

Opinion No. 148.

**Corporations—Co-Operative Marketing
Association—Incorporators, of
Corporations.**

Held: Corporations incorporated under Chapter 40 of the Civil Code of Montana—Sections 6428 to 6449.7, inclusive, Revised Codes of Montana, 1935—cannot be incorporators of a corporation being formed under said chapter.

April 27, 1946.

Mr. Sam W. Mitchell
Secretary of State
State Capitol
Helena, Montana

Dear Mr. Mitchell:

You have requested an opinion on the following question:

May a corporation incorporated under the Co-operative Marketing Association Act be an incorporator in the creation of another co-operative marketing association under the provisions of Chapter 40 of the Civil Code?

In a majority of the decisions, it is generally held that one corporation cannot be an incorporator of another corporation unless that right is expressly given to the corporation by statute. (See 14 C. J., pages 104 and 255.)

This office held in Opinion No. 215, Volume 18, Report and Official Opinions of the Attorney General, as follows:

“A corporation in existence cannot as a corporation be an incorporator in the formation of another corporation.”

This opinion was based on the above general rule and sections of our Code pertaining to general corporations. Section 5902, Revised Codes of Montana, 1935, states that any three persons may form a corporation, and Section 5903, Subsection 32, gives corporations power to acquire stock in other corporations. Even in view of like statutes, other courts have uniformly held that such stockholding authority did not by implication authorize the formation of a corporation by corporations.

The fact that a corporation is an unnatural, soulless, artificial person, existing on paper only, by virtue of statutory enactments, having no conscience of its own as to right or wrong, or fear thereof, other than as its directors may be regulated as to ultra vires acts by statute, the courts have seen fit generally to hold their powers to the minimum expressly enumerated by law.

In the case of *Schwab v. Poetter Co., et al.*, 87 N. E. 670, 672, the court stated:

"There is no statute in this state which directly authorizes one corporation to organize another, and as we think such action is not indirectly authorized by any reasonable inference from the most extensive powers committed to any class of corporations known to our law. Corporations are organized by natural persons, acting under direction of a statute, and they only can become incorporators, directors or officers. 'Artificial persons' without brain or body existing only on paper through legislative command and incapable of thought or action except through natural persons cannot create other 'artificial persons', and those others still until the line is so extended and the capital stock so duplicated and reduplicated as to result in confusion and fraud."

In the case of *American Ball Bearing Company v. Adams*, 222 Fed. 967, 975, the court stated:

"The power to own stock in a lawful organized corporation too greatly differs from the power to create a corporation and to control it for the latter to be raised by implication from the former. Thus, without regard to the opportunities

for mischiefs which would be afforded to corporators to divest the corporate from the purposes to which it has been diverted if such an implied power were held to exist. In grants by the public, the general rule on construction is that nothing passes by implication merely."

Chapter 40 of the Civil Code is a special chapter, and contains certain language which lends more implication to the fact that corporations incorporated under it might be incorporators of other like corporations than does the general corporation statute. Still as hereinafter pointed out, there is no express provision allowing such authority.

Under subsection (d) of Section 6429, Revised Codes of Montana, 1935, the provisions of Section 10713 are expressly made applicable to corporations organized under said Chapter 40. Section 6430 uses the word "persons" generally as to who may incorporate. Subsection (d) of Section 6433 allows corporations to purchase or otherwise acquire stock in other corporations engaged in related activities or in the handling or marketing of any of the products handled by the corporations. Further, Section 6434 expressly gives one corporation organized thereunder the right to be a member or stockholder of any other association or associations organized thereunder.

It is readily seen that the provisions of this special law give far more opportunity, or logically speaking that such a corporation might be an incorporator of a like corporation than is given to general corporations by statutes pertaining thereto. However, even in face of the provisions of said Chapter 40 on the formation of corporations thereunder, there is no express authority given. Some implication must be invoked.

In view of the case herein cited, and especially the general rule cited in *American Ball Bearing Company v. Adams*, supra, which states "in grants by the public, the general rule of construction is that nothing passes by implication merely," it seems to me the corporations organized under Chapter 40 would not possess power to become incorporators of another like corporation. Further, the incorporators of corporations formed under said Chapter 40 must, in accordance with Sec-

tion 6430, Revised Codes of Montana, 1935, be persons engaged in the production of agricultural products. Further, Section 6431, Revised Codes of Montana, 1935, in stating the purpose for which associations may be formed, states as follows:

"An association may be organized to engage in any activity in connection with the marketing or selling of the agricultural products of its members, or with the harvesting, preserving, drying, processing, canning, packing, storing, handling, shipping, or utilization thereof, or the manufacturing or marketing of the by-products thereof; or in connection with the manufacturing, selling, or supplying to its members of machinery, equipment, or supplies; or the financing of the above-enumerated activities; or in any one or more of the activities specified herein."

It is questionable as to whether a corporation formed for one of the above purposes could in reality be considered a producer of agricultural products. The purposes set forth in said Section 6431 and the powers enumerated in Section 6433 pertain to encouraging or facilitating the marketing or processing of products of producers of agricultural products other than to actually producing.

Therefore, in view of the strictness which the courts have universally followed in construing the statutes allowing the formation of corporations, and the fact that the incorporators of corporations organized under Chapter 40 must be producers of agricultural products, it is my opinion that corporations incorporated under Chapter 40 of the Civil Code of Montana—Sections 6428 to 6449.7, inclusive, Revised Codes of Montana, 1935—cannot be incorporators of a corporation being formed under said chapter.

Sincerely yours,
R. V. BOTTOMLY,
Attorney General