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Argued by
HERBERT PLAUT.

New York Supreme Court.

APPELLATE DIVISION—FIRST DEPARTMENT.

In the Matter
of
The Petition of FRANCES R. GRANT, SINA LICHTMANN, NICHOLAS ROERICH, HELENA ROERICH and MAURICE M. LICHTMANN,
Petitioners-Respondents,
to set aside the election of
SIDNEY NEWBERGER, JESSIE NEWBERGER, PHILIP H. HISS and ESTHER J. LICHTMANN, as Trustees of MASTER INSTITUTE OF UNITED ARTS, INC.,
Respondents-Appellants.

POINTS OF PETITIONERS-RESPONDENTS.

The stay from which the appeal is taken prevented the appellants, whose title to office as members of the Board of Trustees the petitioners are contesting, from carrying into effect, pending the determination of the legality of the election, certain resolutions aimed at ousting the petitioners and their organizations from the corporation's school and property. These resolutions were passed by the appellants and others purporting to act as the Board. The officers of the corporation were proceeding to carry out these ouster

measures while this proceeding was *sub judice* before Special Term (fols. 23-27), that is, after the oral argument of the application to set aside the election and prior to the handing down of the opinion sending the matter to a referee (fols. 24-5). The matter is still *sub judice* before Special Term for the hearings before the referee have not yet been completed.

The manner which these officers selected to carry out the measures was that of force and violence, that is to say, these persons at night padlocked the doors leading to petitioners' offices in the school, left notes on the doors stating, ''Please apply to manager of building for removal of your personal belongings,'' and invoked the aid of a police officer to keep the petitioners excluded (fols. 72-4).

The Facts.

In September, 1922, seven persons, being the five petitioners and Mr. and Mrs. Horch, were incorporated as an educational corporation—this corporation (fol. 123). The five petitioners had founded a school a year or so previously under a slightly different name. After that school had been in operation a short time the Horches were introduced to the group by one of them, Miss Grant, and they expressed a desire to join (fols. 37-9). As a result, the school was incorporated, and the capital stock divided into seven shares of no par value, and provision was made for a Board of Trustees of seven (fols. 39-40). The seven stockholders were the five petitioners and the two Horches; the seven trustees were the same persons.

The Stock Deposited in Escrow With Horch.

On April 23, 1923, just prior to the sailing away of Prof. Roerich and his wife on a five years' exploration trip into Central Asia, these seven entered into an agreement to keep forever the stock within their group (fols. 76-91). The purposes of the agreement were expressed in the preamble (fols. 77-9):

> "WHEREAS the parties hereto are the owners and holders of all the issued and outstanding capital stock of MASTER INSTITUTE OF UNITED ARTS, INC., a corporation organized under the laws of the State of New York, and
>
> "WHEREAS all the parties hereto have been the founders of the corporation specified herein and have devoted considerable time and energy in its promotion and desire that the affairs of such corporation shall be in the unified control of the parties hereto at all times and in the event of the death of any of the parties hereto that the survivors may be in a position to carry on the work originally and prior to such death undertaken by all of the parties hereto and in order to more effectually carry out the purpose and intent hereinbefore specified and in order to enable the survivors during their lifetime to reap whatever reward and benefit may accrue by virtue of their holdings of shares of stock and in order to further enable such survivors in the event of the death of any of the parties hereto to succeed to the rights and interests of such parties as may die; * * *"

Each agreed not to sell his stock without first offering that stock to the others at a nominal price of $10 (fols. 80-2); those others had thirty days to exercise the option (fol. 82); upon the death of any of them the survivors had an option to acquire the stock of the deceased from the estate on the same terms (fol. 83).

In order to make the agreement effective they agreed to endorse and deliver the stock certificates to Louis L. Horch **to be held by him in escrow** and to be retained "by him in a suitable vault or safe deposit box" so that upon any transfer to be effected in accordance with the agreement he could cause the shares to be acquired to be deposited pro rata among the remaining parties and make payment of the $10 (fols. 84-5). For added protection, the agreement provided that a notation be placed on the certificates "that such shares are held subject to the terms and conditions of this agreement" (fol. 89).

