

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
In the Matter of the Application of

MAURICE M. LICHTMANN,

Petitioner,

for a mandamus order

against

MASTER INSTITUTE OF UNITED ARTS, INC.,

LOUIS L. HORCH, as its President and

Treasurer, and NETTIE HORCH, as its

Secretary,

Defendants.

-----X
Upon the annexed petition of Maurice M. Lichtmann, verified
January 13, 1936, and on motion of Plaut & Davis, attorneys for the re-
lator and petition,

LET Master Institute of United Arts, Inc., Louis L. Horch, as
its President and Treasurer, and Nettie Horch, as its Secretary, show
cause before this Court at a Special Term, Part 1, thereof, to be held
at the County Courthouse, in the Borough of Manhattan, City of New York,
on the day of January, 1936, at 10 o'clock in the forenoon of said
day, or as soon thereafter as counsel can be heard, why an order of per-
emptory mandamus should not be granted, directing them, and each of them,
to permit an inspection of the books, papers and records of the said Mas-
ter Institute of United Arts, Inc. by the petitioner, his counsel and ac-
countants, and granting the other relief prayed for in the annexed petition.

-----X
(page 2)

IT IS FURTHER ORDERED that service upon the respondents be
made on or before January , 1936, and be deemed sufficient hereof.

Dated, January 13, 1936.

Justice of the Supreme Court
of the State of New York.

-----X
(page 3)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
In the Matter of the Application of

MAURICE M. LICHTMANN, etc. (as above), (last word Respondents)

Petition.

TO THE SUPREME COURT OF THE STATE OF NEW YORK:

The petition of Maurice M. Lichtmann respectfully shows to the Court as follows:

1. The respondent Master Institute of United Arts, Inc. is a corporation organized and existing under and by virtue of the laws of the State of New York, having its principal place of business at 310 Riverside Drive, in the Borough of Manhattan, City and State of New York. The respondents, Louis L. Horch and Nettie Horch, are and act as officers of the Company in the following capacities respectively, that is to say, Louis L. Horch as President and Treasurer, and Nettie Horch as Secretary.

2. The respondent Master Institute of United Arts, Inc. was granted a provisional charter by the Regents of the University of the State of New York on September 28, 1922, as appears from the following which is a copy of said charter: (Copy of charter follows, constituting page 4, and appears herein on next page, - 2a.)

3. Your petitioner was duly elected one of the seven trustees of the respondent Master Institute of United Arts, Inc., having been named in the provisional charter, a copy of which has been quoted above, has continued in office as trustee of the respondent Master Institute of United Arts, Inc., and is now such a trustee.

4. Your petitioner is also a stockholder of the respondent Master Institute of United Arts, Inc., being the owner of one share of the outstanding and issued seven shares of capital stock.

5. The respondent Master Institute of United Arts, Inc. acquired the title to the large building and premises at 103rd Street and Riverside Drive in the Borough of Manhattan, City of New York, familiarly known as the "Roerich Museum" or the "Master Building", on February 23, 1935, after reorganization proceedings had been had of the previous owner; and the respondent Master Institute of United Arts, Inc. is now the owner in fee of such building and premises.

6. The books, records, documents and books of account of the respondent M.I.U.A. (spelled out) have been for a long time past in the possession of the respondents, Louis L. Horch and Nettie Horch; and they are now in their possession.

7. As a trustee of the respondent M.I.U.A., I feel that I have an absolute right to be permitted to inspect said books, records, documents and books of account of M.I.U.A. so that I may perform my duty as trustee intelligently and keep myself informed as to the business and affairs of the corporation.

8. On January 10, 1936, I made a personal demand upon Louis L. Horch to be permitted to examine said books, documents and records, but my demand was refused and I was not permitted to see or examine said books, documents and records. On January 10, 1936, my attorneys, Messrs. Plaut & Davis, 76 Beaver Street, New York City, on my behalf made written demands upon each of the respondents for permission to examine said books, documents and records. Copies of the letters sent on January 10, 1936, are attached hereto and marked Exhibits A, B and C, respectively. No answer has been received to any of these letters.

THE UNIVERSITY OF THE STATE OF NEW YORK

Provisional Charter of Master Institute of United Arts, Inc.

THIS INSTRUMENT WITNESSETH: That the Regents of the University of the State of New York have granted this provisional charter incorporating Louis L. Horch, Nicholas Roerich, Maurice Lichtmann, Frances R. Grant, Nettie Horch, Helena Roerich, Zena Lichtmann, and their associates and successors as an educational institution for the instruction of persons of both sexes, in painting, music, languages, literature, drawing, designing, engraving, sculpture, singing, dramatic art, under the corporate name of "Master Institute of United Arts, Inc." to be located at 312 West 54th Street in the Borough of Manhattan, City and State of New York, with seven trustees to be at first the named incorporators, to hold until their successors shall be chosen by the shareholders of the corporation at and for such time or times as their bylaws shall provide; with power in the corporation to have a capital stock to be divided into seven shares of nominal or no par value, to be issued upon such terms as the trustees shall determine, and upon which may be distributed to the holders thereof dividends or shares of the surplus profits of the corporation, subject to the condition that the corporation shall begin business with a capital of at least \$7500.00; and this provisional charter will be replaced by an absolute charter if within five years the corporation shall acquire resources and equipment deemed suitable and sufficient by the Regents of the University for its chartered purposes and be maintaining an organization of usefulness and character satisfactory to them.

(seal)

Chester C. Lord

Chancellor

GRANTED September 28, 1922
by the Regents of the University
of the State of New York
executed under their seal
and recorded in their office.
Number 3183

Frank P. Graves
President of the University

9. For the foregoing reasons, your petitioner prays that a peremptory mandamus order be made herein, directing the above-named respondents, and each of them, to permit the inspection of the books, papers and records of the respondent I.L.U.A. by your petitioner, his counsel and accountants, and the making of copies and extracts therefrom; or if the Court see fit not to grant such peremptory order, that an alternative mandamus order is-
sue herein, commanding the above-named respondents, and each of them, to do the acts and things above mentioned, or to show cause before this Court why the said peremptory order should not be made and should not issue herein.

(page 7)

No previous or other application for the foregoing relief has been made to any court or judge.

Dated, New York, January 13, 1936.

Petitioner

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

MAURICE M. LICHTMANN, being duly sworn, says:

I am the relator and petitioner herein.

The foregoing petition is true to my knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true.

Sworn to before me this

13th day of January, 1936.

(page 8)

EXHIBIT A

January 10, 1936.

Master Institute of United Arts, Inc.
310 Riverside Drive,
New York, N.Y.

Gentlemen:

On behalf of Mr. Maurice M. Lichtmann, a stockholder and trustee of you, we hereby demand that you permit an inspection of the books, papers records and accounts of your Company by him, his counsel, and accountants, and the making of copies and extracts therefrom.

Among the books, records and accounts of which inspection is hereby demanded are included, but not restricted to, the following: the By-Laws of your Company, minutes of all meetings of stockholders from the creation of your corporation in 1922 to date, the minutes of the trustees of your cor-

poration from the creation of your corporation in 1922 to date, the stock book, and all books of account including financial statements and original books of entry from 1922 to date.

The demand is for an immediate inspection of the above.

Will you therefore inform us at once when and where this inspection may be had?

Very truly yours,

Plaut & Davis

HP:s
Reg. Mail
Return Receipt Requested.

(page 9)

EXHIBIT B

January 10, 1936.

Mr. Louis L. Horch
310 Riverside Drive
New York, N.Y.

Dear Sir:

(text and signature as Exhibit A)

(page 10)

EXHIBIT C

January 10, 1936.

Mrs. Nettie Horch
310 Riverside Drive
New York, N.Y.

Dear Madam:

(as above)

Supreme Court

Appellate Division—First Department.

IN THE MATTER

OF

The Application of MAURICE M. LICHTMANN,
Petitioner-Respondent,
For a Mandamus Order

AGAINST

MASTER INSTITUTE OF UNITED ARTS, INC.,
LOUIS L. HORCH, as its President and Treas-
urer and NETTIE HORCH, as its Secretary,
Respondents-Appellants.

PAPERS ON APPEAL FROM ORDER.

GREENBAUM, WOLFF & ERNST,
Attorneys for Respondents-Appellants,
Office & P. O. Address,
No. 285 Madison Avenue,
Borough of Manhattan,
City of New York.

