

CORPORATIONS

INDISPENSABILITY OF DIRECTORS IN ACTIONS TO COMPEL DECLARATION OF DIVIDENDS

A citizen of New York, the owner of cumulative preferred shares of the General Steel Castings Co., a Delaware corporation, filed suit in a Federal District Court in Pennsylvania to compel the declaration of dividend arrearages on the stock. The corporation was originally named as sole defendant, but the court ordered that its directors also be joined. Only three of twelve directors were residents of Pennsylvania, however, and the action was dismissed on the ground that a majority of them were indispensable parties to the suit.¹ On appeal, the Third Circuit Court of Appeals held that a majority of the directors were not indispensable parties to an action to compel a declaration of dividends. *Kroese v. General Steel Castings Co.*, 179 F. 2d 760 (3d Cir. 1950).²

The classification of parties in equitable actions as dispensable or indispensable³ is basically an effort to give practical application to two rather vague principles: *all persons whose rights are to be affected by a decree must be present in order to be bound*,⁴ and *a court will not issue an order unless it can enforce it*.⁵ A test of two factors is utilized: does the party have such an inseparable interest in the controversy that a decree cannot be made without affecting it, or, if the interest is separable, is the presence of the party essential for the court to make an enforceable decree?⁶ If the answer to either of these

1. *Kroese v. General Steel Castings Co.*, 9 F. R. D. 273 (E. D. Pa. 1949).

2. *Cert. denied sub nom. General Steel Castings Corp. v. Kroese*, 339 U. S. 983 (1950).

For other comment on the instant case, see Notes ILL. L. FORUM 281 (1950); 98 U. PA. L. REV. 753 (1950).

3. Parties have been classified in three categories: formal, necessary, and indispensable. The classification is important in determining what parties *may* or *must* be present in a particular case and, especially in Federal courts, in deciding questions of jurisdiction and venue. 3 MOORE, FEDERAL PRACTICE § 19.02 (2d ed. 1948).

Formal parties may have no interest in the actual controversy and yet properly appear in the action. Necessary parties are those with an interest in the case, but one which may be separated from that of the other defendants and protected if the party cannot be brought into court. The distinction between necessary and indispensable parties will not be elaborated in this note, since adequate discussion appears in the cases and authorities. See 3 MOORE, *op. cit. supra* at § 19.07. The distinction is useful in effectuating the conflicting desires of preventing multiplicity of suits and, at the same time, encouraging adjudication where it is proper to have it. *Ibid.*

4. 1 POMEROY, EQUITY JURISPRUDENCE § 114 (5th ed., Symons 1941).

5. 1 FOSTER, FEDERAL PRACTICE § 120 (6th ed. 1920).

6. *Shields v. Barrow*, 17 HOW. 130 (U. S. 1854). The classic American statement of the rule of indispensability was also made in the *Shields* case: "Persons [are indispensable] who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience." *Id.* at 139. These principles have never been formulated into a precise test, but the factors specified in the text above have generally been recognized and the problem is largely one of practical application. See note 8 *infra* and 3

inquiries is in the affirmative, the party is indispensable and his absence justifies the court in refusing to hear the dispute.⁷ Yet, it should be apparent that classification cannot be made in the abstract, but is a practical matter relating to the type of action brought and the available remedies.⁸

Stockholders' actions to compel the declaration of dividends have been traditionally regarded as equitable and against the directors.⁹ This view arose from the fact that statutes generally grant corporate boards of directors the authority to declare dividends and provide that none shall be paid unless declared.¹⁰ The matter is discretionary with the directors,¹¹ and a stockholder

MOORE, FEDERAL PRACTICE § 19.07 (2d ed. 1948); 3 OHLINGER, FEDERAL PRACTICE 344 (rev. ed. 1948).