Furthermore, notwithstanding the deposit it was agreed that the depositors should retain the right to vote the stock (fol. 88) and the right to dividends (fol. 87). This latter provision became inoperative in 1926 because the corporation's charter was then amended so as to provide that no dividends might be paid and that all income and earnings of the corporation should be used for the maintenance and support of the school and for other educational purposes (fols. 125-6).

The Corporation Acquires Property on February 23, 1935.

For thirteen years that agreement was performed. During that time, the activities of

the corporation became submerged in the broader activities of the Roerich Museum. Master Institute became merely the school department of the Museum. Roerich Museum expanded with the boom, it erected a large building at Riverside Drive and 103rd Street (fol. 45); with the collapse, Roerich Museum lost the building by foreclosure (fol. 46). However, the reorganization plan which was adopted provided that the bondholders' corporation should turn over the property to a financially unembarrassed corporation made up of the "present Roerich Museum interests" which said corporation would give back a large mortgage to the bondholders' corporation. The corporation which fitted the description and to which the property was conveyed was this one, Master Institute (fols. 46-47). Title was transferred and a mortgage for $1,674,900 was given on February 23, 1935 (fol. 48).

Horch Breaches His Trust on February 25, 1935.

Up to that moment the agreement seems to have been performed by Horch, and no one questioned the petitioners' status as stockholders (fols. 48-52); but with the acquisition of the property by the corporation, Horch, the escrowee, breached his trust.

On February 25th, 1935, but two days later, he took out the five certificates of the petitioners which had been deposited with him in 1923, and turned them into the corporation for a single certificate in his name for five shares. The next day he transferred (1) that certificate for five shares, and (2) the certificate for one share in his name, to his

wife, Nettie S. Horch (a party to the 1923 agreement), and he also gave her (3) the certificate for one share in her name which he had been holding in escrow. Then he and she, as officers of the corporation, cancelled these three certificates, issued in their place one certificate for seven shares, all of the stock of the corporation, to her, and changed the corporate books to indicate she was the sole stockholder and none of the petitioners was a stockholder (fols. 52-5).

Horch and His Wife Seize Control of the Corporation by a Coup de Grace.

None of this was told the petitioners. They knew nothing about it until December 15, 1935, when they heard that Mr. Horch was going to hold a stockholders' meeting the next day at which he would assume to act as sole stockholder. They tried to stop that meeting by injunction but were unable to serve the restraining order in time, although counsel for the respondents and the Horches were notified before the time of the meeting that an application for a stay was being made. Nevertheless, the meeting was held and a representative of these attorneys was present there. Mrs. Horch, not he, held the meeting (fols. 55-7).

At that "meeting" Mrs. Horch dropped four of the five petitioners from the Board of Trustees. The petitioners did not know who were "elected" to take their places until June 5, 1936. Even a mandamus proceeding was instituted to discover what was in the books, but because of the interposing of sham defenses the application for a peremptory

order was denied and only an alternative order was made, the trial of which has not yet come on, although an order was made preferring the trial which order was affirmed by this Court (fols. 58-60).

The Rump Board Acts.

On June 5th, 1936, the four persons assumed to have been elected by Mrs. Horch last December, and Mr. and Mrs. Horch proceeded to act as the Board. They passed certain resolutions directed at physically ousting the petitioners and their organizations, as follows:

1. abolishing the office of Dean of the Music School, and relieving the petitioner Maurice M. Lichtmann of his duties as Dean and all other positions which he held in the school of the corporation (fols. 96-7), offices which he occupied since 1923 (fol. 43);

2. terminating all relations between the Master Institute and the Roerich Museum Press, ousting the Press from the rooms and book stand of the building, and relieving the petitioner Grant of any duties and removing her from any positions in the school of the corporation (fols. 106-7), which positions she likewise held for over thirteen years (fol. 43);

3. abolishing the office of Director of the School Department and relieving the petitioner Sina Lichtmann of her duties as Director and all other positions which she held in the school of the corporation (fol. 116), which she held for a similar period (fol. 43);

4. terminating all relations between the corporation and Urusvati Himalayan Institute and ordering that the space occupied by that institute in the corporation's building be vacated (fol. 98). This institute is a scientific organization, the field work of which is conducted by the petitioner Nicholas Roerich (fol. 31).

