possesses a no less perfect title as against the assignor and others. And he would have an action against the corporation, for allowing such a transfer in violation of his rights (*id.*). He also takes the

> risk of the collection of dividends by his assignor, or of any lien the corporation may have on the shares. But in other respects his title is complete."

In 3 *Clark & Marshall on Private Corporations,* at page 1785, § 586, the authors state that where jurisdictions like New Jersey have treated the registry requirements as merely for the protection of the company, the legal title passes by the assignment, as between the assignor and assignee, and in the footnote in support of that proposition the New Jersey cases of *Broadway Bank* v. *Elrath,* 13 *N. J. Eq.,* 24, and *Del. & At. R. Co.* v. *Jeick,* 23 *N. J. L.,* 321, are cited among numerous other cases.

*Cyc.* also states that those cases which use the expression that the assignment of unrecorded stock passes the equitable title, calls the assignee's title as equitable, merely because in such case the assignee must resort to equity to compel the transfer on the books of the company, if the company refuses to transfer.

*Cyc.* (speaking of the two classes of cases, one referring to the title as both legal and equitable and the other as equitable) says:

> "The divergences indicated * * * seem to be mere divergences of expression and not of real meaning. The meaning of the expression that an unregistered transfer of shares passes only the legal (*sic,* evidently meaning equitable) title is, that the legal owner of shares in a corporation is the owner in whose name the shares stand on the books of the corporation; whereas the equitable owner is the one who, being the beneficiary, that is, the real owner, is not registered as such on the corporate books, *and who must, if the corporation refuses so to register him, go into a court of equity to compel them to do so. The real meaning is that the title is*

*complete against everybody but the corporation itself, and those who have a superior right to have the corporation make the transfer to them.*" (10 *Cyc.*, 599.)

This question is examined by Vice Chancellor PITNEY, in *O'Connor* v. *International Silver Company*, 68 *N. J. Eq.*, 67, where he fully considered the title of an assignee of stock, which has not been transferred on the company's books, and declares that such assignment without transfer on the company's books passes the complete legal and equitable title, and that such assignee has the right to intercept payment of dividends by the corporation to the assignor. At pages 72 to 74, he says:

> "The next question raised by the demurrer is this: Can the owner of shares of stock in Corporation A, which he has held for several years, and who is entitled, without question, at any moment, except when the books of transfer are closed preparatory to an election or a dividend, to have a certificate issued to him, but has never exercised that right, and whose shares stand on the books of the company in the name of his grantor, who, however, has no interest therein, have a standing in this court to ask the Court to prevent Corporation A, by its officers, from voting upon the shares in question?
>
> It may be admitted that the stockholder has not the right to vote in person on his shares. He may be content to permit his assignor to vote thereon because that assignor is willing to vote as he, the actual owner, directs, or, what is perhaps the more common practice, to give him a proxy to vote in his name, but such disability, if it be a disability, is the only one under which the actual owner labors. Should any dividend be declared his assignor will receive it for the actual owner's benefit, and I think there can be no doubt that the latter has the right

in equity to intercept its payment by the corporation to his assignor. Except in these matters, his title is absolute and complete.

I am able to perceive little, if any, resemblance in the relations between the registered owner and the real owner of shares of stock and those which exist between the ordinary trustee of an express trust and his *cestui que* trust. In the latter case the trustee is the actual legal owner and the *cestui que* trust the owner only in equity. In the case of a transfer of a certificate of shares of stock by an assignment in the usual form for value received and a delivery of the certificate, which is the usual mode of making title to shares of stock, the complete *legal* and beneficial title passes, and the transfer on the books of the company is not necessary in order to make the *legal title complete.* The situation resulting from such an assignment, without transfer on the books of the company, more nearly resembles that of the owner by actual common law conveyance in fee of real estate which he has not taken the trouble to have recorded.

The status of the holder by legal assignment of a certificate of stock which has not been transferred on the books of the company is in some respects better than that of a real estate owner whose deed is unrecorded, because, in the absence of actual notice, the grantor of such a deed may make a good title to a purchaser in good faith for value.