PLAUT & DAVIS,
Attorneys for Petitioner-Respondent,
Office & P. O. Address,
No. 76 Beaver Street,
Borough of Manhattan,
City of New York.

INDEX.

	PAGE
Notice of Appeal	1
Order Appealed From	2
Order to Show Cause	3
Affidavit of Jonas J. Shapiro, Read in Opposition to Motion	8
Notice of Motion	9
Affidavit of Herbert Plaut, Read in Support of Foregoing Motion	10
Order to Show Cause	18
Petition, Read in Support of Motion	19
Exhibit A, Attached to Foregoing Petition	24
Exhibit B, Attached to Foregoing Petition	25
Exhibit C, Attached to Foregoing Petition	26
Answer to Petition, Read in Support of Motion	27
Opinion on Motion for Order of Mandamus	28
Alternative Order of Mandamus	29
Return to Order of Mandamus	31
Note of Issue	31
Affidavit of Jonas J. Shapiro, Read in Opposition to Foregoing Motion	32
Replying Affidavit of Herbert Plaut, Read in Support of Foregoing Motion	37
Order on Original Motion	40
Affidavit of No Opinion	41
Stipulation Waiving Certification	41

2

**Supreme Court of the State
of New York**

1

COUNTY OF NEW YORK.

1384—1936.

—o—
In the Matter

of

The Application of MAURICE M. LICHTMANN,
Plaintiff,
For a Mandamus Order

AGAINST

MASTER INSTITUTE OF UNITED ARTS, INC., LOUIS
L. HORCH, as its President and Treasurer,
and NETTIE HORCH, as its Secretary,
Defendants.

2

—o—
Notice of Appeal.

SIRS:

PLEASE TAKE NOTICE that the defendants in the above entitled action hereby appeal to the Appellate Division of the Supreme Court, First Department, from an order made in the above entitled matter and entered in the office of the Clerk of the County of New York on the 24th day of March, 1936, granting a motion for a preference and placing the action on the Jury Reserve Calendar for April 3, 1936, and the defendants hereby appeal from each and every part of said order, as well as the whole thereof.

3

Dated, New York, April 8, 1936.

Yours, etc.,

GREENBAUM, WOLFF & ERNST,
Attorneys for Defendants,
285 Madison Avenue,
Borough of Manhattan,
New York City.

To:

PLAUT & DAVIS, Esqs.,
Attorneys for Plaintiffs,
76 Beaver Street,
Borough of Manhattan,
New York City.

Clerk of New York County.

4

Order Appealed From.

NEW YORK SUPREME COURT,

COUNTY OF NEW YORK,

TRIAL TERM—PART II.

Index Number 1384. Year 1936.

Calendar Number (Jury Trial) 14210.

5

Present:—HON. JOHN L. WALSH,
Justice.

 MAURICE M. LICHTMANN,

Petitioner,

AGAINST

MASTER INSTITUTE OF UNITED ARTS, INC., *et al.*,
Defendants.

The following papers numbered 1 to 3 used on
this motion. Opposed.

6

*Papers
Numbered*

Order to Show Cause and Affidavits	
Annexed	1
Answering Affidavits	2
Filed Papers (County Clerk's Office)..	3

Upon the foregoing papers this motion is
granted, cause preferred and placed on the Jury
Reserve Calendar for April 3rd, 1936.

Dated, March 23, 1936.

J. L. W.,
J. S. C.

Filed Mar. 24, 1936.

Order to Show Cause.

7

SUPREME COURT OF THE STATE OF
NEW YORK,

COUNTY OF NEW YORK.

 o

In the Matter

of

The Application of MAURICE M. LICHTMANN,
Petitioner, 8

For a Mandamus Order,

AGAINST

MASTER INSTITUTE OF UNITED ARTS, INC., LOUIS
L. HORCH, as its President and Treasurer,
and NETTIE HORCH, as its Secretary,
Respondents.

 o

Upon the annexed affidavit of Herbert Plaut,
sworn to the 17th day of March, 1936, and upon 9
the petitioner's application for an order granting
this special proceeding a preference and setting
the cause for trial on the day calendar of this
court for a day certain at the earliest available
date, and all the papers in support of the said
application and in opposition to the said applica-
tion, and the order of Mr. Justice Walsh, dated
March 16, 1936, refusing to consider said applica-
tion because the cause had been reached on the
Non-Jury Reserve Calendar on March 13, 1936,
which said application papers and order are now
on file in the office of the County Clerk; and

10

Order to Show Cause.

upon motion of Plaut & Davis, attorneys for the petitioner, it is

11

ORDERED, that the respondents show cause at a Trial Term, Part II, of this Court, to be held at the County Courthouse, Centre and Pearl Streets, in the Borough of Manhattan, City of New York, on the 20th day of March, 1936, at 10 o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, why an order should not be made rearguing the disposition made by the order dated March 16, 1936, refusing to consider the motion, setting aside the order dated March 16, 1936, so refusing to consider, and upon such reargument granting this special proceeding a preference and setting the cause for trial upon the day calendar of this Court for a day certain at the earliest available date, and for such other and further relief as to the Court may then and there seem just and proper; and it is

12

FURTHER ORDERED that service hereof upon the respondents' attorneys on the 18th day of March, 1936, shall be deemed good and sufficient service.

Dated, March 18, 1936.

PHILIP J. McCook,
*Justice of the Supreme Court
of the State of New York.*

**Affidavit of Herbert Plaut, Read in
Support of Motion.**

13

SUPREME COURT OF THE STATE OF
NEW YORK,

COUNTY OF NEW YORK.

— o —

[SAME TITLE]

— o —

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

14

HERBERT PLAUT, being duly sworn, says:

I am a member of the firm of Plaut & Davis,
attorneys for the petitioner.

I make this affidavit in support of the an-
nexed order to show cause to reargue the peti-
tioner's application for a preference and to set
aside an order made by Mr. Justice Walsh on
March 16, 1936, refusing to consider the motion
for a preference, and upon such reargument, for
an order granting the preference and the other
relief applied for in the original motion.

15

This is an alternative writ of mandamus.
Issue was joined on February 17, 1936. A note
of issue for March 2, 1936, together with the
fee, was filed in the office of the Clerk of Trial
Term, Part II, on February 19, 1936. On that
same day, the petitioner, by us as his attorneys,
served a notice of motion for a preference and
for an order setting the cause for trial upon the
Day Calendar of this court for a day certain at
the earliest available date. That motion was re-
turnable at Trial Term, Part II, on March 2,

Affidavit of Herbert Plaut.

1936. Affidavits were submitted in opposition to that motion and reply affidavits were served. The motion papers were left at the office of the Clerk of Trial Term, Part II, on March 2, 1936. That motion, as will be stated later in this affidavit, was not determined until March 16, 1936, appearing in the Law Journal the following day.

17 On March 2, 1936, the respondent served us with a notice that they claimed that the issues of fact in this proceeding are triable by a jury as of right. No prior demand for a jury had been made either by the respondents or by the petitioner. I am informed, too, that the respondents did not pay for the jury.

This cause appeared on the non-jury calendar call of March 13, 1936, being No. 126 on the said Reserve Calendar. That fact, of course, had been indicated in the Law Journal all of that week.

18 On March 11, 1936, the respondents served us with an order to show cause to strike this proceeding from the Non-Jury Reserve Calendar, the motion being returnable on March 13, 1936.

We did not oppose the respondents' motion to strike because we were convinced that this cause should be tried by a jury unless expressly waived.

Up until this morning, March 17, 1936, there were two motions pending before the Court: (1) our motion for a preference, and (2) the respondents' motion to strike from the Non-Jury Calendar.

In this morning's Law Journal, a decision appeared on the petitioner's motion for a preference which stated:

Affidavit of Herbert Plaut.

19

“Motions are not considered, causes having been reached on the Non-Jury Reserve Calendar for March 13, 1936, in regular order.”

This afternoon, I went to the chambers of Mr. Justice Walsh, and in conversation with him, his secretary and someone from the clerk's office, it was found that today an order was made granting the respondents' motion to strike the cause from the Non-Jury Calendar.

20

The motion for a preference not having been considered for the reason that the cause was on the Non-Jury Calendar, and that reason having been removed, in fairness and justice the motion for a preference should now be considered upon its merits.

Mr. Justice Walsh gave me permission to state in this affidavit that this application for a re-argument is made with his permission.

