

bers of the syndicate to whom it is proposed to sell the bonds, it is not alleged that the price for which they are to be sold is inadequate or less than could be obtained elsewhere. If it should be assumed, that the plaintiff may ultimately sustain the allegations of the bill respecting the past transactions which he assails, the fact cannot be gainsaid that the corporation is now largely indebted, that it has no resources practically available, and must raise the means to meet its liabilities and complete the construction and equipment of its road. The directors propose to take such action only as shall be sanctioned by the requisite vote of the preferred stockholders. By the agreement of reorganization, to which every stockholder is a consenting party, the power to represent all, when it is proposed to create a second mortgage, is lodged in the preferred stockholders. It is delegated to them, and to them alone, to determine whether, in view of all the circumstances of the situation, the interests of the corporation will be best subserved by the creation of such a security. If their consent is fairly obtained it is conclusive. The plaintiff cannot be heard to complain if they are satisfied.

It may be proper to state in conclusion that a court of equity will not be swift to grant the stringent relief of a preliminary injunction to an officious plaintiff who seems to have acquired his interests as a stockholder with a view of assailing transactions in the corporate affairs of which existing stockholders do not seem to have complained. The purchaser of a lawsuit is entitled to what he has bought, and may insist that his rights shall be recognized and enforced according to the settled principles of law and the rules of procedure which obtain, irrespective of the motive of the litigant; but he can only insist that such preliminary relief be granted as is absolutely indispensable to preserve rights that cannot be adequately protected at the ultimate decision of the case.

The restraining order is vacated and a preliminary injunction refused.

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PEOPLE *ex rel.* FIELD *v.* NORTHERN PAC. R. CO.

(*N. Y. Superior Court.*)

Application for a *mandamus* to compel the respondents, the Northern Pacific Railroad Company, "to exhibit to the relator the transfer-books of the preferred stock of said company, or other books containing the names and addresses of the holders of the preferred stock of said company; and to permit said relator, his attorney or clerks, to take therefrom the names and addresses of the registered holders of said preferred stock."

*Thomas Henry Edsall* and *E. Ellery Anderson*, for relators.

*Artemas H. Holmes* and *William M. Everts*, for respondents.

INGRAHAM, J. In determining this question I shall not attempt to do more than to give the conclusions at which I have arrived, as I think it important to the parties in interest that the motion should be decided at once. The respondent is a corporation created by an act of congress, and is the owner and operates a railroad running through several states and territories, and has an

office in the City of New York. The plaintiff is the holder of 200 shares of the preferred stock and 500 shares of the common stock of said corporation, and as such requested the officers of said corporation in charge of the transfer-books of said stock to allow him to examine such transfer stock-books, but said officers refused to allow such an examination. The relator, therefore, asks for a peremptory writ of *mandamus*, requiring said company to permit such examination.

The most serious objection made by the respondent is that the courts of this state have no power to interfere or control by *mandamus* a foreign corporation, or a corporation created by or existing under laws of any state, except the state of the tribunal whose interference is asked. The relator does not claim that there is any express provision of statute that authorizes the writ asked for, but insists that by common law the court has power, when necessary for the purpose of preserving the rights and interest of stockholders, to interfere by *mandamus* and compel the exhibition of such books. It will be noticed that this is not an action, and therefore section 1708 of the Code, and the decisions to which I have been referred under that section, do not apply. That the legislature could constitutionally authorize the courts of this state to exercise such power over all corporations, bringing them and their property within their jurisdiction, cannot, I think, be doubted; but no such authority had been given.