Thus, as a result of the Horches' *coup,* they were able to elect a board of their own, and through the vote of that board, pass resolutions to remove the petitioners, who by their five shares out of a total of seven had the theoretical control of the corporation. Force was coming into its own.

The Petitioners Invoke the Legal Remedy.

This proceeding to contest the election was instituted on June 8, 1936, three days after the meeting, by an order to show cause, service of which order and the petition was made on the four claimed usurpers in office, the corporation and the Horches (fols. 20-1). The petition appears at folios 121-156. Issue was joined on June 12th (fol. 24) by the service of an answer (fols. 157-174). Argument was had at Special Term before Mr. Justice Valente on that day. Decision was reserved; briefs were to be submitted on June 15 (fol. 24). The matter was not decided until June 24, *i. e.,* a referee to hear and report was appointed (fols. 24-5). The Referee is taking testimony now.

The Horches and the Rump Board Invoke Force.

On June 18, three days after briefs were

submitted to Mr. Justice Valente, Horch sent registered letters (fols. 92-120) to three of the petitioners enclosing certified copies of the resolutions adopted, notifying them that "your employment with Master Institute has expired", requesting them to remove their property from the premises and to vacate the apartments they occupied, the tenure of which depended on their connection with the corporation (fol. 71). The letters ended with the threat: "I am empowered to carry out the enclosed resolutions. Unless you comply with these resolutions by June 22, 1936, I shall resort to legal sanctions to enforce them".

"Legal sanctions" were brushed aside and forgotten. On June 24, when the three petitioners came to their offices, they found them locked. They found the notices to apply to the building manager for their personal belongings. Then the manager declared they were not to remove anything. Finally Horch came with a police officer, and Horch asked him to arrest these petitioners (fols. 72-4).

Attacking the petitioners again, but in an indirect way, the corporation, acting through that board, instituted summary proceedings against Mrs. Sophie Schafran, the mother of the petitioner Sina Lichtmann. Mrs. Schafran was elected a trustee for life of the Roerich Museum and as such was entitled to an apartment in the building rent free (fol. 31). This board decided to rescind that agreement.

This Application to Preserve the Statu Quo.

Needless to elaborate, none of the measures which the Horches were enforcing would have been voted at any board meeting at which petitioners were participating as members. They would constitute a majority of the Board. Consequently, these ouster measures would be invalid if in this proceeding it is decided that the election was illegal. But in the meantime and until such election is set aside and a new one held, irreparable damage would result. The school which the petitioners have been operating since 1922 would be disrupted. Relations with other institutions would be terminated. The petitioners would be out on the streets.

Surely, these considerations called for the exercise of the Court's discretion to preserve the *statu quo* until the legality of the election could be tested by the regular and legal procedure. That is what the order of stay did do.

POINT I.

The illegality of the election of the four persons as trustees being *sub judice* at the time the ouster measures were taken, and still being *sub judice,* Special Term had the power to preserve the subject of the litigation. This is not an exercise of the power to grant a provisional remedy, but the exertion of a power inherent in the Court, apart from the statute.

It does not follow that every restraining order made by a court is an exercise of the power under the Civil Practice Act to give

the provisional remedy of injunction. Courts do grant stays and injunctions which are independent of statutory bases, as for instance, the injunction against interference with assets seized by a receiver issued in

> *Woerishoffer* v. *North River Const. Co.,* 99 N. Y. 398.