As to the first factor, see *Thayer v. Life Ass'n of America*, 112 U. S. 717 (1885), in which a trustee who held legal title to property was held indispensable to a suit involving his right to sell the property. As to the second, see *Kendig v. Dean*, 97 U. S. 423 (1878), a suit to transfer stock on the books of a certain company, in which the company was held an indispensable party because a decree could not be enforced unless it were present. See also *Rhoads v. National Iron Bank of Pottstown*, 35 F. Supp. 650, 652 (E. D. Pa. 1940).

7. *Minnesota v. Northern Securities Co.*, 184 U. S. 199 (1902); *Thayer v. Life Ass'n of America*, 112 U. S. 717 (1885); *Kendig v. Dean*, 97 U. S. 423 (1878); *Shields v. Barrow*, 17 How. 130 (U. S. 1854); *Rhoads v. National Iron Bank of Pottstown*, 35 F. Supp. 650 (E. D. Pa. 1940); 3 MOORE, FEDERAL PRACTICE §§ 19.02, 19.07 (2d ed. 1948); 3 OHLINGER, FEDERAL PRACTICE 361 (rev. ed. 1948).

Since, particularly in the Federal Courts, the absence of an indispensable party may defeat jurisdiction, the classification of parties as indispensable should not be unnecessarily broad. See note 3 *supra*. See also *Payne v. Hook*, 7 Wall. 425, 432 (U. S. 1869); *Parker Rust-Proof Co. v. Western Union*, 105 F. 2d 976, 980 (2d Cir. 1939); 3 MOORE, FEDERAL PRACTICE § 19.07 (2d ed. 1948).

8. See *Roos v. Texas Co.*, 23 F.2d 171, 172, (2d Cir. 1929).

There is a conflict in the authorities as to whether indispensability in a diversity case should be determined by state or federal law. Compare 3 MOORE, FEDERAL PRACTICE § 19.07 (2d ed. 1948) with 3 OHLINGER, FEDERAL PRACTICE 355 *et seq.* (rev. ed. 1948). The first author believes that federal rules should govern, while the second feels that the question of interest in the controversy should be determined by the governing substantive law, whether state or federal. Judge Goodrich, writing in the instant case, indicates a preference for the latter analysis and predicates his decision on state law. *Kroese v. General Steel Castings Co.*, 179 F.2d 760, 761 n. 1 (3d Cir. 1950).

The other cases are in conflict. Compare *DeKorwin v. First Nat. Bank of Chicago*, 156 F.2d 858 (7th Cir. 1946) with *Young v. Garrett*, 149 F.2d 223 (8th Cir. 1945).

9. *Hunter v. Roberts, Throp & Co.*, 83 Mich. 63, 47 N. W. 131 (1890); *Keough v. St. Paul Milk Co.*, 205 Minn. 96, 285 N. W. 809 (1939); *Laurel Springs Land Co. v. Fougerey*, 50 N. J. Eq. 756, 26 Atl. 886 (1893); *Jones v. Van Heusen Charles Co.*, 230 App. Div. 694, 246 N. Y. Supp. 204 (1930); *Hopkins v. Union Canvas Goods Co.*, 104 Pa. Sup. 264, 158 Atl. 301 (1932). Cf. *Lydia E. Pinkham Co. v. Gove*, 303 Mass. 1, 20 N. E.2d 482 (1939); *Griffing v. Griffing Iron Co.*, 61 N. J. Eq. 269, 48 Atl. 910 (1901); *Boardman v. Lake Shore, etc., Ry.*, 84 N. Y. 157 (1881).

See also BALLANTINE, CORPORATIONS § 234 (rev. ed. 1946); 11 FLETCHER, CYC. CORPORATIONS § 5325 (perm. ed. 1932); 4 POMEROY, EQUITY JURISPRUDENCE § 1095a (5th ed., Symons 1941).

10. DEL. REV. CODE (1935) §§ 2066, 2067; IND. STAT. ANN. (Burns Repl. 1948) § 25-211.

11. *Rubens v. Marion-Washington Realty Co.*, 116 Ind. App. 55, 59 N. E.2d 907 (1945); *Dodge v. Ford Motor Co.*, 204 Mich. 459, 170 N. W. 668 (1919); *City Bank Farmers Trust Co. v. Hewitt Realty Co.*, 257 N. Y. 62, 177 N.E. 309 (1931); *Jones v. Motor Sales Co.*, 322 Pa. 492, 185 Atl. 809 (1936).