No previous application for this or any similar relief has been made to any court or judge with the exception that the matter was discussed between Mr. Justice Walsh and me today, at which time he suggested that I bring on this motion.

21

HERBERT PLAUT.

(Sworn to by Herbert Plaut, March 17, 1936.)

22 **Affidavit of Jonas J. Shapiro, Read in
Opposition to Motion.**

SUPREME COURT OF THE STATE OF
NEW YORK,

COUNTY OF NEW YORK.

—o—
[SAME TITLE]
—o—

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

23 JONAS J. SHAPIRO, being duly sworn, deposes and says: I am a member of the firm of Greenbaum, Wolff & Ernst, attorneys for the respondents herein and am familiar with the proceedings heretofore had herein.

I make this affidavit in opposition to petitioner's motion for reargument of its motion for a preference. In view of the fact that the order to show cause is founded upon the papers submitted to this court in opposition to the motion for a preference, it is unnecessary to do more than to refer this court to my affidavit in opposition to the motion for a preference and the memorandum on behalf of the respondents, both of which were submitted to this court in opposition to the motion.

24 From that affidavit and the memorandum it will be seen that there is no warrant in fact or in law for granting the petitioner herein a preference.

WHEREFORE your deponent respectfully prays that the petitioner's motion for reargument be denied and also that petitioner's request for a preference be denied.

JONAS J. SHAPIRO.

(Sworn to by Jonas J. Shapiro, March 18, 1936.)

Notice of Motion.

25

SUPREME COURT OF THE STATE OF
NEW YORK,

COUNTY OF NEW YORK.

—o—
[SAME TITLE]
—o—

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of Herbert Plaut, duly sworn to the 19th day of February, 1936, and upon all the proceedings heretofore had herein, the undersigned will move this Court at a Trial Term, Part II thereof, to be held at the County Courthouse, Centre and Pearl Streets, in the Borough of Manhattan, City of New York, on the 2nd day of March, 1936, at the opening of court, or as soon thereafter as counsel can be heard, for an order granting this special proceeding a preference and setting the cause for trial upon the Day Calendar of this court for a day certain at the earliest available date, and for such other and further relief as to the Court may then and there seem just and proper.

26

27

PLEASE TAKE FURTHER NOTICE that all papers to be submitted in opposition to this motion must be served upon the undersigned at least five days prior to the return date of this motion.

Dated, February 19, 1936.

Yours, etc.,

PLAUT & DAVIS,
Attorneys for Petitioner,
76 Beaver Street,
New York, N. Y.

To:

GREENBAUM, WOLFF & ERNST, ESQS.,
Attorneys for Respondents,
285 Madison Avenue,
New York, N. Y.

28

**Affidavit of Herbert Plaut, Read in
Support of Foregoing Motion.**

SUPREME COURT OF THE STATE OF
NEW YORK,

COUNTY OF NEW YORK.

—o—

[SAME TITLE]

—o—

29

STATE OF NEW YORK, }
COUNTY OF NEW YORK. } ss.:

HERBERT PLAUT, being duly sworn, says:

I am a member of the firm of Plaut & Davis, attorneys for the petitioner; and I make this affidavit in support of the annexed application for a preference and to have this special proceeding placed upon the calendar of this court for a day certain.

30

On January 13, 1936, an order was signed upon the petition of the above petitioner to the respondents to show cause why an order of peremptory mandamus should not be granted, directing them to permit an inspection of the books, papers and records of Master Institute of United Arts, Inc. The said order to show cause was returnable at Special Term, Part I, of this court on January 16, 1936.

On January 15, 1936, Mr. Shapiro, of the firm of Greenbaum, Wolff & Ernst, attorneys for the respondents, spoke to me on the telephone. At that time he stated that he wanted an adjournment for about a week and said that on behalf

Affidavit of Herbert Plaut.

31

of the respondents he would have no objection to permitting the inspection of the books, provided his consent would not be an admission of the allegation that there had been a demand and a refusal. This was important because there was pending at that time an action in the Municipal Court to recover the statutory penalty of \$50 under Section 10 of the Stock Corporation Law for the refusal to permit the inspection of one of these books. I then stated that we did not care to give such a lengthy adjournment if they were willing to permit the inspection of the books with that reservation. I suggested that he draw a stipulation that afternoon and send it to me embodying the terms of the consent, or that he have a representative in Special Term, Part I, the following morning when the motion was returnable to state the conditions in open court, or that if neither of these two measures would be acceptable, the motion be marked "granted on consent, order to be settled," in which latter event we could have put in the necessary reservations. Mr. Shapiro said that he was too busy to draw up a stipulation or to come to court, and then there was a great deal of confusion on the telephone and nothing was accomplished.

32

33

When the motion called before Mr. Justice McLaughlin the following morning, the respondents had a representative in court who asked for a day to put in papers. That permission was granted.

In the affidavits in opposition to the order to show cause the respondents denied that the books were in the possession of the respondents Louis

34

Affidavit of Herbert Plaut.

L. Horch and Nettie Horch, that there was a demand made for inspection, and for a first separate defense, "that the application of the petitioner herein is made in bad faith in that the examination * * * is not for the purpose of securing information to guide him in his conduct as a trustee of the respondent Master Institute of United Arts, Inc., but, on the contrary, is for the purpose of prosecuting a separate action in which not only the said petitioner but Sina Lichtmann and Frances R. Grant are plaintiffs", and for a second defense that a reasonable time had not elapsed between the time of the demand and the commencement of this proceeding within which to comply with the demand.

35

These defenses, while they were sufficient to raise an issue of fact sufficient to defeat the application for a peremptory mandamus were and are sham and intended only to delay the petitioner's right to inspect the books, which undoubtedly was due, as will appear later in this affidavit, to the personal pique between Mr. Shapiro and myself. The reasons why the answer is sham are as follows:

36

(1) As to the respondents' claim that they did not have possession of the books:

In the examination before trial of the respondent Louis L. Horch as a defendant in the Municipal Court action, above referred to, he stated in answer to questions by me concerning the stock book as follows:

"Q. Does this corporation have a stock book? A. The corporation has a stock book.

"Q. Do you know where that stock book was on January 10th, 1936? A. I do.

Affidavit of Herbert Plaut.

37.

"Q Will you kindly state where it was?

A. The stock book was in the hands of the attorneys for the corporation.

"Q. Who are the attorneys that you refer to? A. Greenbaum, Wolff & Ernst.

"Q. Had they had it prior to January 10th, 1936? A. Yes.

"Q. Can you estimate for me how long before that date they had it? A. Well, can I say approximately—since this litigation began. I should say some time in 1935.

38

"Q. Prior to December, 1935? A. No, I mean it is just about that time—is that right? It is really hard for me to remember the date or the time. I know they had it at that time, but I don't know when this whole thing began.

"Q. That was approximately a month before January 10th, 1936, wasn't it? A. Approximately, that's right.

"Q. And since January 10th, 1936, do you know where it has been? A. Yes, I do.

"Q. In the same place? A. That's right.

39

"Q. And who delivered the stock book to Messrs. Greenbaum, Wolff & Ernst? A. Possibly myself.

"Q. Can you state with any more certainty? A. No, to be frank with you, I just can't remember this minute exactly how it was sent down—by messenger or given by myself."

And at page 13:

"Q. Do you have in your possession a certain Stockholders' Agreement bearing date April 23, 1923? A. I think I have.

40

Affidavit of Herbert Plaut.

"Q. According to your best recollection, can you state where it is? A. It is at the attorneys for the corporation.

"Q. Messrs. Greenbaum, Wolff & Ernst? A. Right."

(2) As to the claim that there had not been a demand and that sufficient time had not elapsed between the time of the alleged demand and the commencement of the proceedings:

41 In that same examination, Mr. Horch testified at page 5:

"Q. Do you recall a conversation on January 10th, 1936, sometime in the afternoon, between Mr. Maurice M. Lichtmann and yourself? A. Yes, I do.

"Q. Where was that conversation? A. The conversation was at 310 Riverside Drive.

"Q. Was it in any particular room or apartment? A. Yes, it was on the fourth floor, outside of my office.

42 "Q. That is, your office as President of the Institute? A. Yes.

"Q. Now, will you state as closely as you can remember, what was said by him and what was said by you at that time? A. As closely as I can remember, Mr. Lichtmann at that time asked to see all the records of the Master Institute of United Arts, Inc., and I told him that the records are with the attorneys, Greenbaum, Wolff & Ernst."