In that case, at page 402, Judge Finch wrote:

> "The provisions of the Code in respect to injunctions do not apply to the case. In one sense, every order of a court which commands or forbids is an injunction. But an injunction proper is a recognized provisional remedy, and the rules of the Code apply to it as such. The order here is not of that character."

And at page 403, discussing the injunction granted in *Attorney-General* v. *Guardian Mut. Ins. Co.,* 77 N. Y. 272, Judge Finch continued:

> "* * * the decision is an authority for the existence, outside of the provisions of the Code as to injunctions, of power in the court to make the order complained of."

Consequently, while it is true that Special Term in a special proceeding has no power to grant a Civil Practice Act temporary injunction because Sections 877 and 878 restrict such injunction to an "action", it does not follow that the court is wholly without power to restrain any acts. The *inherent power* may serve as a foundation.

This inherent power in the Supreme Court is conferred by the State Constitution. It is not restricted by statute, but exists independently of statute:

> "In view of the fact that there is inherent power in the Supreme Court to grant relief by injunction the Code sections which are merely regulative should not receive a narrow construction. The State Constitution confers upon the Supreme Court 'general jurisdiction in law and equity'. State Const. art. VI, §1. No broader jurisdiction could be conferred upon that court. It is not limited to the jurisdiction possessed by the Supreme Court at common law and there is no authority conferred upon the legislature to whittle down that jurisdiction by statutory enactments. The authority to alter and regulate the jurisdiction and proceedings at law and in equity is subject to the reservation 'except as herein otherwise provided.' Id. §3. The Constitution otherwise provides with respect to the jurisdiction of the Supreme Court and the legislature is without power to interfere with it. The jurisdiction of the Supreme Court being complete and ample to cover the subject of injunctions, the legislature can not restrict the constitutional jurisdiction of the Supreme Court by prescribing a limited number of cases in which this jurisdiction may be exercised. In drafting the Code of Civil Procedure it has been rather assumed that the legislature had authority not

only in procedural matters but in jurisdictional matters over the Supreme Court but this is not the case. If this were true the legislature might, by neglecting to prescribe the cases in which a temporary injunction may issue, deprive the Supreme Court entirely of its power to grant a temporary injunction. Is it possible that in a case where justice requires it, the Supreme Court is without power to grant a temporary injunction to preserve or protect the rights of parties because perchance the legislature has not authorized it? The power to grant such an injunction exists independently of the enactments of the Code of Civil Procedure and in a proper case in the interests of justice the Supreme Court may grant a temporary injunction although not provided for in the express language of the Code of Civil Procedure."

Ocorr v. *Lynn,* 105 Misc. 489, 490, 491.

The leading cases deciding that a temporary injunction under the code cannot be issued in a special proceeding acknowledge the existence of this inherent power to make a temporary stay under the general powers of the court:

"And it may well be that there are instances where, in special proceedings brought for specified particular purposes under the general powers of the court,

it would be authorized to issue a temporary staying order to insure the efficient execution of its final determination."

Matter of Dietz, 138 App. Div. 283, 286.

See also:

Matter of Greene, 153 App. Div. 8, 11;

Matter of Holle, 160 App. Div. 369, 372.

Just as the courts defend this inherent, not statutory, power to make orders protecting property *in custodia legis,* so do they find the warrant, apart from statute but inherent in its jurisdiction over the main subject of the litigation, to protect the subject of its jurisdiction by incidental or ancillary orders. This power is discussed alike for property in the court's possession and litigation over which it has assumed jurisdiction. The subject is given extensive treatment in 15 Corpus Juris, "Courts", §108, as follows:

"Although the legislature may by virtue of constitutional authority expressly give to a court cognizance over all incidental and dependent matters, so that the litigants shall have the full benefit of their rights and the court be enabled to pronounce finally, still a grant of jurisdiction implies the necessary and usual incidental powers essential to effectuate it, and every regularly constituted court has power to do all things that are reasonably necessary for the administration of

justice within the scope of its jurisdiction and the enforcement of its judgment and mandates. When parties are once rightfully in court, the court has jurisdiction over them, and that jurisdiction continues, without further notice, and as long as any steps can be rightfully taken in the cause, a court's power to apply a remedy being coextensive with its jurisdiction over the subject matter; and a court having property in its possession may determine all questions relative to title, possession, and control of the same. So demands, matters or questions ancillary or incidental to or growing out of the main action, and which also come within the above principles, may be taken cognizance of by the court and determined, for such jurisdiction is in aid of its authority over the principal matter, even though the court may thus be called on to consider and decide matters which, as original causes of action, would not be within its cognizance. Again, a court may entertain proceedings ancillary to the judgment, for jurisdiction once acquired is not exhausted by the rendition of judgment, but continues until such judgment is satisfied, and includes the power to issue all proper process and to take all proper proceedings for its enforcement. A court may also entertain a petition to restrain a foreign corporation over which it has jurisdiction from doing anything to prevent a receiver from acting in matters which pertain to the subject matter

> of the suit before it, such as taking possession of property; and it has also been held that a court which is without original jurisdiction for injunctions may, in an original action of *quo warranto* to determine the right of rival courts of supervisors to exercise official functions, grant an ancillary injunction to protect those having the *prima facie* right from interference by other claimants during the pendency of such action."

That a court which has taken jurisdiction over a dispute concerning title to office does have the inherent, though not statutory, power to grant stays so as to preserve the existing status until the merits of the dispute can be determined, and will exercise such power to protect the subject of its jurisdiction, has been held in a case strikingly similar to ours.

State v. *Board,* 70 Ohio St. 341, 71 N. E. 717.

That was a *quo warranto* pending as an original matter before the Supreme Court to determine who were the lawful supervisors and inspectors of elections. Before that proceeding could be determined an election was to be held. A motion was made to the Supreme Court to enjoin the members of the former board from interfering with the members of the latterly appointed board and from withholding property. The Supreme Court acknowledged that under the statute it did not have original jurisdiction of suits for an injunction. However, it found the power to issue the stay in its inherent jurisdiction

over the title-to-office dispute as ancillary thereto, to make effective its later decree. And because it was unseemly that there should be conflicts between two sets of disputants to office pending the determination of the main issue, the stay was made. At page 349, the Court expounded on its exercise of the inherent power to stay:

> "* * * a court has authority to make any judicial order which, from the nature of the case, may be necessary to the effective exercise of its jurisdiction, whether original or appellate. Jurisdiction is the power to hear and determine the subject matter in controversy between the parties to a suit. Authority to determine is exercised in the form of judgments, decrees and orders, and it implies power to make all such orders as may be appropriate to the case presented and necessary to give practical effect to the final judgment, as well as to preserve the subject of the action, pending the final determination of the case."
>
> (P. 350.) "The power to grant an ancillary injunction for that purpose is inherent in the court which has jurisdiction of the principal subject."

The opinion in *State* v. *Board, supra,* was quoted almost entirely in

State v. *Assurance Co. of America,*
251 Mo. 278, 158 S. W. 640,

and the ruling in the Ohio case was followed. This case was also a *quo warranto,* against

foreign fire insurance companies licensed to do business in the State, to punish them for violation of the anti-trust laws. In that proceeding an injunction was granted to restrain the defendants from cancelling all fire insurance policies. The Missouri Constitution, like the Ohio statute, did not authorize the Supreme Court to issue an injunction, but the granting of it was upheld under the inherent power of the court. At page 301, the Court ruled:

> "It seems to me to be unanswerable to say that where a court is given express authority to try a cause, it must also by implication, have the power to do all the things that are incident to that trial, or are necessary to be done in order to carry into full force and effect the judgment or decree the law authorizes the court to render therein.
>
> "It is not doubted that this court has jurisdiction to try and determine a *quo warranto* proceeding, which is this, and if it is necessary, as it appears to be by the information filed in this case, to preserve the *statu quo* of the parties to the suit and the rights involved therein to issue a temporary injunction during the pendency of the proceedings, in order that full force and effect may be given to the judgment which may be rendered herein, then I think the court has the implied, if not the inherent, power to issue a temporary injunction in aid of the *quo warranto* proceeding."