Mandatory provisions in by-laws or articles of incorporation may remove the discretion and make declarations obligatory, however. See, e.g., *Lydia E. Pinkham Co. v. Gove*,

cannot sue the corporation to recover a dividend until it is declared.¹² To protect the shareholder's right to receive dividends, an obligation was placed on the directors to exercise their discretion in good faith, and it became the accepted principle that where they could be shown to have acted arbitrarily, fraudulently or in bad faith in withholding dividends, a court of equity would order them to make the declarations.¹³ Courts which accepted the above theory continued to maintain a formal distinction between the proceedings and the result, and statements appeared to the effect that a court could not *declare* a dividend but could only *order* it declared.¹⁴ It was held to follow from these statements that the court's power was limited to personal compulsion against the directors to declare the dividend, and that no action at all could be taken unless a majority of them were present.¹⁵

The *Kroese* case departs from this theory by refusing to follow form and by testing anew the necessity of the directors' presence in such actions.

303 Mass. 1, 20 N. E.2d 482 (1939). Similarly, if payment of dividends on preferred stock is found to be mandatory under the purchase agreement the directors are obligated to declare dividends and in event of their failure a court may be induced to specifically perform the agreement. *Hazeltine v. Belfast, etc., Ry.*, 79 Maine 411, 10 Atl. 328 (1887). See also Thompson, *Rights and Remedies of Preferred Shareholders*, 37 CENT. L. J. 433 (1893). But see *Wabash Ry. v. Barclay*, 280 U. S. 197 (1930).

12. *Hamblock v. Clipper Lawn Mower Co.*, 148 Ill. App. 618 (1909); *Rubens v. Marion-Washington Realty Co.*, 116 Ind. App. 55, 59 N. E.2d 907 (1945).

Declaration of a dividend, however, creates a debt which the shareholder may enforce by action against the corporation, and which cannot be cancelled by rescission of the declaration. *McLaran v. Planing Mill Co.*, 117 Mo. App. 40, 93 S. W. 819 (1905); KEHL, CORPORATE DIVIDENDS § 57 (1941).

13. See BALLANTINE, CORPORATIONS § 231 (rev. ed. 1946); 11 FLETCHER, CYC. CORPORATIONS § 5325 (perm. ed. 1932); KEHL, CORPORATE DIVIDENDS § 54 (1941); 4 POMEROY, EQUITY JURISPRUDENCE § 1095a (5th ed., Symons 1941); STEVENS, CORPORATIONS § 99 (1936).

14. The leading statement to this effect is found in *Kales v. Woodworth*, 32 F.2d 37, 39 (6th Cir. 1929), a tax case in which the court discussed the effect of the decision in *Dodge v. Ford Motor Co.*, 204 Mich. 459, 170 N. W. 668 (1919). The court in the *Kales* case stated flatly that a court could not declare a dividend but could cause one to be declared by acting in personam against the directors. It then decided the case on grounds of statutory interpretation, however, making the statement *obiter*.

15. *Schuckman v. Rubenstein*, 164 F.2d 952 (6th Cir. 1947), *cert. denied* 333 U. S. 875 (1948) held squarely contra to the instant case that unless a majority of the board of directors could be brought before the court, an action to compel declaration of dividends must be dismissed. *Accord*, *Gesell v. Tomahawk Land Co.*, 184 Wis. 537, 200 N. W. 550 (1924). *But cf.* *Koppel v. Middle States Pet. Co.*, 272 App. Div. 790, 69 N. Y. S.2d 784 (1947). The Third Circuit Court in the *Kroese* case declined to follow the *Schuckman* decision on the ground that it was declaratory of Ohio law. *Kroese v. General Steel Castings Co.*, 179 F. 2d 760, 765 (3d Cir. 1950). As to whether indispensability of parties is a matter of state or federal law in diversity actions, see note 7 *supra*.

