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CORPORATIONS—DIVIDENDS—MAJORITY OF THE BOARD OF DIRECTORS AS INDISPENSABLE PARTIES IN A SUIT TO COMPEL THE DECLARATION OF CORPORATE DIVIDENDS—A minority group of stockholders brought an action to compel a declaration of dividends on common stock, naming as defendants the Continental Mills company, four of the five directors of the corporation, and a majority stockholder. Effective service of process was made only on the corporation and two of the directors. The majority stockholder and the other two directors named appeared specially and obtained a dismissal of the action as to them. The two directors properly served then moved to dismiss the action for failure to include a majority of the board of directors as parties. *Held*, a majority of the board are not indispensable under the Maine corporation law and general principles of equity as applied by Maine courts. *Whittemore v. Continental Mills*, (D.C. Maine 1951) 98 F. Supp. 387.

Until recently, the almost unanimous consensus has been that a majority of the board of directors are indispensable parties¹ in a suit to compel the declara-

¹ An indispensable party is a party who has such an interest in the controversy that a final decree would necessarily affect him, or be wholly inconsistent with equity. *Shields v. Barrows*, 17 How. (58 U.S.) 130 (1854). This does not seem to apply to the absent

tion of corporate dividends.² The instant case, however, is indicative of a growing disposition to hold that a majority are not indispensable to such an action.³ The problem is an acute one because if a majority of the board are required as defendants, failure to acquire jurisdiction over them in any one state precludes maintenance of the action in any state⁴ or federal⁵ court. Faced with such a rule, the plaintiff might find a solution in the federal courts by employing sections 1401 and 1695⁶ of the federal judicial code, which deal with stockholder's derivative actions. The former provides a special venue in any district where the corporation might have sued the defendants, and the latter provides for extraterritorial service of process on the corporation.⁷ However, it is not clear that an action to compel a declaration of dividends is a derivative action, the weight of authority holding that it is not.⁸ Most, if not all, of the state incorporation acts provide that dividends are to be declared by a majority of the board of directors.⁹ Thus, the indispensable party problem, where the action is not held to be derivative, is simply one of determining how far courts may sacrifice ". . . the logic and symmetry of legal concepts to the practical desirability of affording a forum to . . ." the stockholder.¹⁰ On the one hand, those courts holding the majority indispensable to the action proceed upon the theory that the court cannot declare a dividend, but is limited to giving a judgment *in per-*

director. However, *Kendig v. Dean*, 97 U.S. 423 (1878), holding that when an individual is the only one who can give effect to a decree of the court he is considered indispensable, is apparently relied on to cover the absent director.

² For example, see *Schuckman v. Rubenstein*, (6th Cir. 1947) 164 F. (2d) 952, cert. den. 333 U.S. 875, 68 S.Ct. 905 (1948); also *Gesell v. Tomahawk Land Co.*, 184 Wis. 537, 200 N.W. 550 (1924); *Kales v. Woodworth*, (6th Cir. 1929) 32 F. (2d) 37 at 39.

³ The instant case is one of three such cases recently decided. The others are *Kroese v. General Steel Castings Corp.*, (3d Cir. 1949) 179 F. (2d) 760, cert. den. 339 U.S. 983, 70 S.Ct. 1026 (1950); *Swinton v. W. J. Bush & Co.*, 102 N.Y.S. (2d) 994 (1951), *affd.*, no opinion 278 App. Div. 754, 103 N.Y.S. (2d) 1019. Faint authority will also be found in *O'Neill Co. v. O'Neill*, 108 Ind. App. 116 at 126, 25 N.E. (2d) 656 (1940), where an objection for failure to join directors was not seasonably made, and the court said that if a defect, it was waived. Cf. *Koppel v. Middle States Petrol. Corp.*, 272 App. Div. 790, 69 N.Y.S. (2d) 784 (1947).

⁴ The United States Supreme Court has decided that personal service of process outside of a state where the action is pending will not give the court power to render a judgment in personam against a nonresident defendant. See *BOWERS, PROCESS AND SERVICE* §291ff, p. 422 (1927). Nor is a nonresident director or officer subject to constructive service in a suit or proceeding to enforce a duty or obligation to stockholders. See 148 A.L.R. 1251 (1944).

⁵ Federal Rules of Civil Procedure, rule 4(f).

⁶ 28 U.S.C. (Supp. IV, 1951) §§1401 and 1695.

⁷ Even under these sections, however, the action could not be maintained if the directors were residents of more than one state. See 3 MOORE, FEDERAL PRACTICE, 2d ed., ¶23.21, pp. 3542-3544 (1948).

⁸ BALLANTINE, CORPORATIONS §234, pp. 556-557 (1946), saying it is not derivative; 3 MOORE, FEDERAL PRACTICE ACT, 2d ed., ¶23.16, pp. 3508-3510 (1948), agreeing with Ballantine; 11 FLETCHER, CYC. CORP. §5326 (1932), stating that it should be derivative. Many cases are collected in each.

⁹ BALLANTINE, CORPORATIONS §231 (1946); 11 FLETCHER, CYC. CORP. §5235 (1932).

¹⁰ *Swinton v. W. J. Bush & Co.*, *supra* note 3, at 998.

sonam against the directors, who must then make the declaration as the legislative scheme contemplates.¹¹ On the other hand, the principal case argues that where the court has to step in and order payment, the judgment of the court is sufficient. The case has passed beyond the ordinary situation contemplated by the legislature, and the duty of the corporation to pay is imposed by the judgment, based on a rule of law, not the ayes and nays of the board. If any formal action is necessary, it would be a mere ministerial act.¹² Inasmuch as dismissal of the action because a majority of the board cannot be served may result in a serious injustice toward stockholders, while the opposite view does not seem to prejudice the defense¹³ or any right of the corporation, the rule adopted in the instant case would seem commendable.¹⁴

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¹¹ See especially *Schuckman v. Rubenstein*, *supra* note 2.

¹² As to the enforcement of such a decree, *Kroese v. General Steel Castings Corp.*, *supra* note 3, indicated that a receivership or sequestration of corporate property within the jurisdiction would be available.

¹³ If the action is held to be maintainable without a majority of board named as defendants, nothing is to prevent a majority from becoming defendants if they desire to subject themselves to the suit; nor would anything prevent them from being witnesses on behalf of the corporation.

¹⁴ As the whole nature of the proceeding to compel a declaration of dividends is one sounding in equity, the rule which will reach the most justice for all the parties, as the rule of the instant case would seem to do, is certainly to be sought for.