

the contention may be made the use of "stock" and "common stock" implies a difference between shares of stock issued by such corporations, it is wise to note also no specific authority to issue preferred shares of stock is granted. Any such authority or power, if existent, must therefore arise by implication.

Section 6433, Revised Codes of Montana, 1935, provides:

"Each association incorporated under this act shall have the following powers:

"(a) To engage in any activity in connection with the marketing, selling, harvesting, preserving, drying, processing, canning, packing, storing, handling, or utilization of any agricultural products produced or delivered to it by its members; or the manufacturing or marketing of the by-products thereof; or in connection with the purchase, hiring or use by its members of supplies, machinery or equipment; or in the financing of any such activities; or in any one or more of the activities specified in this section. No association shall handle the agricultural products of non-members in greater volume than that of members.

"(b) To borrow money and to make advances to members.

"(c) To act as the agent or representative of any member or members in any of the above mentioned activities.

"(d) To purchase or otherwise acquire, and to hold, own, and exercise all rights of ownership in, and to sell, transfer, or pledge shares of the capital stock or bonds of any corporation or association engaged in any related activity or in the handling or marketing of any of the products handled by the association.

"(e) To establish reserves and to invest the funds thereof or such other property as may be provided in the by-laws.

"(f) To buy, hold and exercise all privileges of ownership, over such real or personal property as may be necessary or convenient for the conducting and operation of any of the business of the association or incidental thereto.

"(g) To do each and every thing necessary, suitable or proper for the

Opinion No. 127.

Cooperative Marketing Associations—Corporations.

Held: Cooperative marketing associations—organized under Chapter 40 of Volume 3, Revised Codes of Montana, 1935—may not amend their articles of incorporation to permit the issuance of preferred shares of stock.

September 22, 1943.

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

Dear Mr. Mitchell:

You have asked whether cooperative marketing associations, organized under Chapter 40 of Volume 3, Revised Codes of Montana, 1935, may amend their articles of incorporation to permit the issuance of preferred stock.

Chapter 40 covering Sections 6428 through 6449.7, Revised Codes of Montana, 1935, is loosely drawn in many respects; and, as a consequence, it is probably capable of many constructions.

In many places throughout the chapter, the word "stock" alone is employed in speaking of cooperative marketing association shares, while in many other instances the more particularized form, "common stock," is employed. While

accomplishment of any one of the purposes of the attainment or any one or more of the objects herein enumerated or conducive to or expedient for the interest or benefit of the association; and to contract accordingly; and in addition to exercise and possess all powers, rights and privileges necessary or incidental to the purposes for which the association is organized or to the activities in which it is engaged; and in addition any other rights, powers, and privileges granted by the laws of this state to ordinary corporations, except such as are inconsistent with the expressed provisions of this act, and to do any such thing anywhere."

While the power granted in the last part of paragraph (g) appears broad and sweeping, it should be kept in mind no power is conferred thereby which is inconsistent with the expressed provisions of the act. Section 6428 states the chapter's purpose is "to promote, foster, and encourage the intelligent and orderly marketing of agricultural products through cooperation." Since ordinary stock or "common stock" gives no stockholder any greater rights than any other stockholder, while preferred stock—as the term implies—gives the holder a preference over the holders of common stock with respect to payment of dividends, etc., it appears that—without specific statutory authorization from the legislature—it would be a violation of the spirit of the cooperative marketing act to say the issuance of preferred shares is permissible thereunder.

The states of Kansas and California have cooperative marketing legislation greatly paralleling that contained in our law. The Kansas act was originally passed in 1921, the same year which saw the birth of the chapter we are here considering, while it appears the California law came into being in 1923. Both states' acts contain the type of clause set out in paragraph (g) of our Section 6433. Our Section 6441, Revised Codes of Montana, 1935, is almost identical to Section 17-1613 of the Kansas Statutes of 1923. Section 6441, Revised Codes of Montana, 1935, provides:

"When a member of an association established without capital

stock, has paid his membership fee in full, he shall receive a certificate of membership.