He also admitted receiving a letter, dated January 10, 1936, from my office on behalf of the petitioner demanding the inspection. On January 11, 1936, Messrs. Greenbaum, Wolff & Ernst

Affidavit of Herbert Plaut.

43

wrote to us a letter in which they stated that they would refuse to turn over any records except such as were matters of public record. This letter is as follows:

"January Eleventh, 1936.

Plaut & Davis, Esqs.,
76 Beaver Street,
New York City.

Re: Lichtmann v. Horch et al.

Gentlemen:

44

Referring to your letter of January 6th we confirm our telephone advices to you of a day or two thereafter that without the consent of our client we are unable to make available the records you desire to examine. To accommodate you, however, we will be happy to supply copies of such documents in our possession as may be matters of public record.

As we have mentioned to you in several of our telephone conversations during the week, it seems to us these records will be of little aid in working out an amicable adjustment of the differences between the parties. If some kind of a formula can be developed along the constructive lines we have been discussing, the corporate records will be of little relevancy. Should we be unable to agree upon a program within the next week or two acceptable to all parties concerned, we will then take this up again with our client.

45

Very truly yours,

GREENBAUM, WOLFF & ERNST

(signed) By SAMUEL J. SCHUR

SJS:BBO"

46

Affidavit of Herbert Plaut.

In the face of this letter, it was useless to wait any longer.

(3) As to the claim of bad faith:

The allegation in the petition that the petitioner was and is a trustee of the corporation was admitted, and even if there had been bad faith, that is not an objection that can be asserted against the trustee or a director because the law under repeated decisions is that the motives of a director in seeking an examination of the books of the corporation are immaterial:

47

Peo. ex rel. Leach v. Central Fish Co.,
117 App. Div. 77;

*Peo. ex rel. Grant v. Atlantic Terra
Cotta Co.*, 133 App. Div. 890, aff'd
196 N. Y. 523;

*Peo. ex rel. McInnes v. Columbia Bag
Co.*, 103 App. Div. 208.

In view of these issues of fact, the application for a peremptory mandamus was denied, but an alternative writ was granted.

48

On February 17th, a return to the writ was made, setting up the same matters as were contained in the papers in opposition to the application.

On January 31, 1936, I appeared at the office of Greenbaum, Wolff & Ernst to conduct the examination before trial of their client in the Municipal Court action. After the questioning was finished that afternoon, I had a conversation with Mr. Shapiro and I said that if there is any personal animosity between us two I was willing to forget about it and if there had been

Affidavit of Herbert Plaut.

49

any undue rudeness on my part, I was willing to apologize. He took this offer with due consideration. We then discussed what our versions of the telephone conversations were and I said there must have been a misunderstanding between us and if that could be ironed out, would he then permit the examination of the books. He then said to me that it was too late, that he was not going to permit an inspection of the books, and that as a matter of fact, when this cause is placed on the calendar, he was going to demand a jury trial in order to delay the inspection for over a year. I said that I did not think this was quite right. 50

On behalf of the petitioner I respectfully ask that this cause be placed on the calendar for a day certain in the early part of March, 1936. Mr. Lichtmann is still a trustee of the corporation. He is unable to exercise the functions of his office without seeing the books. A special meeting of trustees was had on Saturday, February 8, of the trustees of Master Institute of United Arts, Inc., in order to make a report of the earnings to the mortgagee. Mr. Lichtmann was unable to vote at that meeting because he was unacquainted with the financial data which was presented to that meeting. Other meetings may be required to take place, but without the information from the books he is unable to vote. 51

WHEREFORE, I respectfully ask that the case be granted a preference and be set at the head of the calendar for some early date for trial.

HERBERT PLAUT.

(Sworn to by Herbert Plaut, February 19, 1936.)

52

Order to Show Cause.

SUPREME COURT OF THE STATE OF
NEW YORK,

COUNTY OF NEW YORK.

—o—
[SAME TITLE]
—o—

53 Upon the annexed petition of Maurice M. Lichtmann, verified January 13, 1936, and on motion of Plaut & Davis, attorneys for the relator and petitioner,

54 LET Master Institute of United Arts, Inc., Louis L. Horch, as its President and Treasurer, and Nettie Horch, as its Secretary, show cause before this Court at a Special Term, Part I, thereof, to be held at the County Courthouse, in the Borough of Manhattan, City of New York, on the 16th day of January, 1936, at 10 o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, why an order of peremptory mandamus should not be granted, directing them, and each of them, to permit an inspection of the books, papers and records of the said Master Institute of United Arts, Inc. by the petitioner, his counsel and accountants, and granting the other relief prayed for in the annexed petition.

IT IS FURTHER ORDERED that service upon the respondents be made on or before January 14th, 1936, and be deemed sufficient thereof.

Dated, January 13, 1936.

RICHARD P. LYDON,
*Justice of the Supreme Court
of the State of New York.*

Petition, Read in Support of Motion.

55

SUPREME COURT OF THE STATE OF
NEW YORK,

COUNTY OF NEW YORK.

—o—

[SAME TITLE]

—o—

To the Supreme Court of the State of New York:

56

The petition of MAURICE M. LICHTMANN, respectfully shows to the Court as follows:

1. The respondent Master Institute of United Arts, Inc., is a corporation organized and existing under and by virtue of the laws of the State of New York, having its principal place of business at 310 Riverside Drive, in the Borough of Manhattan, City and State of New York. The respondents, Louis L. Horch and Nettie Horch, are and act as officers of the company in the following capacities respectively, that is to say, Louis L. Horch, as president and treasurer, and Nettie Horch as secretary.

57

2. The respondent Master Institute of United Arts, Inc., was granted a provisional charter by the Regents of the University of the State of New York on September 28, 1922, as appears from the following which is a copy of said charter:

THE
UNIVERSITY OF THE STATE OF NEW YORK
Provisional Charter of
MASTER INSTITUTE OF UNITED ARTS, INC.

Petition.

THIS INSTRUMENT WITNESSETH, That the Regents of the University of the State of New York have granted this provisional charter incorporating LOUIS L. HORCH, NICHOLAS ROERICH, MAURICE LICHTMANN, FRANCES R. GRANT, NETTIE HORCH, HELENA ROERICH, ZENA LICHTMANN, and their associates and successors as an educational institution for the instruction of persons of both sexes, in painting, music, languages, literature, drawing, designing, engraving, sculpture, singing, dramatic art, under the corporate name of "Master Institute of United Arts, Inc.", to be located at 312 West 54th Street in the Borough of Manhattan, City and State of New York, with seven trustees to be at first the named incorporators, to hold until their successors shall be chosen by the shareholders of the corporation at and for such time or times as their bylaws shall provide; with power in the corporation to have a capital stock to be divided into seven shares of nominal or no par value, to be issued upon such terms as the trustees shall determine, and upon which may be distributed to the holders thereof dividends or shares of the surplus profits of the corporation, subject to the condition that the corporation shall begin business with a capital of at least \$7500.00; and this provisional charter will be replaced by an absolute charter if within five years the corporation shall acquire resources and equipment deemed suitable and sufficient by the Regents of the University for its chartered purposes and be maintaining an organization of usefulness and character satisfactory to them.

GRANTED September 28, 1922 by the Regents of the University of the State of New

Petition.

61

York, executed under their seal and recorded
in their office. Number 3183.

(Signed) FRANK P. GRAVES,
President of the University.

(SEAL) CHESTER O. LORD,
Chancellor.

3. Your petitioner was duly elected one of
the seven trustees of the respondent Master In-
stitute of United Arts, Inc., having been named 62
in the provisional charter, a copy of which has
been quoted above, has continued in office as trustee
of the respondent Master Institute of United
Arts, Inc., and is now such a trustee.

4. Your petitioner is also a stockholder of the
respondent Master Institute of United Arts, Inc.,
being the owner of one share of the outstanding
and issued seven shares of capital stock.

5. The respondent Master Institute of United
Arts, Inc., acquired the title to the large build-
ing and premises at 103rd Street and Riverside 63
Drive in the Borough of Manhattan, City of New
York, familiarly known as the "Roerich Mu-
seum" or the "Master Building," on February
23, 1935, after reorganization proceedings had
been had of the previous owner; and the re-
spondent Master Institute of United Arts, Inc.,
is now the owner in fee of such building and
premises.

