

Opinion No. 567**State Auditor—State Treasurer—Warrants—Duplicate Warrants—Sureties, Liability of.**

HELD: Where a warrant is represented as lost and a duplicate warrant is issued to the payee and both warrants are paid by the state treasurer:

(1) If the payee, or some one authorized by him, endorsed both the original and duplicate warrants and caused them to be presented for payment, then he and his sureties are liable under Section 159, R. C. M., 1921;

(2) If the original warrant was lost and the endorsement thereon forged, there is no liability on their part but the State may recover from subsequent endorsers on the original warrant.

July 7, 1934.

It appears that on November 23, 1932, the state auditor drew a warrant upon the general fund for the sum of \$67.50 in favor of one Agnes V. Peterson because of public services rendered by her. On or about December 12, 1932, she represented to the auditor that the warrant had been lost or destroyed and requested him to issue a duplicate warrant to her. On that day, also, she executed a bond to the State of Montana in the sum of \$135.00, with Nora E. Harber and W. R. Hagie as sureties, conditioned to save the obligee and its officers harmless on account of the

issuance of the duplicate warrant, and deposited the same with the auditor. Thereupon, the auditor issued the duplicate warrant as requested.

It appears further, that on December 1, 1932, the original warrant, with the name of Agnes V. Peterson indorsed thereon, was received by the Choteau County Bank at Fort Benton, Montana. On December 31, 1932, the state treasurer registered the warrant and on May 20, 1933, he paid the bank the face value thereof with interest. On June 20, 1933, Agnes V. Peterson presented the duplicate warrant to the state treasurer for payment and the same was by him paid in full.

On this statement of the facts you ask us to "advise if the principal and sureties on the indemnity bond filed with the state auditor are liable to the state for the amount which the state has lost by reason of the auditor executing a duplicate warrant."

The duplicate warrant was evidently issued under the authority of section 159, Revised Codes of 1921, which reads as follows: "The state auditor is hereby empowered and authorized to issue a duplicate warrant whenever any warrant drawn by him upon the treasurer of the State of Montana shall have been lost or destroyed. This duplicate warrant must be in the same form as the original, except that it must have plainly printed across its face the word 'duplicate,' and no such warrant shall be issued or delivered by the state auditor, except the person entitled to receive the same shall deposit with the state auditor a bond in double the amount for which the duplicate warrant is issued, conditioned to save the State of Montana, and its officers, harmless on account of the issuance of said duplicate warrant."

A diligent search through the books has failed to reveal any case entirely like this in its facts. State ex rel. Ackerman v. Meath, 87 Wash. 659, 152 Pac. 536, comes closest in that regard. There, the state auditor, on December 21, 1914, issued to O. A. Burkland a warrant upon the state treasurer for the sum of \$36.90, payable out of the accident fund of the Industrial Insurance Department. On January 28, 1915, Burkland, claiming to have lost this warrant, applied to the state auditor for a duplicate warrant. He made affi-

davit in writing of that fact and of the fact that the warrant was unpaid, and also furnished the auditor an indemnity bond. Thereupon the auditor, on February 3, 1915, issued to him a duplicate of the original warrant, of the same date, with the word "Duplicate" indorsed across the face thereof. On February 1, 1915, this duplicate warrant was by Burkland caused to be presented to the state treasurer for payment, when it was accordingly paid. Thereafter, on or about April 16, 1915, Burkland, then having the original warrant in his possession, assigned and delivered the same for valuable consideration to S. L. Ackerman. Some time subsequent to April 16, 1915, Ackerman presented the original warrant to the state treasurer for payment, which was by him refused. In a mandamus proceeding instituted by Ackerman the court held that the treasurer was right in refusing to pay the original warrant, on the theory that Ackerman was in no better position to claim payment than was Burkland.

After consideration of such authorities as we could find, it is our view that if Agnes V. Peterson herself indorsed the original warrant and delivered it to the Chouteau County Bank or if she authorized somebody else to indorse her name thereon and deliver it to the bank, she and her sureties are liable on the bond. On the other hand, if the warrant was lost and the indorsement thereon forged there is no liability on their part. In that event payment of the warrant by the treasurer would be deemed voluntary, in the sense that there was no legal obligation on him to make it. (Oregon-Washington R. & Nav. Co. v. Washington Tire & Rubber Co., 219 Pac. 9; 31 C. J. 440.) Again, if the latter condition existed when the warrant was received by the bank it acquired no title thereto and the State of Montana can recover from the bank the amount which the treasurer paid to it. (People v. Chapman, 61 Cal. 262; Citizens' Nat. Bank v. City Nat. Bank, 82 N. W. 464; Levy v. First Nat. Bank, 43 N. W. 354; State v. Broadway Nat. Bank, 282 S. W. 194; 8 C. J. 608.) The right to recover is strengthened, if possible, by the fact that the bank expressly guaranteed the prior indorsement made on the warrant.

It may be well, however, to call the

attention of the bank at once to the peculiar developments recited above and which have been taken substantially from your letter.