

Promissory Notes — Negotiable Instruments — Stock Subscription Notes.

A promissory note payable to "myself" is a negotiable instrument if endorsed by the maker except where the note is given for a stock subscription and is drawn and executed according to Sections 5968 and 5969, R.C.M. 1921. A stock subscription note executed in conformity with said sections is non-negotiable.

George P. Porter, Esq., November 18, 1930.
State Auditor and Commissioner of Insurance,
Helena, Montana.

My dear Mr. Porter:

You have submitted a copy of a form of promissory note which is made payable to "myself" and you inquire if a note so payable is legal in Montana.

Under Sections 8415 and 8591, R.C.M. 1921, a negotiable promissory note may be made payable to the order of the maker provided it is also endorsed by him. Under the general law relating to negotiable instruments this form of note would be negotiable.

However, under Sections 5968 and 5969, R.C.M. 1921, promissory notes given for subscriptions for the stock of corporations are required to be made payable to the corporation selling the stock or to the officer who is to deliver it and there must be stated on the note that it is given for a stock subscription. A note so executed is by the terms of said section not a negotiable promissory note for the reason that the law specifically provides that the person to whom it is transferred by the payee takes the same subject to all the defenses that the maker could interpose against the payee in case a suit was brought by him against the maker.

Where a note is in fact given for a stock subscription but it is made payable to "myself" and there is no endorsement upon it that it is given for a stock subscription as required by said Sections 5968 and 5969 it is my opinion that the note would be negotiable in the hands of a holder in due course as defined by Section 8459, R.C.M. 1921. While Sections 5968 and 5969 have never been interpreted by our Supreme Court, it is my opinion that they only mean to withdraw from the law of negotiable instruments such notes as are executed in conformity with said section, and the penalty provided therein is to compel such notes to be executed in accordance with said section. If, notwithstanding said sections, a note which is in fact a subscription stock note is not executed in conformity therewith and the note subsequently gets into the hands of a holder in due course the only effect of said sections is to prescribe a criminal penalty to be suffered by the corporation or its officers and they do not have the effect of rendering the note non-negotiable because of such omission. Of course, if the holder of such a note took it with knowledge that it was in fact a stock subscription note then he would not be a holder in due course and the maker would be permitted to put in any defense against such holder as he could have made had an action been brought against him by the person to whom he delivered it.

Whether or not a person is a holder in due course is always a question of fact to be determined by a court after all the facts and circumstances concerning the transfer of the note have been put in evidence. There are other things which would make the holder of a note not a holder in due course, such as taking the note by assignment instead of endorsement, taking it after it was past due, taking it with infirmities upon its face which are sufficient to charge the holder with notice, etc., so that in any given case whether or not a holder is or is not a holder in due course is always a question for judicial determination in an action between parties affected by the question.

Very truly yours,

L. A. FOOT,
Attorney General.