6. The books, records, documents and books
of account of the respondent Master Institute
of United Arts, Inc., have been for a long time

Petition.

past in the possession of the respondents, Louis L. Horch and Nettie Horch; and they are now in their possession.

65 7. As a trustee of the respondent Master Institute of United Arts, Inc., I feel that I have an absolute right to be permitted to inspect said books, records, documents and books of account of Master Institute of United Arts, Inc., so that I may perform my duty as trustee intelligently and keep myself informed as to the business and affairs of the corporation.

66 8. On January 10, 1936, I made a personal demand upon Louis L. Horch to be permitted to examine said books, documents and records, but my demand was refused and I was not permitted to see or examine said books, documents and records. On January 10, 1936, my attorneys, Messrs. Plaut & Davis, 76 Beaver Street, New York City, on my behalf made written demands upon each of the respondents for permission to examine said books, documents and records. Copies of the letters sent on January 10, 1936, are attached hereto and marked Exhibits A, B and C, respectively. No answer has been received to any of these letters.

9. For the foregoing reasons, your petitioner prays that a peremptory mandamus order be made herein, directing the above-named respondents, and each of them, to permit the inspection of the books, papers and records of the respondent Master Institute of United Arts, Inc., by your petitioner, his counsel and accountants, and

Petition.

67

the making of copies and extracts therefrom; or if the Court see fit not to grant such peremptory order, that an alternative mandamus order issue herein, commanding the above named respondents, and each of them, to do the acts and things above mentioned, or to show cause before this Court why the said peremptory order should not be made and should not issue herein.

No previous or other application for the foregoing relief has been made to any court or judge.

Dated, New York, January 13, 1936.

68

MAURICE M. LICHTMANN,
Petitioner.

(Sworn to by M. M. Lichtmann, Jan. 13, 1936.)

69

70

**Exhibit A, Attached to Foregoing
Petition.**

January 10, 1936.

Master Institute of United Arts, Inc.
310 Riverside Drive
New York, N. Y.

Gentlemen:

On behalf of Mr. Maurice M. Lichtmann, a
stockholder and trustee of you, we hereby de-
mand that you permit an inspection of the books,
71 papers, records and accounts of your Company
by him, his counsel, and accountants, and the
making of copies and extracts therefrom.

Among the books, records and accounts of
which inspection is hereby demanded are in-
cluded, but not restricted to, the following: the
By-Laws of your Company, minutes of all meet-
ings of stockholders from the creation of your
corporation in 1922 to date, the minutes of the
trustees of your corporation from the creation
of your corporation in 1922 to date, the stock
book, and all books of account including finan-
72 cial statements and original books of entry from
1922 to date.

The demand is for an immediate inspection
of the above.

Will you therefore inform us at once when
and where this inspection may be had?

Very truly yours,

PLAUT & DAVIS

HP:s

Reg. Mail

Return Receipt Requested.

**Exhibit B, Attached to Foregoing
Petition.**

73

January 10, 1936.

Mr. Louis L. Horch
310 Riverside Drive
New York, N. Y.

Dear Sir:

On behalf of Mr. Maurice M. Lichtmann, a stockholder and trustee of Master Institute of United Arts, Inc., a corporation of which you are an officer, we hereby demand that you permit an inspection of the books, papers, records and accounts of said Company by him, his counsel, and accountants, and the making of copies and extracts therefrom.

74

Among the books, records and accounts of which inspection is hereby demanded are included, but not restricted to, the following: the By-Laws of said Company, minutes of all meetings of stockholders from the creation of said corporation in 1922 to date, the minutes of the trustees of said corporation from the creation of said corporation in 1922 to date, the stock book, and all books of account including financial statements and original books of entry from 1922 to date.

75

The demand is for an immediate inspection of the above.

Will you therefore inform us at once when and where this inspection may be had?

Very truly yours,

PLAUT & DAVIS

HP:s
Reg. Mail
Return Receipt Requested.

76

**Exhibit C, Attached to Foregoing
Petition.**

January 10, 1936.

Mrs. Nettie Horch
310 Riverside Drive
New York, N. Y.

Dear Madam:

On behalf of Mr. Maurice M. Lichtmann, a stockholder and trustee of Master Institute of United Arts, Inc., a corporation of which you are an officer, we hereby demand that you permit an inspection of the books, papers, records and accounts of said Company by him, his counsel, and accountants, and the making of copies and extracts therefrom.

Among the books, records and accounts of which inspection is hereby demanded are included, but not restricted to, the following: the By-Laws of said Company, minutes of all meetings of stockholders from the creation of said corporation in 1922 to date, the minutes of the trustees of said corporation from the creation of said corporation in 1922 to date, the stock book, and all books of account including financial statements and original books of entry from 1922 to date.

The demand is for an immediate inspection of the above.

Will you therefore inform us at once when and where this inspection may be had?

Very truly yours,

PLAUT & DAVIS.

HP:s
Reg. Mail
Return Receipt Requested.

**Answer to Petition, Read in Support
of Motion.**

79

SUPREME COURT OF THE STATE OF
NEW YORK,

COUNTY OF NEW YORK.

—o—

[SAME TITLE]

—o—

The respondents above named, by their attorneys, Greenbaum, Wolff & Ernst, answering the petition herein. 80

I.—Deny each and every allegation contained in paragraphs of said petition “4”, “6”, “7” and “8”.

FOR A FIRST, SEPARATE AND COMPLETE DEFENSE,
SAID RESPONDENTS ALLEGE:

II.—Upon information and belief that the application of the petitioner herein is made in bad faith in that the examination of books, records and documents sought by the petitioner is not for the purpose of securing information to guide him in his conduct as a trustee of the respondent Master Institute of United Arts, Inc., but, on the contrary, is for the purpose of prosecuting a separate action in which not only the said petitioner but Sina Lichtmann and Frances R. Grant are plaintiffs. 81

FOR A SECOND, SEPARATE AND COMPLETE DEFENSE,
SAID RESPONDENTS ALLEGE:

III.—That a reasonable time had not elapsed between the time of petitioner's alleged demand

82

Opinion on Motion for Order of Mandamus.

and the commencement of this proceeding within which to comply with the said alleged demand.

IV.—That the alleged demand itself was of no force and effect in that it failed to give to respondents a reasonable time within which to comply with said demand, but in lieu thereof demanded an “immediate inspection.”

WHEREFORE the respondents pray that the petition herein be dismissed with costs and disbursements.

GREENBAUM, WOLFF & ERNST,
Attorneys for Respondents,
Office & P. O. Address,
285 Madison Avenue,
Manhattan Borough,
New York City.

(Verified on January 17th, 1936, by Louis L. Horch, one of respondents.)

84

**Opinion on Motion for Order of
Mandamus.**

SUPREME COURT,

SPECIAL TERM—PART I.

MR. JUSTICE McLAUGHLIN.

January 21, 1936.

Lichtmann v. Master Institute of United Arts, Inc.—From the meagre papers submitted herein it appears doubtful whether this application is made in good faith. In any event, there is lacking the necessary elements required for a peremptory order. The issues raised necessitate a trial. Alternative order of mandamus is granted. Settle order.

Alternative Order of Mandamus.

85

At a Special Term, Part I, of the Supreme Court of the State of New York, held in and for the County of New York, at the County Courthouse, in said County on the 25th day of January, 1936.

Present:—HON. CHARLES B. McLAUGHLIN,
Justice.

—o—

86

In the Matter

of

The Application of MAURICE M. LICHTMANN,
Petitioner,
For a Mandamus Order,

AGAINST

MASTER INSTITUTE OF UNITED ARTS, INC., LOUIS
L. HORCH, as its President and Treasurer,
and NETTIE HORCH, as its Secretary,
Respondents.