This subject was exhaustively dealt with by Chancellor GREEN, in *Bank* v. *McElrath,* 13 *N. J. Eq.* (2 *Beas.*), 24. He there gave the holder, by assignment of certificates of stock who held them as collateral security for a debt, with the usual transfer in blank from the owner, to whom they were issued and in whose name they stood on the books of the bank, preference over an attaching creditor of the registered owner. He points out the true office of the rule that the transfer must appear on the books of the bank to be to pro-

> tect the corporation from conflicting claims and to prevent disputes as to the right to vote and the like."

The Vice Chancellor then, at page 78, approves of the case of *Ervin* v. *Oregon Railway Co.*, 62 *How. Pr.*, 490, where the Court speaks as follows:

> "That the stock of the plaintiff has not been registered is no reason why he should not maintain this action. He is the legal and equitable owner of this stock. The possession by him of the certificate as owner, gives him a complete title. For certain purposes and for the enjoyment of specific privileges, such as to vote and receive dividends, it may be necessary, as between him and the corporation, that he be registered as a stockholder. But as the absolute owner of the stock he is, to the exclusion of every other person, entitled to prosecute an action for injury to it or to himself as the proprietor thereof."

The case of *International Silver Co.* v. *O'Connor*, *supra,* was affirmed in our Court of Appeals, 68 *N. J. Eq.*, 683. At page 682, GUMMERE, Chief Justice, says:

> "We consider that the complainant, as the real owner of the stock of the International Company, which he has acquired, has a sufficient standing to file the bill, notwithstanding that the stock has not been transferred to him upon the books of the company, and for the reasons which are given by the Vice Chancellor for his conclusion upon this point."

The plain meaning of the language of these cases is, that, as between the *assignor and assignee,* the legal and equitable title to the stock passes to the assignee; that is to say, the assignor as to the *assignee* has no legal title left whatever.

If such assignor has the right to subscribe, for whose benefit has he this right?

Manifestly he would subscribe either for his own benefit or for that of the real owner. He cannot subscribe for his own benefit without defrauding the real owner, because he has assigned all his beneficial interest in the stock including the right to subscribe, to the real owner.

On the other hand, he cannot of his volition just because he was once a stockholder and *happens* to appear as such on the record, constitute himself a sort of general protector of the real owner's right to subscribe, and subscribe for the real owner's benefit.

Having parted with all his interest he has no more right to subscribe for the benefit of the assignee, than any stranger would have who never was a stockholder.

*Such a person has no title or interest with reference to the subject of this suit.*

It is a general rule, that a *plaintiff* must have title or interest in the subject of the suit, in order to maintain it. As a mere volunteer to protect the rights of another, a person without title or interest has no standing or right to maintain an action.

The assignor of the stock or his assignees after the assignor has parted with all his interest have no more standing or right to maintain an action for the right to subscribe for the increase of stock for the benefit of the assignee, than a person who had passed his title to property generally would have thereafter to sue a trespasser on behalf of the real owner.

*The supposition that plaintiff has the right to maintain the action for the benefit of the real owner,*

*implies that the real owner has not lost his right, but may maintain the action for himself.*

The real owner, of course, would not be bound by the assignor's action taken on behalf of the real owner without the latter's consent or knowledge, and the defendant might be subjected to two suits, one by a mere volunteer on behalf of the party interested and another by the interested party himself.

Even if M. L. Parsons, the assignor, had the right as against the company to protect the right of the assignee by constituting herself of her own volition such protector for the assignee, she would have to sue on behalf of the owner, but in this suit the claim is for no such purpose.

On the contrary, plaintiff's claim as set forth in his complaint and at the trial must be taken as emphatically for himself. If he were to bring suit in his name for the benefit of the real owner, he would be required to set forth such facts in his complaint, so that defendant could be protected by the record from another suit by the real owner. He claims, however, for himself through M. L. Parsons, the right alleged to be assigned to Levy Brothers and from them assigned to plaintiff.