The *Schuckman* case is properly criticized in 61 HARV. L. REV. 1253 (1948) as "unnecessarily severe." Although the criticism is valid, the suggestion there offered that separate actions should be permitted against the individual directors is superficial. It is unrealistic in that it would require both the plaintiff and the corporate defendant to participate in a large number of actions to achieve a single result, and would call for a determination of fact by several courts. See note 16 *infra*. This would be to encourage, not disparage, multiplicity of suits.

The validity of this departure may be determined by applying the two-fold test outlined above.

The question of whether the directors have an interest in the suit should be determined by analysis of the effect of the action. A stockholder who asks a court to compel the declaration of a dividend presents an equitable claim against corporate assets wrongfully withheld. The court is required to test the exercise of the directors' discretion, and if it finds an abuse, to enforce the claim *against the corporate assets*. Since any recovery obtained must be paid from the corporate treasury, the corporation is recognized as an indispensable party defendant.¹⁶ This fact reveals that the directors have no direct interest in the controversy; their fortunes are not involved nor are they personally liable for failure to declare dividends.¹⁷ Consequently, the action is essentially against the corporation, not its directors.¹⁸

16. See *Tower Hill Connellsville Coke Co., v. Piedmont Coal Co.*, 33 F.2d 703, 706 (4th Cir. 1929); BALLANTYNE, CORPORATIONS § 234 (rev. ed. 1946).

17. No case or statute has been found which imposed personal liability on directors for failure to declare dividends. Nor is there any reason for doing so, since if the dividends are ordered paid the stockholder receives the necessary relief in the form of a dividend payment.

There are two possible bases on which directors may be said to have an interest in an action to compel declaration of dividends. First, since the rule requires finding fraud or bad faith on the part of directors before relief is granted, it may be argued that the directors have an interest in the determination of the nature of their conduct. The answer is, however, that in these actions the court does not determine the individual conduct of each director but looks rather to the collective acts of the directors as a board, i.e., an entity. The result, as pointed out above, does not touch the personality of any particular director, nor does it create any personal liability against either the individuals or the board. Second, since most statutes impose personal liability on directors for a wrongful declaration of dividends, it may be argued that they should be present at any judicial declaration of dividends in order to insure that it is not wrongful. The answer to this is two-fold. Any director may appear in such an action if he desires and present reasons why a dividend should not be declared. Further, there is no reason to suppose that there would be liability on the director under such statutes where the declaration was made by a court in a proper proceeding, since the court has then usurped the directors' discretion. See KEHL, CORPORATE DIVIDENDS § 54 (1941).

18. Compare, however, statements that the action is for the benefit of the corporation. See *Laurel Springs Land Co. v. Fougeray*, 50 N. J. Eq. 756, 760, 26 Atl. 886, 887 (1893); *Jones v. Van Heusen Charles Co.*, 230 App. Div. 694, 697, 246 N. Y. Supp. 204, 207 (1930); *Hiscock v. Lacy*, 9 Misc. 578, 592, 30 N. Y. Supp. 860, 870 (1894); 11 FLETCHER, CYS. CORPORATIONS § 5326 (perm. ed. 1932). Cf. *Lydia E. Pinkham Co. v. Gove*, 303 Mass. 1, 20 N. E.2d 482 (1939); *N.Y. P.A. N.J. Utilities Co. v. Public Service Comm.*, New York, 23 F. Supp. 313 (S.D. N.Y. 1938). But see *W. Q. O'Neal Co. v. O'Neal*, 108 Ind. App. 116, 25 N. E.2d 656 (1940).

It is submitted that considering the cause of action to belong to the corporation in these cases is a basic error. The corporation could have no cause of action because it is not harmed and because recovery is sought from its own assets. The true theory would seem to be that the action is a class one brought for the benefit of all stockholders of that class. BALLANTYNE, CORPORATIONS § 234 (rev. ed. 1946); cf. *Giesecke v. Denver Tramway Co.*, 81 F. Supp. 957 (D. Del. 1949).