The Ohio case of *State* v. *Board, supra,* was also followed in

> *State* v. *Anheuser Busch Brewing Ass'n,* 76 Kan. 184; 90 Pac. 777.

This was also a *quo warranto* proceeding, an original proceeding before the Supreme Court. That Court conceded it had no original jurisdiction to issue injunctions under the constitution. The Court refused to be limited by the provisions of the Code of Civil Procedure of Kansas, which provided that the only injunctions in *quo warranto* proceedings should be final injunctions after final decree. At page 195 the Court said:

> "It is urged however that in the Code of Civil Procedure the legislature has authorized the court to restrain the disposition of the property of the corporation and to appoint a receiver for such property after judgment in *quo warranto,* and hence that such orders before judgment are impliedly prohibited. The court needs no assistance from the legislature to enable it to exercise its constitutional jurisdiction in *quo warranto.* If so, its power would be completely emasculated if the legislature failed or refused to act (cases cited). And the court will brook no abatement of its authority by the legislature. It is true that legislative regulations of matters of procedure which do not impair jurisdiction will be recognized and utilized, and the legislature may invent new processes and new forms of remedy calculated to aid the court in the exercise of its juris-

diction, but the jurisdiction itself can neither be augmented nor diminished."

In *Boynton* v. *Moffat Tunnel Imp. District*, 57 F. (2d) 772, 778 (C. C. A. 10th), *cert. den.,* 287 U. S. 620, it was stated:

> "It is correctly argued that a court has inherent power to make such interlocutory orders as may be necessary to protect its jurisdiction, and to make certain that its eventual decree may not be ineffective."

In *City of Dallas* v. *Wright,* 120 Tex. 190, 195, 36 S. W. (2d) 973, it was stated:

> "It is likewise elementary that a court, once having obtained jurisdiction of a cause of action as incidental to its general jurisdiction, may exercise any power, or grant any writ, including the writ of injunction, necessary to administer justice between the parties, preserve the subject matter of the litigation, and make its judgment effective."

See also:

Farmers State Bank v. *Haun,* 29 Wyo. 322, 213 Pac. 361;
14 Ruling Case Law 323.

The theory of the existence of an inherent power to enjoin, as an incidental and necessary part of the right to hear and determine the case, which makes a court jealous to guard the subject matter of the case so that once before it the case may be determined as completely as possible, is expounded by Chancellor Walworth in

Matter of Hemiup, 2 Paige Ch. 316.

In that case it appeared that before the reference upon the merits of the case could be completed, the heirs were proceeding with an ejectment, and as the Chancellor said at page *318:

> "The relief asked for here would be in a great measure useless if the heirs were permitted to go on with their suit at law and obtain possession of the property, and collect their costs and the mesne profits, while these proceedings were delayed by a protracted examination of the merits, or by an appeal to the court for the correction of errors from the decision of the chancellor."

To protect the subject matter of the litigation before the court, and without any separate bill filed, an order was made staying the ejectment, the Chancellor stating at page *319:

> "There is a variety of cases in which this court enforces its orders and decrees by injunction, when the proceeding is founded on a petition only, and without any bill filed."

That inherent power to issue a stay to protect the subject matter of the litigation pending and undetermined before the court is the basis of the order here involved. On June 12th, the petition was heard at Special Term and part of the relief demanded was that (fol. 154):

> "the offices of such trustees elected at such meeting be declared to be vacated and that all persons assuming to act as trustees cease to act as such * * *."

That application was before Special Term when the offices were barricaded on June 23-24. It was still pending when this order appealed from was made on July 24th, although an opinion had been handed down sending the matter to a referee to hear and report back to Special Term.