Moreover, M. L. Parsons' assignment to Levy Brothers purports to transfer to Levy Brothers *"the right to subscribe for the increase"* as a right of *Parsons* (p. 123), although Parsons had years ago transferred all interest to her assignees. This assignment purports to be given *"for a good and valuable consideration"* from Levy Brothers to Parsons. This is inconsistent with any idea that Parsons was transferring her interest for the benefit of the real owners. By taking a valuable consideration from Levy Brothers for her alleged right for herself, she would be taking something to which

she was not entitled. There is no pretense that she took this consideration from Levy Brothers for the benefit of the real owner. She would certainly have no right to make a contract for the real owner without the real owner's consent.

Then again Levy Brothers (as the complaint alleges) "for a good and valuable" consideration, assigned their claim to the plaintiff, and the complaint alleges that *Levy Brothers* paid to defendant over $16,000.00 for *their* subscription.

Clearly then no construction of the complaint is permissible other than this, that the plaintiff asserts the right to subscribe and the claim to damages as his own.

Whether plaintiff should recover for his benefit or that of the true owner, the character of the claim appears to us to savor of fraud. If plaintiff could recover damages for his own benefit, he would be getting them through a right of the real owner, who never gave it to him.

If, on the other hand, plaintiff's recovery would be for the benefit of the real owner, then plaintiff would dishonestly get possession of the damages which belong to the real owner without the real owner's knowledge or consent.

*The requirement as to the transfer of stock on the books of the company is entirely for the protection of the company, and in no sense gives an assignor any right to subscribe for new stock after his assignment.*

The liability for unpaid subscriptions of a stockholder who has assigned his stock, but neglected to surrender his certificate and cause his assignee to be substituted on the books, when such liability is expressly provided in the certificate of incorporation, as held in *Brown* v. *Morton,* 71 *N. J. L.,* 26,

quoted in the brief of plaintiff's counsel, can in no way operate to give a person who has parted with all his interest in stock a right to subscribe for new stock. It is merely one of the incidents for the protection of the company only, that the company under our corporation law is allowed to look to the owner of record for unpaid subscription.

See

*Reilly* v. *Absecon Land Co.*, 71 *Atlantic Rep.*, 248 (*N. J. Court of Chancery* and cases there cited).

The effect of such requirement of transfer on the books is that, as between the company and an assignee, the company has the right in the absence of *notice or knowledge* to the contrary, to assume that the holder of record is the legal owner for certain purposes. One of the instances of such protection would be that, if *without notice or knowledge to the contrary,* the company in good faith should pay dividends to the holder of record, the company may be protected from a suit by the assignee, but if the company should do so with notice or knowledge of the assignment, although there was no transfer on the books, the company would be liable to the assignee.

2 *Clark and Marshall on Private Corporation,* p. 1612, and numerous cases cited in footnotes 113 and 114.

*Campbell* v. *Perth Amboy Mut. L. Assn.*, 74 *Atl.*, 144, *N. J.*, per EMERY, *V. C.*, at page 149.

The defendant, therefore, knowing that Parsons had assigned all her interest in the stock, was bound inperforming its duty to the real stockholders, not

to permit M. L. Parsons, who was a stranger, to subscribe, since the offer was made and legally could be made to the real owners only. If any real owner did not comply with the terms of the offer, and waived and lost his right to subscribe, and if the right to subscribe was a thing of value, it belonged to the *company;* that is to say, to all the real stock owners collectively, and surely not to M. L. Parsons, who had lost all interest and tsood as a stranger to the company. Suppose the real owner of the 135 shares of the stock in question at the time of the increase thought that it would be for his own benefit as to his existing stock not to subscribe for new shares, but that his interest as to his existing shares would be better benefited by waiving his right to subscribe and allowing the right to the other stockholders then existing, what right has M. L. Parsons to subscribe for the real owner's benefit without the real owner's knowledge or consent?