The distinction is important since if the action were properly derivative in nature it could not be maintained against the corporation alone, but other parties, presumably the directors, would be required as the true defendants. *Island Paper Co. v. Carthage Timber Co.*, 128 Misc. 246, 218 N. Y. Supp. 346 (1926).

But courts which follow the traditional theory find it difficult to dispense with directors as essential to enforcement of the decree.¹⁹ The difficulty is more apparent than real. The proper solution, as indicated by the *Kroese* case, is to repudiate the theory that a court cannot *declare* a dividend and accept the reality that a decree ordering the payment of dividends is in its inevitable result a declaration of dividends. It is not doubted that if personal decrees are rendered against the directors ordering them to vote a dividend, they must do so. There is no reason that the same result cannot be attained by directing the decree against the corporation itself rather than the directors.²⁰

The argument that the court would have no means of forcing the corporation to act suggests judicial impotency when facing a corporate entity. The suggestion at this date is a novel one. Any measure which may be taken against the directors may be used against the corporation except physical imprisonment:²¹ corporations may be held in contempt,²² orders against the corporate personality may be enforced against agents who fail to obey them,²³

For an excellent general analysis of when the acts of corporate directors give rise to causes of action in the corporation, and when the causes of action are properly those of stockholders, see 4 POMEROY, EQUITY JURISPRUDENCE §§ 1088-1096 (5th ed., Symons 1941).

19. See, e.g., *Schuckman v. Rubenstein*, 164 F.2d 952 (6th Cir. 1947); *Gesell v. Tomahawk Land Co.*, 184 Wis. 537, 200 N. W. 550 (1924). But see *W. Q. O'Neal Co. v. O'Neal*, 108 Ind. App. 116, 25 N. E.2d 656 (1940).

20. Analogy should be drawn here to actions such as specific performance, which are customarily maintained against the corporation as sole defendant. See, e.g., *State National Bank v. U. S. Life Ins. Co.*, 238 Ill. 148, 87 N. E. 396 (1909); *Jones v. Boston Mill Co.*, 4 Pick. (Mass.) 507 (1827); *Bailey v. Colleen Products Co.*, 120 Misc. 297, 198 N. Y. Supp. 418 (1923). See also *Williams v. Green Bay, W. R.R. Co.*, 326 U. S. 549, 558 (1945). Indeed it is generally true that where the corporation is capable of being sued, it is sufficient to proceed against it without joining its officers or agents. *Angola State Bank v. State ex. rel. Sanders*, 222 Ind. 244, 52 N. E. 2d 620 (1944).

Perhaps the sole reason for maintaining the formality of ordering directors to make declarations of a dividend would be the fact that statutes grant to the directors the sole power to declare dividends. See note 10 *supra*. Such statutes have always been held not to abridge the common law rule that courts can interfere with the directors' discretion, and it would seem equally reasonable to interpret them to except declarations by the court.

21. *Butler Co. v. Pittsburgh, H., B. & N.C. Ry.*, 298 Pa. 247, 148 Atl. 504 (1929).

22. *Consolidated Rendering Co. v. Vermont*, 207 U. S. 541 (1907); *Telegram Newspaper Co. v. Commonwealth*, 172 Mass. 294, 52 N. E. 445 (1899); *Butler Co. v. Pittsburgh, H., B. & N. C. Ry.* 298 Pa. 347, 148 Atl. 504 (1929). See also 10 FLETCHER, CYC. CORPORATIONS § 5069 (perm. ed. 1932); STEVENS, CORPORATIONS § 81 (1936).

23. See, e. g., *Wilson v. United States*, 221 U. S. 361 (1910); *Parker v. United States*, 126 F.2d 370 (1st Cir. 1942); *Katenkamp v. Sup. Ct., Santa Barbara Co.*, 16 Cal.2d 696, 108 P.2d 1 (1940); *Geller v. Flamout Realty Co.*, 260 N. Y. 346, 183 N. E. 520 (1932). See also 10 FLETCHER, CYC. CORPORATIONS §§ 5071, 5073 (perm. ed. 1932).