That there would be little left of the subject of this legal controversy if the acts stayed had been permitted to go on unhampered seem self-evident. The school's main offices would have been "abolished", to use the exact phrasing of the resolutions; its relations with other important institutions "terminated". There would be no school to fight over in this litigation; control over a non-entity would be unimportant. This stay preserved the existing status and kept it from destruction beyond power to rebuild.

POINT II.

The corporation and the Horches are parties to this proceeding.

Section 25 of the General Corporation Law provides that notice of the application shall be given to the parties declared elected and "the corporation and such other persons as the court may direct".

> *Matter of Empire State Supreme Lodge,* 53 Misc. 344, aff'd 118 App. Div. 616.

Actually, notice of this application, that is, the order to show cause, was served, not only upon the four persons whose title to office the petitioners dispute, but also upon the cor-

poration, Louis L. Horch and Nettie S. Horch (fol. 21).

The order to show cause, which for some reason has not been printed in the papers on appeal, specifically provided that notice be given to the four persons, the corporation, and the Horches. Proof of service upon all of them is on file in the County Clerk's Office.

That these proceedings are regular is evidenced most clearly by the decision of Mr. Justice Valente (fols. 24-25) sending the entire matter to a referee. Surely, if defect in jurisdiction existed, especially if the corporation had not been made a party, no such determination would have been made.

The statement in the appellants' brief to this Court that the corporation or the Horches are not parties is the first time that they have ever made such a suggestion.

POINT III.

The corporation has not been enjoined from functioning.

If the sole function of the corporation was to oust the petitioners and their organizations from its school and property, then the appellants would be right when they assert the corporation has been enjoined from functioning. But the corporation's functions are many. It conducts the school; it operates the real estate owned by it; and it meets its obligations to its bondholders. None of these normal functions of the corporation have been touched by the order appealed from.

POINT IV.

That some of the subjects of protection of the order appealed from are not parties to this proceeding is no reason for vacating the injunction as to them.

The only parties petitioners to this proceeding could be "members aggrieved by an election" (Sec. 25, General Corporation Law).

Mrs. Schafran, Urusvati Himalayan Institute and Roerich Museum Press concededly are not such *members* of the corporation who were aggrieved by the election. Nevertheless, the relations between them and the corporation were valuable relations which the petitioners had an interest in maintaining. The ouster resolutions were made not only at the petitioners individually but at these organizations and at the mother of the petitioner Sina Lichtmann. In attempting to oust these from the corporation's property the Horches, through their dummy board, sought indirectly to inflict equal punishment with that which they were attempting to visit upon the petitioners directly.

If the resolutions had said that an ancient tree upon the property should be cut down, there would be no doubt that the tree would be a proper subject of protection. Similarly, the relations between the corporation and these others being valuable, and the authority of the purported board to pass any resolution concerning them being litigated as illegal in foundation, the Court was within its power to encompass them in its protective order.

The illegality of the persons to vote any measures on behalf of the corporation is the precise matter in present litigation. These

measures have been singled out as worthy of preservation until the question of illegality has been determined.

Conclusion.

The ouster acts taken by the corporate officers were founded on the resolutions. These resolutions were passed by persons assuming to act as a Board of Trustees. On the record facts, the election of four of these persons, a majority of the Board, was illegal. Not a word controverting the allegations of illegality appeared in the opposing affidavit. That illegality was a subject over which Special Term had taken jurisdiction, and over which it still retains jurisdiction.

The order appealed from can be paraphrased, as if Special Term had said: "This matter is entirely before me. Considerable time will pass before the merits can be determined. In the meantime, do nothing to affect any of these matters before me. The *statu quo* which I am preserving represents a condition existing for 13 years. It should remain a while longer until the court can determine the right in the matter."

It would be unseemly that the supervision over, the direction of policies of, and the continuity of, an established school should be disturbed by acts until the legal basis for such acts is settled.

The order should be affirmed.

Dated, New York, October 15, 1936.

Respectfully submitted,

PLAUT & DAVIS,
Attorneys for Petitioners-Respondents.

The Court Press