The contention of plaintiff's counsel, on page 17 of his brief, that Levy Brothers bound themselves to take the stock, and that the defendant is liable on that account, is untenable, because:

FIRST: Their deposit of the money and subscription was nothing but an unaccepted offer, and they could not be bound by it until it was accepted by the company. If it is admitted that the defendant could legally have accepted the offer, and thereby bound Levy Brothers to their offer in case the stock had fallen, the situation would not differ from that where a person makes an offer and indiscreetly leaves it open until he may be injured by changed conditions, if the offer is accepted before it is withdrawn. Such would be the case, for example, if "A" offers to buy goods to-day at a certain price, and failing to withdraw it, allows the offer to become accepted when the market price is less.

SECOND: We do not concede, however, that Levy Brothers would have been bound in this case. The offer to subscribe, as we have shown, was made only to those who actually owned stock on April 20, 1912. The defendant had no right or authority to offer this right to a stranger like Levy Brothers, so that Levy Brothers' offer to subscribe was made upon the misconception of the defendant's offer and a misconception of its power. Where the acceptance of the offer would be *ultra vires,* we submit, that it should not be enforced on either side.

## III.

**The evidence is conclusive that the defendant did not accept the subscription agreement.**

The offer to subscribe stated that subscriptions and payments for the new stock were to be made to the Corporation Trust Company, the registered agent, which was thereby designated as the person who was merely to receive the subscriptions and act as depository of the payments. This limited authority of the Trust Company is carefully expressed in the first receipt given by the Trust Company to Levy Brothers for their first payment, on May 4, 1912, as follows:

> "The giving of this receipt does not evidence the right of the subscriber to make said subscription, as all rights to subscribe shall be finally determined by the Marconi Wireless Telegraph Company of America" (Case, p. 130, Exhibit D-9).

At the time, therefore, when Levy Brothers made their subscription and first payment, they accepted this receipt which thereby became a part of the

transaction and understanding between the parties with respect to the subscription and agreement.

The uncontradicted testimony of Mr. Griggs shows this limited authority of the Trust Company, as follows:

> "Q. What was the relation between the Corporation Trust Company and the Marconi Company? A. They were mere agents to whom these subscriptions might be sent and payments be made.
>
> Q. How is that? A. They were mere agents to whom the stockholders might send their subscriptions to the new stock.
>
> Q. Yes? A. Many thousands of subscriptions were sent from all over the country by mail, and the last two or three days there was a crowd around their window there that reached across to the street, being people present to put in their subscriptions.
>
> Q. And in what way did they take these subscriptions and money? A. Oh, they took them and issued a receipt for the mere—acknowledging what they had received and stating that it was received for examination.
>
> Q. And then was it referred to the Marconi Company? A. Yes, it was referred to the Marconi Company. And if there was a case of any doubt it was referred to me as counsel. I passed on many hundreds of cases.
>
> Q. And that was for the purpose of passing upon the validity of the subscriptions? A. That was it, the right of the subscriber to have his new shares.
>
> Q. And that was all the authority they had, just to take it that way? A. That was all they had" (pp. 78, 79).

The testimony of Sidney A. Anderson, assistant auditor of the Trust Company, is to the same effect (Case, pp. 81, 82).

The next evidence showing that the defendant

never accepted the subscription is the undisputed testimony of Mr. Griggs already referred to, when Mr. Griggs informed Levy Brothers that they had no right to subscribe and that the defendant would refuse to issue stock. This was about the middle of May, 1912 (Case, pp. 72, 78).

Moreover, on May 17th, 1912, the defendant sent a letter to Levy Brothers as follows:

"May 17, 1912.

Messrs. Levy Brothers,
44 Broad Street, City.

Gentlemen:

The issue of stock recently put out by this company was offered to stockholders of record April 20th, 1912. Persons not actual owners and holders of stock were not entitled to subscribe for new stock or to sell their rights.

In every instance where this company has reason to believe that application for new shares has been made or rights sold by persons who were not actual holders of stock on April 20th, 1912, the production of the stock certificate will be required before acceptance of subscription to new stock.

The above applies to stock standing in the name of M. L. Parsons, A. Steinhardt and others, or any man in the same position, of which you are perfectly aware.

Yours very truly,

MARCONI WIRELESS TELEGRAPH
COMPANY OF AMERICA,

By J. Bottomley,
Secretary"

(Case, p. 131, Exhibit D-10).