In STEVENS, CORPORATIONS § 81 (1936), however, it is questioned whether this principle could be applied to corporate directors who have failed to act in obedience to a court order. While the rule might be so limited in most cases, the directors could be considered under a duty to carry out the court order where the action ordered is of a nature that is ordinarily done by the directors, i.e., putting in motion the corporate machinery necessary to pay a dividend.

Further, it would seem that directors who fail or refuse to cause the corporation to carry out a court order to pay a dividend might be required to reimburse the corporation for any fine or penalty imposed on it as a result of its disobedience.

the property of the reluctant corporation may be sequestered as an inducement to obedience,²⁴ a receiver may be appointed to operate the corporation and comply with the order,²⁵ or the court order may be considered as creating a debt from the corporation to the shareholders, which may be enforced by the ordinary action of debt.²⁶ These illustrations sufficiently indicate that the threat of contempt actions against the directors is not the sole manner of enforcing an order to pay dividends.²⁷ Since, in fact, the main object of the proceeding is to bind corporate assets, the most direct method of inducing action is an order to the corporation itself. Logically, therefore, the directors' presence is not required, and adds little to the ability of the court to formulate and enforce a suitable decree.²⁸

The theory of the *Kroese* case, although departing from precedent,²⁹ is

24. *Manning v. Securities Co.*, 242 Ill. 584, 90 N. E. 238 (1909); *Jones v. Boston Mill Co.*, 4 Pick. (Mass.) 507 (1827); *Commonwealth ex. rel. Lieberum v. Lewis*, 253 Pa. 175, 98 Atl. 31 (1916). See also 10 FLETCHER, *CYC. CORPORATIONS* § 5077 (perm. ed. 1932).

25. *Cunliffe v. Consumer's Ass'n of America*, 280 Pa. 263, 124 Atl. 501 (1924); *Blum Bros. v. Girard Nat. Bank of Philadelphia*, 248 Pa. 148, 93 Atl. 940 (1915).

26. See *Raynolds v. Diamond Mills Paper Co.*, 69 N. J. Eq. 299, 301, 60 Atl. 941 (1905); *Stevens v. U. S. Steel Co.*, 68 N. J. Eq. 373, 378, 59 Atl. 905, 906 (1905). Both cases recognize that the judicial declaration of a dividend need have no other result than an ordinary declaration by the directors themselves. Cf. *Hazeltine v. Belfast, etc., Ry.*, 79 Maine 411, 10 Atl. 328 (1887).

See also *W. Q. O'Neal Co. v. O'Neal*, 108 Ind. App. 116, 25 N. E.2d 656 (1940), in which it was held proper for the trial court to render judgment against the corporation for the accrued dividends decreed to be paid.

27. Since the court in the instant case is departing from pre-existing theory, there is no precise precedent on the question of enforcing the resultant decree. Judge Goodrich treats the problem as one of coercing necessary action by the corporation and indicates that threat of receivership or sequestration of assets should produce the desired result. Elsewhere, however, he declares: "Nor does a shareholder whose claim to dividends is based on his showing of fiduciary mismanagement need a directors' meeting to make his rights good. The judgment of a court is enough. . . ." *Kroese v. General Steel Castings Co.*, 179 F.2d 760, 764-765 (3d Cir. 1950).

In any event, the problem is an eminently practical one, and might depend in any particular jurisdiction on enforcement methods previously employed against corporations. Also, the precise effect of the decree might vary. The possibilities would seem to be two. First, the decree might require the corporation to act, and be enforceable by action or threat of action against the corporation by the court. Second, the decree might be held to have determined the shareholder's rights and be enforceable either in individual actions by the shareholders or by rendition of a judgment against the corporation as a part of the original relief. See note 26 *supra*.

28. Jurisdictions which have heretofore espoused the idea that these actions are derivative in nature may object that the *Kroese* rule cannot be followed. Properly, however, they should reconsider their earlier position and conclude that the action is not in fact derivative. See note 18 *supra*.

