Building and Loan Associations, Preferred Stock of. Corporations, Kinds of Stock of. Preferred Stock, of Building and Loan Associations.

It is not within the power of a Building and Loan Association to exempt stock from the assessment provided for in Section 4197, Revised Codes.

It is not within the power of a Building and Loan Association to place additional burdens upon one character of stock for the benefit of some other kind or character of stock.

Voluntary submission to extra burdens is a matter resting with the stockholder, and he may by his own acts bar himself from contesting the legality of the contract.

February 18, 1916.

Hon. H. S. Magraw,
State Examiner,
Helena, Montana.

Dear Sir:

I am in receipt of your letter submitting for the consideration of this office the questions:

1. May a building and loan association create two or more kinds of stock, giving to one kind preference over the other?

2. May a building and loan association provide that paid up stock shall have no withdrawal value?

These questions are so related that we will consider them together, for they both relate to the power and authority of a building and loan association to create preferred stock.

The law specifically relating to building and loan associations, is found in the Revised Codes as Section 4190 to 4209. The law relating to the authority of a corporation to create two or more kinds of stock, is expressed in Section 3889, Revised Codes as amended by Chapter 88, Laws of 1915. This section of the law relating to preferred stock is a general provision relating to corporations. The provisions of our Code relating to building and loan associations is a special law relating only to that subject. The law relating to building and loan associations does not specifically prohibit the creation of preferred stock, neither does it contain any provisions specifically authorizing it. Great latitude of action is given to the corporation in the enactment of by-laws as expressed in Section 4193 prescribing the powers of such corporations. The statute, therefore, is not specific as to either of these questions, and in their determination, we are forced to the consideration of general principles relating to such associations. The general doctrine appears to be that such an association has no power to issue stock that will give the members a preference over other sharenolders, unless empowered to do so by law.

6 Cyc., 128, and cases.

But it is also a general principal that members accepting stock with knowledge that the association had no right to issue it cannot question its validity on the grounds that its issue is ultra vires.

6 Cyc., 127,

International Bldg. etc., Assn. v. Braten, 24 Ind., pp. 654, 56 N. E. 105;

Leshy v. National Bldg. Etc. Assn., 100 Wis., 555, 76 N. W. 625; 69 Am St. Rep. 945.

In considering the general nature and purpose of such associations the Wisconsin Court in the above case said:

> "The fundamental idea of a building and loan association is mutual profit-sharing. Its business necessarily is confined to its own members. Its object is to raise a fund to be loaned to its members. Each shareholder, whether a borrower or non-borrower, participates alike in all profits earned, and alike must assist in bearing the burden of expenses and losses. Such associations are the only ones that can issue their capital stock before it is paid for. The member makes his application, receives his stock, and agrees to pay for it in monthly installments at a fixed rate. In case of default, he is subject to fine, which goes into the general profit fund for all alike. When the aggregate dues he has paid, with the credited earnings, equal the face value of his stock, he can no longer share in the earnings, and his stock is retired, and his membership in the corporation ceases. But the member has no claim to, or property in, any specific fund of the association: Atwood v. Dumas, 149 Mass. 167. The theory of our statutes and the law of all the cases is to the effect that such associations are purely mutual in their character, and that the members share in the common gains, and, from the very necessity of their relations must bear a proportionate share of the losses. Probably, under our law, such an association would have no right to issue what is called definite contract stock. Such stock is opposed to the fundamental principal of such associations. The members themselves constitute the corporation. It has no capital except such as it receives from its members in monthly installments and its interest earnings. When the corporation aggregate agrees with all its members to pay them a definite amount at a given time, regardless of whether the anticipated profit has been earned or not, unless the requisite profit has been earned it is quite evident that some one must suffer. The principle of equality and mutuality would thereby be destroyed."

In the Wisconsin case, its is further announced, as expressed in the syllabi thereof:

> "One who, on the payment at one time of a gross sum, receives a certificate of stock of a building and loan association, reciting that he is the owner of a specified number of shares of stock of a par value of one hundred dollars, and

> that the association will pays him that amount for each share after the expiration of a time specified, becomes a member of the association, and hence subject to his share of its losses, and not entitled on its insolvency, to the performance of the contract expressed in the certificate."

A similar doctrine is announced in Latimer v. Equitable Loan and Investment Co., 81 Fed. 776, in which it is held:

> Building associations are established on a system of perfect equality and mutality between all their members, and hence an association organized under Rev St. Mo. Art. 9, c 42, has no power, in the absence of express provision to that effect, to pledge part of its assets for the payment of one class of its stock in preference to others.

It should be noticed, however, that the Missouri statute referred to, confers specific right upon the member to withdraw. The Montana statute classes this as one of the powers conferred upon the corporation to be provided for by by-laws. In Section 4197 Revised Codes, we find this provision:

> "All loss shall be assessed in the same proportion and manner on all members after the amount in the reserve fund has been applied to the payment of the same."

Under this statutory mandate no stock can be created which is exempt from such assessment, for all stock stands equal and any attempt to create a preferred stock in such a manner as to relieve it from this burden, is wholly void. It is evidently contrary to the very purpose and fundamental idea of a building and loan association that preferred stock should exist at all. For such an arrangement would destroy the mutuality of such association, but in view of the fact that a member who accepts stock knowing the conditions on which it is issued, cannot raise the question that it is ultra vires. It is probably within the power of the person knowingly accepting such alleged preferred stock by contract to fasten upon his stock certain conditions, but neither he, nor the corporation can legally issue or accept stock which adds additional burdens to other stock. Hence, if preferred stock may exist at all, it is by reason of the doctrine of estoppel rather than by legal enactment. The conclusions reached are:

1. It is not within the power of a building and loan association to exempt stock from the assessments provided for in Section 4197, Revised Codes;

2. It is not within the power of a corporation to place additional burdens upon one character of stock for the benefit of some other kind or character of stock, for all must stand equal under the law.

Voluntary submission of alleged preferred stock to extra burdens could not, however, be taken advantage of by the holders of the other stock. These questions may also be found discussed in

Forwood v. Eubank, 106 Ky. 291, 50 S .W. 255.

I return herewith papers submitted by you.

Yours very truly,
J. B. POINDEXTER,
Attorney General.