Notwithstanding the fact that Levy Brothers had been notified that their right to subscribe was denied and that the defendant refused to issue the stock to them, as shown by the evidence of Mr. Griggs and the letter of May 17, 1912, Levy Brothers on June 10th, 1912, deposited with the Trust Company the last payment.

When this last money was deposited The Corporation Trust Company gave to Levy Brothers a paper or memorandum referring to the receipt of "check for $10,125.00, Bal. Payment," and also stating "Received for examination" (p. 125). The effect of this paper is merely to acknowledge that the balance had been deposited and cannot operate to annul the terms of the first receipt which contained the terms upon which the subscription was taken and the money deposited.

The delivery of this last check, according to the understanding of Mr. Griggs, "was made in order simply to legalize the claim which they notified us they were going to bring in the shape of a law suit" (Case, p. 72).

It is evident that the delivery of this last check to the Trust Company could not have any effect as an acceptance of the defendant. The power of the defendant to finally decide as to the right to subscribe as expressed in the first receipt, and the refusal of the defendant to accept the subscription expressed to Levy Brothers by Mr. Griggs and the letter of May 17th continued and never became changed or modified; and on June 12th, 1912, the Trust Company wrote to said Levy Brothers that it was instructed by the defendant to return the subscription and assignment (Case, pp. 126, 127, Exhibit D-6), and on June 26th, 1912, the Trust Company returned the payment of the subscription to Levy Brothers, who received and kept the same (Case, pp. 127, 128, Exhibit D-8).

The defendant was not bound by any acceptance for the following reasons:

FIRST: The transaction shows conclusively from the facts last stated that acceptance was expressly refused, and such intention of defendant was expressed to Levy Brothers and fully understood by them.

SECOND: Even if defendant had accepted the subscription, it would have been in reliance upon the right of Levy Brothers to subscribe, and if Levy Brothers had no right to subscribe, such acceptance by the defendant would be against the rights of all stockholders of the company and would be *ultra vires* and not binding on the company.

THIRD: Since Levy Brothers had no right to subscribe, their subscription to the Trust Company and deposit with it for the subscription, even if the Trust Company otherwise would have had authority to bind the defendant, would have been a fraud on the defendant, who offered the right only to stockholders who had the right to subscribe, and no action founded on such fraudulent and illegal subscription could be maintained.

FOURTH: The return of the money so deposited to Levy Brothers and their acceptance of the same is inconsistent with their claiming an acceptance of their subscription and would operate to do away with any acceptance of the subscription even if it had been made.

## IV.

**Any contention or suggestion that the defendant is in any wise bound by estoppel from disputing the right of Levy Brothers to subscribe, because the name of M. L. Parsons appeared on the records of the company as stockholder, has no merit.**

The answer to that contention made on the motion to strike out the answer is fully given in the decision of Judge SPEER on that motion (See Case, p. 30).

Since the offer was not made to Levy Brothers to subscribe, but was made only to stock owners of record, and since the defendant could not legally offer the right to subscribe to any person other than the real owners of the stock, Levy Brothers had no right or reason to assume that the offer was made to them or to M. L. Parsons, who was not a real owner. The assignment of M. L. Parsons to Levy Brothers is for the right to subscribe only, as a thing separate and apart from the ownership of the stock, so that Levy Brothers knew that they were taking an alleged right separate from the real ownership of the stock. The record as we have shown was entirely for the protection of the company. Levy Brothers had no right or reason as against the defendant to assume that M. L. Parsons was the real owner just because her name appeared as stockholder on the books. Any reliance of Levy Brothers upon the record was not caused by any act or conduct of the defendant, but if Levy Brothers had such reliance it was due entirely to their own judgment in an endeavor to acquire by sharp practice a valuable right from one who was not entitled to it. No misrepresentation or conduct

of defendant caused any injury to Levy Brothers which could constitute an element of estoppel against defendant.

**The judgment should be affirmed.**

Respectfully submitted,

GRIGGS & HARDING,
Counsel for Appellee.