29. The nearest case in point was decided by the Indiana Appellate Court. In *W. Q. O'Neal Co. v. O'Neal*, 108 Ind. App. 116, 25 N. E.2d 656 (1940) an action to compel declaration of dividends was filed against the corporation alone. The dominant owner appeared and opposed the proceeding. The corporation was closely held and appeared to be substantially operated by the dominant owner. When the question of non-joinder of directors was raised on appeal, it was held that the defect had been waived. Because of the difference in the nature of the two corporations involved, the court in the *Kroese* case

based on realities rather than conceptual fictions. It results largely from the recognition of jurisdictional problems attending the expansion of modern corporations throughout the nation and the diversification of their stock holdings and directorships.³⁰ It has become increasingly difficult to obtain service over requisite parties in actions involving corporations. A problem related to that presented by the *Kroese* case is found in derivative suits against corporate directors for defalcations in their duties. These actions too have been conditioned upon joinder of both the corporation and the individual director; and thus where one but not both can be served with process, the action cannot be maintained.³¹ A solution here has been found in the adoption of statutes which require a corporate director to consent to service within the corporation's domestic state for actions arising from his directorship.³² Such statutes would seem to present an alternate solution to the *Kroese* problem by permitting effective joinder of the corporation and the directors in a single action. In the absence of such statutes, however, it remains desirable for courts to accept the modifications imposed by the *Kroese* case on the traditional theory of actions to compel declaration of dividends, in the recognition that a failure to do so serves no purpose but that of untrustworthy directors.³³

did not rely on the *O'Neall* case. *Kroese v. General Steel Castings Co.*, 179 F.2d 760, 765 (3d Cir. 1950). Nevertheless, the *O'Neall* case would seem to be authority for the proposition that directors are not indispensable parties to such an action.

30. The common stock of the General Steel Castings Company is largely owned by four manufacturing companies: American Steel Foundries Co., Baldwin Locomotive Works, American Locomotive Company, and Pullman, Inc. Together these companies own 92.38% of the common stock. General Steel's 100,000 shares of preferred stock are traded on the New York Stock Exchange and others, and are widely held. Brief for Appellant, p. 9a. Although incorporated in Delaware, the principal office of General Steel is in Pennsylvania.

Of General Steel's twelve directors, two reside in Missouri, three in Pennsylvania and four in Illinois. The remainder are presumably residents of New York, plaintiff's residence. It was alleged that there is no one state or federal district in which jurisdiction over a majority of the board could be acquired except by the directors' voluntary appearance. Brief for Appellant, pp. 10a-11a; see also *Kroese v. General Steel Castings Co.*, 179 F.2d 760, 762 (3d Cir. 1950).

31. *Freeman v. Bean*, 243 App. Div. 504, 276 N. Y. Supp. 310 (1934), *aff'd* 266 N. Y. 657, 195 N. E. 368 (1935); Note, 44 YALE L. J. 1091 (1935).

The situation is notorious and has been justly criticized. See, e.g., Keefe and Cotter, *Service of Process in Suits Against Directors: A Barrier to Justice*, 27 CORN. L. Q. 74 (1941); Winer, *Jurisdiction over the Beneficiary Corporation in Stockholders Suits*, 22 VA. L. REV. 153 (1935); Note, 33 VA. L. REV. 187 (1947). The cited materials suggest many solutions other than that pointed out in note 32 *infra*.

32. Such a statute was passed in South Carolina in 1947. See 45 STAT. AT LARGE c.277 (May 19, 1947). Although its constitutionality has not yet been determined, there are indications that it and similar statutes would be held valid. See Note, 28 N. C. L. REV. 201 (1950).

33. "If that [the lower court's] holding results in the complaining shareholder being unable to bring his suit either in any federal court or, for that matter, in any state court the result may disappoint the plaintiff, but the defendants will bear up under it pretty well." *Kroese v. General Steel Castings Co.*, 179 F.2d 760, 763 (3d Cir. 1950).