"No association shall issue stock to a member until it has been fully paid for. The promissory notes of the members may be accepted by the association as full or partial payment. The association shall hold the stock as security for the payment of the note, but such retention as security shall not affect the members' right to vote.

"Except for debts lawfully contracted between him and the association, no members shall be liable for the debts of the association to an amount exceeding the sum remaining unpaid on his membership fee or his subscription to the capital stock, including any unpaid balance on any promissory notes given in payment thereof.

"No stockholder of a cooperative association shall own more than one-twentieth of the issued common stock of the association; and an association, in its by-laws, may limit the amount of common stock which one member may own to any amount less than one-twentieth of the issued common stock.

"No member or stockholder shall be entitled to more than one vote.

"The by-laws shall prohibit the transfer of the common stock of the association to persons not engaged in the production of the agricultural products handled by the association, and such restrictions must be printed upon every certificate of stock subject thereto.

"The association may at any time, except when the debt of the association exceeds fifty per cent of the assets thereof, buy in or purchase its common stock at book value thereof as conclusively determined by the board of directors and pay for it in cash within one year thereafter."

By Chapter 150 of the Laws of Kansas of 1931, an amendment to Section 17-1613 of the Kansas Statutes of 1923 (which was almost identical to Section 6441, supra) was enacted—and this language was added:

"Any association organized with stock, under this act, may issue preferred stock with or without the

right to vote, or with such restrictions on its voting power as the articles or incorporation may prescribe. . . ."

In the same year Kansas added the above provision to its laws, California amended its cooperative marketing association statute comparable to our Section 6441 and Kansas' Section 17-1613 by removing this language:

"Any association organized with stock under this act may issue preferred stock. . . ."

Although I have attempted to determine what caused the amendments by the legislatures of Kansas and California above-noted, I have been unable to discover a court decision or attorney general's opinion from either jurisdiction which could be cited as cause for the legislatures' actions. It is at once apparent, however, the legislatures of both states deemed it necessary for specific authority to be granted before cooperative marketing associations could issue preferred shares of stock.

While I am aware legislative interpretation of acts of sister states which are similar to statutes of Montana is not binding on this office or on the judiciary of Montana, I am nonetheless impressed by the actions of the legislatures of Kansas and California as indicative of their conclusions with regard to issuance of preferred shares by cooperative marketing associations.

Our legislature has dealt similarly with cooperative associations in Chapter 38 of Volume 3, Revised Codes of Montana, 1935 (not to be confused with cooperative marketing associations here under discussion, which are the subject of Chapter 40 of the same volume). Cooperative associations were given this power by Section 6381, Revised Codes of Montana, 1921:

"The shares of stock shall not be less than ten dollars nor more than five thousand dollars per share, and may be made payable in installments, and every cooperative association may divide its shares of stock into classes of different par values, and the owners thereof shall share in the profits of the association in proportion to the par value of their shares; provided, however, that the owners of the said shares in

the different classes shall have the same power and vote in the association. . . ."

But Chapter 135, Laws of 1933, amended the above language, and today Section 6381, Revised Codes of Montana, 1935, provides so far as pertinent here:

"The shares of stock shall not be less than ten dollars (\$10.00) nor more than five thousand dollars (\$5,000.00) per share, and may be made payable in installments. **Every cooperative association may divide its shares of stock into preferred and common stock . . .**" (Emphasis mine.)

Thus, in dealing with cooperative associations, as distinguished from cooperative marketing associations, our legislature felt a specific grant of authority necessary to authorize the issuance of preferred shares.

Therefore, it is my opinion cooperative marketing associations, organized under Chapter 40 of Volume 3, Revised Codes of Montana, 1935, may not amend their articles of incorporation to permit the issuance of preferred shares of stock. Specific authority by legislative act is necessary.

Sincerely yours,
R. V. BOTTOMLY
Attorney General