Chapter 165 of the Laws of 1842 provides that the transfer agents in this state of any corporation existing beyond the jurisdiction of this state shall, at all reasonable times, exhibit to any stockholder when required by him such books; and then provides a penalty for each refusal to comply with the statute. It is not claimed by relator that this application can be sustained by this statute; it applies only to transfer agents and not to the corporation. Any proceeding under that statute must be taken against the transfer agents, and not against the company. *People v. L. S. & M. S. R. Co.* 11 Hun, 1. To sustain the power of the courts of this state to grant this application, it must therefore appear that a court of equity has power to control, by its process, the corporate action of a foreign corporation. This power, it would appear, the legislature of this state has given to the courts when a cause of action exists in favor of the resident of this state against such a corporation, (Code, § 1708;) but no statute to which I have been referred, or which, in the limited time I have had to devote to the examination of this question, have I been able to find, has given such a power to the courts of this state to proceed by special proceedings, or in any other way, except by action.

An application for a *mandamus* is a special proceeding. An action must be commenced by the service of a summons. Code, § 416. The only case to which I have been referred on this question is the case of *People v. Parker Vein Coal Co.* 10 How. Pr. 548, where Judge MITCHELL, on delivering one of the opinions, holds that a *mandamus* cannot issue against a foreign corporation except it violates a law of this state, and while it does not violate any law of any state the state should not interfere with it.

The case of *People v. L. S. & M. S. R. Co.*, *supra*, holds that proceedings for a writ of *mandamus* to compel the exhibition of transfer-books of a foreign corporation can be taken against a transfer agent only.

The passage of the act of 1842 would not have been necessary if the courts of this state had the power claimed, as the transfer agents, being the agents of the corporation, could have been compelled to exhibit the transfer-books of the corporations themselves, and were subject to such control. But if the court had the power to grant the relief asked, I do not think, under the circumstances in this case, the application should be granted. The application "is addressed to the sound discretion of the court," and should be exercised with great discrimination and care. "The courts should guard against all at-

tempts, by combinations hostile to the corporation or its existing officers, to use its writ of *mandamus* to accomplish their personal or speculative ends." *People v. L. S. & M. S. R., supra.*

In this case it is alleged by the respondent, and not denied by the relator, that the stock owned by the relator was transferred to him long after the resolution of the board of directors of said corporation authorizing the execution of the mortgage which the relator opposes, and to which opposition the inspection is sought, and the circular asking the consent of the stockholders has been issued.

Under such circumstances, I think before the court should grant such a writ as is here applied for, it was incumbent on the relator to show that he was a *bona fide* holder of the stock that he sought to protect before the action of the directors of said company, and that this is but an attempt to use the writ of *mandamus* to accomplish personal or speculative ends.

The relator must show affirmatively all the facts to entitle him to such writ, and under the facts as they appear on this application I am of opinion that the application should be denied.

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CARSTAIRS and others v. MECHANICS' & TRADERS' INS. Co. OF  
NEW YORK.

(Circuit Court, D. Maryland. June 4, 1883.)

INSURANCE—SUBROGATION—BILL OF LADING—DEFEATING INSURER'S RIGHT OF  
SUBROGATION.

Under an open policy of insurance on goods while in transit by railroad, it was stipulated that the insurance company should, in case of loss, be subrogated to all claims against the carrier. Certain goods covered by the policy were destroyed in a railroad collision, having been shipped under a bill of lading which provided that in case of loss, by which the railroad company incurred any liability, the railroad company should have the benefit of any insurance which might have been effected on the goods. *Held*, in an action by the insured against the insurance company, that he could not recover, having by the bill of lading defeated the right of subrogation against the carrier to which the insurance company was entitled.

At Law.

*John H. Thomas*, for plaintiffs.

*John S. Tyson* and *S. T. Wallis*, for defendant.

MORRIS, J. In my judgment, one of the defenses set up in this case is fatal to the plaintiffs' right to recover, and I shall consider but that one. The suit is brought to recover from the insurance company the value of goods which were lost while in transit from Peoria to Philadelphia by railroad, in consequence of the car in which they were carried being wrecked by a collision with other cars. This was one of the risks insured against under the open policy, and the written indorsement thereon, issued by the defendant to the plaintiffs. The policy was for one year and was issued several months before these goods were shipped, and both the policy and the written indorsement thereon, expressly stipulate that the insurance company,