—o—

87

The petitioner having moved this Court by an order to show cause, dated January 13, 1936, for an order of peremptory mandamus directing the respondents and each of them to permit an inspection of the books, papers and records of Master Institute of United Arts, Inc., and in the alternative, for an alternative mandamus order,

Now, upon reading and filing the order to show cause, dated January 13, 1936, and the petition of Maurice M. Lichtmann, verified January 13, 1936, and the exhibits attached thereto, in support

88

Alternative Order of Mandamus.

of the said motion, together with proof of due service thereof upon the respondents, and the answer of the respondents, verified January 17, 1936, in opposition to the said motion; and the said motion having duly come on to be heard, and after due deliberation and upon filing the opinion of the Court, it is, upon motion of Greenbaum, Wolff & Ernst, Esqs., attorneys for the respondents,

89

ORDERED, that the application for an order of peremptory mandamus be and the same hereby is denied; and

Upon motion of Plaut & Davis, Esqs., attorneys for the petitioner, it is

ORDERED, that the application for an alternative order of mandamus be and the same hereby is granted; and accordingly, therefore, to Master Institute of United Arts, Inc., Louis L. Horch, as its president and treasurer, and Nettie Horch, as its secretary;

90

IT IS ORDERED that you, Master Institute of United Arts, Inc., Louis L. Horch, as its president and treasurer, and Nettie Horch, as its secretary, forthwith permit an inspection of the books, papers and records of Master Institute of United Arts, Inc., by the petitioner, his counsel and accountants, and the making of copies and extracts therefrom, or that you show cause why the command of this order should not be obeyed, and make return to this order and the petition therefor, pursuant to the provisions of the Civil Practice Act, at the office of the Clerk of the County of New York within twenty days after its service upon you.

Enter,

C. B. McL.,
J. S. C.

Return to Order of Mandamus.

91

The return to the alternative order of mandamus is the same as the answer to the petition printed *supra* at folios 79 to 83 except that the return is verified February 17th, 1936.

Note of Issue.

SUPREME COURT,
NEW YORK COUNTY.

[SAME TITLE]

92

File No. 1384/1936.

Issue of Law and Fact to be Tried by Court.

Issue joined on the 17th day of February, 1936,
by service of answer.

Note of issue filed by petitioner.

Note of issue served for March 2, 1936.

Action for alternative writ of mandamus to
compel inspection of corporate books and records.

93

An application will be made to the Court at
the opening of the March term to move this
cause as a preferred cause.

GREENBAUM, WOLFF & ERNST,
Attorneys for Respondents,
Office and P. O. Address,
285 Madison Avenue,
New York, N. Y.

PLAUT & DAVIS,
Attorneys for Petitioner,
Office & P. O. Address,
76 Beaver Street,
New York, N. Y.

94 **Affidavit of Jonas J. Shapiro, Read in
Opposition to Foregoing Motion.**

SUPREME COURT OF THE STATE OF
NEW YORK,

COUNTY OF NEW YORK.

—o—
[SAME TITLE]
—o—

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

95 JONAS J. SHAPIRO, being duly sworn, deposes and says: I am a member of the firm of Greenbaum, Wolff & Ernst, attorneys for the respondents herein and am familiar with the proceedings heretofore had herein. I make this affidavit in opposition to the petitioner's motion to set this cause for trial for a day certain.

There is no provision of law or rule of court which warrants the granting of the preference sought by the plaintiff. That will be more fully discussed in the memorandum to be submitted by the respondents on this motion. Nor are
96 there any facts given in the moving affidavit which establish any extraordinary circumstances requiring or justifying a preference. Indeed, the petitioner fails to mention to this court that Mr. Justice McLaughlin in granting the alternative order of mandamus stated:

“ * * * it appears doubtful whether this application [for an order of mandamus] is made in good faith.”

Lichtmann v. Master Institute of United Arts, Inc., N. Y. Law Journal, January 21, 1936, Special Term, Part I, Decisions of McLaughlin, J.

Affidavit of Jonas J. Shapiro.

97

Nor does the moving affidavit point out that the action which this petitioner commenced in the Municipal Court to recover a penalty for the alleged refusal of the respondents Louis L. Horch and Nettie Horch to permit him to examine the stock book was discontinued by the petitioner herein after the defendants in that action had moved for summary judgment.

In view of the petitioner's lack of good faith there is patently no reason why he should have a preference over other litigants who have un-

98

preferred causes on the calendar of this court. The moving affidavit attempts to conceal the lack of merit in the application by referring at great length to personal differences existing between counsel for the respective parties. While those allegations are wholly irrelevant to the application, your deponent cannot permit them to go unnoticed and unchallenged.

Mr. Plaut in his affidavit refers to a conversation I had with him prior to the return day of the motion for mandamus. It is true that I had a conversation with him. It is also true that I offered at that time to consent to a mandamus order provided the granting of such order should not be construed as an adjudication that the respondents had refused to permit inspection. I asked for no consideration for my consent. What Mr. Plaut fails to point out is that when he adopted an unreasonable attitude I informed him that the offer was withdrawn and I would let the legal processes of the court take their natural course. Mr. Plaut attempts to conceal this latter portion of the conversation by saying: " * * * there was a great deal of

99

100

Affidavit of Jonas J. Shapiro.

confusion on the telephone and nothing was accomplished." There was no confusion whatever and Mr. Plaut never had any doubt at the close of that telephone conversation that I intended to oppose his application for a mandamus. This I did with the result that Mr. Justice McLaughlin who heard the application denied it insofar as a peremptory writ was sought and apparently granted the alternative writ reluctantly, saying the while that there was doubt as to the good faith of the petitioner in making the application.

101

Mr. Plaut in his affidavit refers to an apology which he claims he has tendered me. With Mr. Plaut's apologies I am not concerned, but since he attempts to make much of it it might not be amiss to point out that subsequent to the date of the alleged apology his office has continued its unwarranted conduct. Thus on February 5, 1936 there was returnable in the Municipal Court at 1:30 P. M. a motion for summary judgment in the penalty action before referred to. I spoke with Mr. Plaut's partner, Mr. Davis, that same morning on another matter and, notwithstanding that in the afternoon he made an application to the court for an adjournment on the ground that Mr. Plaut was actually engaged in a trial in Bronx County, Supreme Court, he never intimated to me in our morning conversation that he intended to make such an application. As a result almost a full afternoon was wasted in the Municipal Court. Incidentally, it is noteworthy that the action in which Mr. Plaut was supposedly actually engaged did not go to trial that day as appears from the Law Journal of the following day.

102

Affidavit of Jonas J. Shapiro.

103

Mr. Plaut in his affidavit says that I threatened to delay this matter by demanding a jury. I never made any such threat because the same was wholly unnecessary. Under Section 1333 of the Civil Practice Act the respondents are entitled to a jury trial as a matter of right.

Mr. Plaut contends in his affidavit that the denials are sham. I deny that those denials are sham and further point out that if they had been Mr. Justice McLaughlin could and would have disregarded them. It is not to be supposed that this court of equal jurisdiction on an incidental motion for a preference will overrule another justice of this court on a matter which was directly involved. 104

Mr. Plaut (not the petitioner) claims that without the books petitioner is unable to exercise the functions of his office. In attempted support of that he says that the petitioner was unable to vote at a special meeting of the trustees of the corporation held February 8th, 1936 because he was unfamiliar with the affairs of the company. That allegation is contrary to the facts as will be demonstrated by the following: In another action in this court in which the petitioner is one of the plaintiffs a motion was pending before Mr. Justice Rosenman for an injunction. That motion was brought on by order to show cause signed by Mr. Justice Shientag. It contained a stay which was ambiguous and might have been construed as prohibiting the holding of a meeting of the trustees which was necessary in order to certify to a bondholders' corporation the operating and management figures of the property owned by the corporation. The board of trustees in certifying these figures to the bondholders' 105

106

Affidavit of Jonas J. Shapiro.

corporation have always in the past taken the figures prepared by the accountant for the respondent Master Institute of United Arts, Inc., and certified them as their own. It being necessary to hold such a meeting solely for said purpose your deponent made an application to Mr. Justice Rosenman to modify the order to show cause to permit the holding thereof. Mr. Plaut and I appeared before Mr. Justice Rosenman and a modification order was finally drawn up

107 on consent. In the course of the conversations leading up to that modification order Mr. Plaut asked that the accountant's statement be furnished him before the meeting. This was done. He then stated that in view of the pending controversy as to the legality of the election of the then existing board of trustees he preferred that his client be excused from voting unless it was absolutely necessary for a majority, although he stated his client would be there to make the necessary quorum. I stated that that would be all right so far as I was concerned. Mr. Plaut and

108 his client, the petitioner herein, appeared at the meeting, his vote was not necessary and he refrained from voting, obviously not for the reason now assigned by Mr. Plaut.

WHEREFORE, your deponent respectfully asks that the motion be denied.

JONAS J. SHAPIRO.

(Sworn to by Jonas J. Shapiro, Feb. 26, 1936.)

