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CORPORATIONS—AMENDMENT OF BY-LAWS BY CUSTOM—In an application for a preliminary injunction to prevent stockholders from exercising their rights of ownership until there had been a determination whether such stock should be cancelled because issued without corporate authorization, the success of the petitioner depended upon whether a quorum of the directors was present at the meeting authorizing its issuance. This in turn depended upon whether the by-law requiring a board of directors of ten members had been amended by custom to require only seven. For the four years preceeding the meeting at which the stock was authorized, during which time, however, there were neither directors' nor stockholders' meetings, there had been only seven directors, a condition which continued for several subsequent meetings. *Held*, the injunction should issue; no quorum was present and the stock was improperly issued.[1] Although recognizing the doctrine that a by-law may be amended by a custom inconsistent therewith acquiesced in by the stockholders,[2] the court refused to apply it here because of the total stockholder and director inaction prior to the issuance of the stock. *Belle Isle Corp. v. MacBean*, (Del. Ch. 1946) 49 A. (2d) 5.

If the court limits its consideration to the time prior to the meeting at which the stock was issued, the single inconsistent act would not indicate an amendment by custom.[3] It would seem, however, that the court should have considered the subsequent meetings of the reduced board in determining whether there had been an amendment by usage. If all the meetings of the seven-director board

[1] The injunction was limited to the stock issued June 5, 1944. There was another stock issue, dated June 22, 1944, whose authorization was challenged on other grounds.

[2] 2 THOMPSON, CORPORATIONS, 3d ed., § 1116 (1927); 8 FLETCHER, CYC. CORP., perm. ed. § 4179 (1931); BALLANTINE, CORPORATIONS, § 107 (1946); 30 CAL. L. REV. 195 (1942).

[3] In re Ivey & Ellington, Inc., (Del. Ch. 1945) 42 A. (2d) 508; Hornady v. Goodman, 167 Ga. 555, 146 S.E. 173 (1928).

establish such a usage, it is as reasonable to date the amendment from the first time the practice contrary to the by-law was used as to pick out a particular time during which the practice was followed as the critical date at which such inconsistent practice became a by-law.[4] There is considerable authority for the theory approved by the court, although not applied, that when a corporation has followed for some length of time a practice inconsistent with a by-law that the by-law will be amended by reason of the custom and usage.[5] In addition, there are cases where custom and usage are used to establish a by-law never formally adopted.[6] Occasionally the courts will sustain the corporate action inconsistent with a by-law on the theory that it was waived in those instances where it was violated, refusing to go so far as to say it has been amended.[7]

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[4] In Henry v. Jackson, 37 Vt. 431 (1865), the written by-law provided that the directors were to supervise the store, but from the time the association was formed until the time of suit six years later these duties, to the general knowledge of the members, had been performed by an agent. The court made no attempt to distinguish between transactions that occurred in the first months during which the practice was followed and later transactions. See also Bowler v. Am. Box Strap Co., 22 Misc. 335, 49 N.Y.S. 153 (1898). For a somewhat analogous situation see Domasek v. Kluck, 113 Wis. 336, 89 N.W. 139 (1902), where subsequent transactions were used to prove an implied agency.

[5] Bay City Lumber Co. v. Anderson, 8 Wash. (2d) 191, 111 P. (2d) 771 (1941); Buck v. Troy Aqueduct Co., 76 Vt. 75, 56 A. 285 (1903); Henry v. Jackson, 37 Vt. 431 (1865); Bowler v. Am. Box Strap Co., 22 Misc. 335, 49 N.Y.S. 153 (1898); Elkins v. Camden and Atl. R.R. Co., 36 N.J. Eq. 467 (1883); Grand Valley Irr. Co. v. Fruita Imp. Co., 37 Colo. 483, 86 P. 324 (1906); Huxtable v. Berg, 98 Wash. 616, 168 P. 187 (1917); Blair v. Metropolitan Savings Bank, 27 Wash. 192, 67 P. 609 (1902); Marsh & Olsen v. Mathias, 19 Utah 350, 56 P. 1074 (1899); Beazell v. Farmers Mut. Ins. Co., 214 Mo. App. 430, 253 S.W. 125 (1923); Horner v. Kukaiau Plantation Co., 21 Hawaii 13 (1912); Hill v. Am. Co-op. Assn., 195 La. 590, 197 S. 241 (1940); Farmers State Bank v. Haun, 30 Wyo. 322, 222 P. 45 (1924). *Contra*: Proctor Coal Co. v. Finley, 98 Ky. 405, 33 S.W. 188 (1895); Houdeck v. Merchants & Bankers Ins. Co., 102 Iowa 303, 71 N.W. 354 (1897). See also Clark v. Wild, 85 Vt. 212, 81 A. 536 (1911), and Powers v. Marine Engineers' Beneficial Assn., 52 Cal. App. 551, 199 P. 353 (1921), where the court refused to allow an amendment of the by-law by custom since there was a statute providing the method of amendment of corporate by-laws.

[6] Myar v. Poe, 79 Ark. 465, 95 S.W. 1005 (1906); Walker v. Johnson, 17 App. D.C. 144 (1900); Germania Iron Mining Co. v. King, 94 Wis. 439, 69 N.W. 181 (1896); Graebner v. Post, 119 Wis. 392, 96 N.W. 783 (1903); Lockwood v. Mechanics National Bank, 9 R.I. 308 (1869); National Surety Co. v. Williams, 74 Fla. 446, 77 S. 212 (1917); Union Bank of Md. v. Ridgely, 1 H. & G. (Md.) 324 (1827); Star Loan Assn. v. Moore, 4 Penne. (20 Del.) 308, 55 A. 946 (1903).

[7] State ex rel. Guaranty Build. & Loan Co. v. Wiley, 100 Ind. App. 438, 196 N.E. 153 (1935); Realty Acceptance Corp. v. Montgomery, (C.C.A. 3d, 1930) 51 F. (2d) 636; American Savings Bank & Trust v. Earles, 113 Wash. 629, 194 P. 55 (1921).