Reply Affidavit of Herbert Plaut, Read 109
in Support of Foregoing Motion.

SUPREME COURT OF THE STATE OF
NEW YORK,

COUNTY OF NEW YORK.

—o—
[SAME TITLE]
—o—

STATE OF NEW YORK, }
COUNTY OF NEW YORK. } ss.: 110

HERBERT PLAUT, being duly sworn, says:

I make this affidavit in reply to the affidavit of Jonas J. Shapiro, sworn to February 26, 1936, and offered in opposition to the motion made by the petitioner for a preference.

Mr. Shapiro talks about the petitioner's "lack of good faith" which appeared in Mr. Justice McLaughlin's decision on the application for a peremptory mandamus. On pages 2 and 3 of my affidavit in support of this motion, sworn to February 19, 1936, I stated that the respondents, in opposition to the application for a peremptory mandamus, included in their answer the statement, "that the application of the petitioner herein is made in bad faith in that the examination * * * is not for the purpose of securing information to guide him in his conduct as a trustee of the respondent Master Institute of United Arts, Inc., but, on the contrary, is for the purpose of prosecuting a separate action in which not only the said petitioner but Sina Lichtmann and Frances R. Grant are plaintiffs". 111

That was the sole basis of the claim of "bad faith" made by the respondents. When these

112

Reply Affidavit of Herbert Plaut.

respondents made such claim, it was useless to contest said claim on the facts because, as this Court well knows, an issue on the facts is sufficient to warrant a denial of an application for a peremptory mandamus. Consequently, no replying affidavits were submitted.

113

This other action which the respondents say that the petitioner is seeking to aid by this mandamus proceeding is the action for an injunction against these same respondents to restrain them from disposing of the shares of stock of Master Institute of United Arts, Inc., to which they have asserted a claim and which the petitioner and two other persons assert that they have the right of ownership and voting. This is the action which the newspapers call the "internal dispute in the Roerich Museum".

114

Mr. Justice Rosenman decided the application for a temporary injunction in favor of this petitioner and those two other plaintiffs by restraining these respondents as defendants in that action from disposing of the shares of stock and from voting said stock during the pendency of the action, and he set the case down for an early trial, that is, on April 6, 1936.

Mr. Shapiro also makes mention that the Municipal Court penalty action was discontinued. That is true. The respondent, Master Institute of United Arts, Inc., had its charter amended so that no stockholder should be permitted to receive any dividends or earnings of the corporation. Under the definition of a stock corporation in the General Corporation Law, such amendment deprived the corporation of the attributes of a stock corporation within the meaning of Section 10 of the Stock Corporation Law providing for a

Reply Affidavit of Herbert Plaut.

115

penalty of \$50 for the failure to exhibit the stock book. However, that has nothing to do with this action since the petitioner is asserting a common law right of a trustee to examine all the books (*Matter of Steinway*, 159 N. Y. 250).

It will be of no use to contradict Mr. Shapiro on his version of our personal dispute. Undoubtedly, we never could get each other to agree to our versions of the incidents.

However, he states on page 3 of his affidavit that although an excuse was made to the Municipal Court that I was actually engaged, I was not so engaged. The fact of the matter is that I was in the Bronx Supreme Court as trial counsel in the case of *Halperin v. Meyer* and was held there to follow the case then being tried and could not leave.

116

Mr. Shapiro's statements on page 5 as to the reason why Mr. Lichtmann could not vote at the meeting is very misleading. The reason why he did not vote was that at this meeting an accountant's report was prepared which showed a number of figures of the supposed earnings of the corporation. These included payments to Mr. Horch, one of the respondents. How these figures were arrived at in the summary statement of the accountants is unknown to the petitioner or to me, and he could not in true conscience certify that those were the actual figures. He had been denied the right to inspect the books to find out the bases for the accountant's summary statement.

117

WHEREFORE, I respectfully ask that the motion be granted.

HERBERT PLAUT.

(Sworn to by Herbert Plaut, February 29, 1936.)

118

Order on Original Motion.

NEW YORK SUPREME COURT,

COUNTY OF NEW YORK.

TRIAL TERM—PART II.

Index Number 1384—Year 1936.

Calendar Number 14210—Trial without Jury.

Present:—HON. JOHN L. WALSH,
Justice.

119

MAURICE M. LICHTMANN,

Petitioner,

AGAINST

MASTER INSTITUTE OF UNITED ARTS, INC., *et al.*,
Respondents.The following papers numbered 1 to 3 used
on this motion. Opposed.*Papers
Numbered.*

120	Notice of Motion and Affidavits Annexed	1
	Answering Affidavits	2
	Replying Affidavits	3

Upon the foregoing papers this motion is not
considered, cause having been reached on the
Non-Jury Reserve Calendar, for March 13, 1936
in regular order.

Dated, March 16, 1936.

J. L. W.,
J. S. C.

Defendant's Brief ✓.
Filed March 17, 1936.
N. Y. County Clerk's Office.

Affidavit of No Opinion.

121

STATE OF NEW YORK, }
 COUNTY OF NEW YORK. } ss.:

JONAS J. SHAPIRO, being duly sworn, deposes and says, that he is counsel for the appellants herein and that no opinion was rendered by the court below in making the order appealed from except a memorandum stating "Memorandum is granted and cause placed on jury reserve calendar for April 3, 1936. Order filed."

JONAS J. SHAPIRO.

122

Sworn to before me this }
 23rd day of April, 1936. }

PAULA GROSS,

Notary Public,

N. Y. Co. Clk's No. 217, Reg. No. 7-G-357;

Kings Co. Clk's No. 57, Reg. No. 7269;

Commission expires March 30, 1937.

Stipulation Waiving Certification.

IT IS HEREBY STIPULATED pursuant to Section 170 of the Civil Practice Act, that the foregoing are true and correct copies of the notice of appeal, the order appealed from, and all the papers upon which said order was founded and now on file in the office of the Clerk of the County of New York and certification thereof pursuant to Section 616 of the Civil Practice Act is hereby waived.

123

Dated, New York, April 23rd, 1936.

GREENBAUM, WOLFF & ERNST,
 Attorneys for Respondents-Appellants.

PLAUT & DAVIS,
 Attorneys for Petitioner-Respondent.

*Clerk's Certificate of Certification
 attached hereto the 23rd day of
 April 1936*

Argued by
HERBERT PLAUT

New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

In the Matter of the Application of
MAURICE M. LICHTMANN,
Petitioner-Respondent,

For a Mandamus Order

against

MASTER INSTITUTE OF UNITED ARTS, INC., LOUIS L.
HORCH, as its President and Treasurer, and
NETTIE HORCH, as its Secretary,

Respondents-Appellants.

POINTS OF PETITIONER-RESPONDENT

The respondents-appellants have appealed from an order made at Trial Term, Part II (Walsh, J.), granting this cause a preference and placing it on the Jury Reserve Calendar for April 3, 1936 (which will be called on May 1, 1936).

This is an alternative order of mandamus for the inspection of the books and records of a corporation. The corporation is Master Institute of United Arts, Inc., organized under the Education Law (fols. 57-61); it is the fee owner of the large premises at 103rd Street and Riverside Drive familiarly known as the "Roerich Museum," or "Master Building." The petitioner is a member of its Board of Trustees (fols. 61-62). The indi-

vidual respondents are its president and treasurer, and its secretary (fol. 56).

The Need for the Inspection

As a trustee the petitioner requires the inspection in order to perform his duties (see *Peo. ex rel. Leach v. Central Fish Co.*, 117 App. Div. 77, 79). For example, a meeting has been had to approve an accountant's summary report for the purpose of submitting the same to the mortgagee. The petitioner was unable to vote to approve the report without being able to see the original entry books (fols. 50-1). Demands for the inspection (fols. 65-6, 70-78, 41-2) were refused with a statement that the books were with the respondents' attorneys. The attorneys wrote that an inspection would not be allowed except only as to those documents which were "matters of public record" (fols. 43-5).

The Policy of Making an Early Inspection a Practical Impossibility

An application was made for a peremptory order (fols. 52-67). The return (fols. 79-82) raised apparent issues of fact sufficient to defeat the application for the peremptory order and to throw the cause into Trial Term (fol. 84) which issues, however, were sham:

1. *That the books were not in the possession of the respondents* (par. 6, petition, denied). Besides the point that the books of a corporation should be in the possession of its officers, the fact is, as developed by an examination, that the books were in the hands of

their attorneys, having been sent there by the respondent Louis L. Horch (fols. 36-40).

2. *That there was no demand, and that enough time had not elapsed between the date of the alleged demand and the commencement of these proceedings* (par. 8, petition, denied, and par. III, answer). In that same examination, Horch admitted the oral demand made on him and the receipt of the written demands (fols. 41-2). The attorneys' letter, dated January 11th (fols. 44-5), expressed a formal refusal to permit the inspection except as to matters of public record. These proceedings were begun two days later (fol. 54).

3. *The "bad faith" defense, i.e., that the inspection was to secure information for the prosecution of another action* (par. II, answer). Apart from the consideration that such acts do not constitute "bad faith", the defense was no good on the law for under repeated decisions the motives of a director of a corporation in seeking an inspection of the corporate records are completely immaterial (*Peo. ex rel. Leach v. Central Fish Co.*, 117 App. Div. 77; *Peo. ex rel. Grant v. Atlantic Terra Cotta Co.*, 133 App. Div. 890, aff'd 196 N. Y. 523; *Peo. ex rel. McInnes v. Columbia Bag Co.*, 103 App. Div. 208).

The record shows an unmasking of the policy to delay. After a personal dispute between counsel (fols. 30-33), an attempt was made to conciliate, but counsel for the respondents thereupon stated (fols. 49-50):

"* * * it was too late, that he was not going to permit an inspection of the books, and

that as a matter of fact, when this cause is placed on the calendar, he was going to demand a jury trial *in order to delay the inspection for over a year.*"

The respondents did move to strike the cause from the Non-Jury Calendar, on which it had been placed, their claim being that the issues were triable by a jury as of right. The motion was granted (fols. 16-20). This motion for a preference was thereupon reconsidered by Mr. Justice Walsh, and granted to the extent above indicated.

POINT I

The Court had power to grant the preference.

"A preference may be granted for the trial of the issues joined on the granting of an alternative mandamus order at a special term of the supreme court."

10, *Carmody's New York Practice*, 781.

This, under subdivision 20 of Section 138 of the Civil Practice Act, is in addition to the preference "over *any of the causes* specified in section one hundred thirty-eight," provided in Section 140 of the Civil Practice Act where the mandamus order is issued from the Appellate Division.

And this is in accordance with a well established practice, as is evidenced by these cases where preferences were granted for the trial of issues on the granting of an alternative mandamus order:

Matter of Potts v. Kaplan, 147 Misc. 573,
578;
*Matter of Fuchs v. First Dobromiler S. &
B. Ass'n.*, 217 App. Div. 399, 400.

POINT II

**The Court correctly exercised its discretion
in granting the preference.**

Were the cause not preferred, the trial would
not take place for over two years. In the mean-
time,

1. the petitioner, as a trustee, would be
effectively prevented from attending to any
of his duties and privileges as such;
2. he would for that length of time be ex-
posed to the common liabilities or risks of
any director or trustee without being able
to examine into the management details of
the corporation, having but one alternative,
i.e., resigning as a trustee.
3. corporate mismanagement, if it existed,
could not be uncovered for that long period
of time.

The order should be affirmed.

Dated, New York, April 30, 1936.

Respectfully submitted,

PLAUT & DAVIS,
Attorneys for Petitioner-Respondent.

32
At a Special Term, Part III
of the Supreme Court of the
State of New York, held in
and for the County of New York,
at the County Courthouse,
Borough of Manhattan, City
of New York, on the
12th day of November, 1936.

PRESENT:

HON. JOHN F. GAREW,
JUSTICE.

----- -X
In the Matter of the Application of
MAURICE M. LICHTMANN,
Petitioner,
For a Mandamus Order
against

MASTER INSTITUTE OF UNITED ARTS, INC.
LOUIS L. HORCH, as its President and
Treasurer, and NETTIE HORCH, as its
Secretary,

Respondents
----- -X

TO MASTER INSTITUTE OF UNITED ARTS, INC.,
LOUIS L. HORCH, as its President and Treasurer, and
NETTIE HORCH, as its Secretary.

The petitioner Maurice M. Lichtmann having presented a verified petition at a Special Term of the Supreme Court asking for an order of mandamus directing the above named respondents to perform certain acts hereinafter specified; and an order to show cause, dated the 13th day of January, 1936, having been signed and issued by Hon. Richard P. Lydon, a Justice of the Supreme Court, pursuant to the aforesaid petition; and the said order having been made returnable on the 16th day of January 1936; and the respondents having duly filed a verified answer to the petition; and upon the said petition and the said answer the Court having made and order dated the 25th day of January, 1936, denying the petitioner's application for an order of peremptory mandamus and granting petitioner's application for an alternative order of mandamus requiring the respondents to perform such acts or to show cause why they should not do so and to make return to the petition and alternative order of mandamus pursuant to the provisions of the Civil Practice Act; and a return, verified the 17th day of February, 1936, having been filed by the respondents on the 17th day of February, 1936, raising issues of fact;

And the said issues of fact having duly come on to be tried and determined before Hon. Salvatore A. Cotillo at a Trial Term, Part XIV, of the Supreme Court, held in and for the County of New York, on the 27th day of October, 1936, and the petitioner and the respondents, by consent and stipulation made in open court, having waived trial by jury and findings of fact and conclusions of law, and having consented that the Court might direct judgement, and the Court having directed judgement in favor of the petitioner herein by a decision dated the 28th day of October, 1936, and filed on the 28th day of October, 1936;

And the petitioner having duly moved this Court at a Special Term, Part III, thereof, upon all the proceedings heretofore had herein, including the

the aforesaid order to show cause, dated the 13th day of January, 1936, the petition herein duly verified the 13th day of January, 1936, the answer to the petition herein duly verified the 17th day of January, 1936, the order of alternative mandamus, dated the 25th day of January, 1936, and the return to the alternative order of mandamus, duly verified the 17th day of February, 1936, the decision of Hon. Salvatore A. Cotillo, Justice of the Supreme Court, made at Trial Term, Part XIV, of the Supreme Court, and upon the extract from the clerk's minutes, for a final order herein including a peremptory mandamus in favor of the petitioner herein and including an award to the petitioner herein of costs and disbursements as in an action as against the respondents and a direction to the clerk of this court to tax costs and disbursements as in an action in favor of the petitioner and against the respondents; and the respondents having filed in opposition to the said motion an affidavit of Harold H. Stern, duly sworn to the 2nd day of November, 1936; and the said motion having duly come on to be heard, and Plaut & Davis, Esqs. (Mr. Herbert Plaut of counsel) having appeared in support of the application for a final order, and Greenbaum, Wolff & Ernst, Esqs. (Mr. Harold H. Stern of counsel) having appeared in opposition thereto; and the Court having filed its opinion herein;

NOW, THEREFORE, on motion of PLAUT & DAVIS, ESQS., attorneys for the petitioners, it is

ADJUDGED AND DECREED that Maurice M. Lichtmann, petitioner herein, his counsel and accountants, were and they are entitled to an inspection of the books, papers, records of Master Institute of United Arts, Inc. and to the making of copies and extracts therefrom; and it is

ORDERED that you, Master Institute of United Arts, Inc., Louis L. Horch, as its President and Treasurer, and Nettie Horch, as its Secretary, be and you are hereby ordered and directed, immediately upon receipt by you of a certified copy of this order, to permit Maurice M. Lichtmann, the petitioner herein, his counsel and accountants, to inspect the books, papers and records of Master Institute of United Arts, Inc. and to make copies and extracts therefrom; and you are further commanded to do any and all such other acts as may be necessary to allow the petitioner Maurice M. Lichtmann, his counsel and accountants, to make an inspection of the books, papers and records of Master Institute of United Arts, Inc. and to make copies and extracts therefrom; and it is further

ORDERED that Maurice M. Lichtmann, petitioner herein, be allowed costs of this proceeding, and the County of New York is hereby directed to tax X costs and disbursements in favor of the petitioner herein and against the respondents herein as in an action; and it is

ADJUDGED that Maurice M. Lichtmann, petitioner herein, recover of the respondents Master Institute of United Arts, Inc., Louis L. Horch, as its President and Treasurer and Nettie Horch, as its Secretary, the sum of \$ costs and disbursements as taxed, and that the petitioner Maurice M. Lichtmann have execution therefore.

E N T E R

*County Clerk of the

J.F.C.
J.S.C. +