

uary 16 to February 15, 1935. The warrant, with others of like kind, was forwarded from the Helena office of the commission to Scott P. Hart, its division engineer at Wolf Point, who in turn mailed it to Jones at Glasgow. In some unaccountable way and without the knowledge and consent of the payee, a third person possessed himself of the warrant, endorsed it by forging the name of A. W. Jones thereon, and obtained the face value thereof from the Hall Drug Company, a concern doing business in Glasgow. The Hall Drug Company does not feel disposed to surrender the warrant to Jones and besides it has been directed by the county attorney of Valley County to retain it for use as evidence against the forger when he is apprehended and brought to trial. The state auditor has refused to issue a duplicate warrant to Jones until the original warrant is first returned to him for cancellation. Under the circumstances, Jones would be almost justified in feeling that so far as his rights are concerned he must be somewhere between the devil and the deep blue sea.

Section 159, Revised Codes 1921, provides: "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."

As the warrant is in existence and is known to be in the possession of the Hall Drug Company it cannot be said that, as a matter of law, it is lost or has been destroyed. (Cobb v. Tirrell, 5 N. E. 828; Read v. Marine Bank, 32 N. E. 1083; Sullivan v. Kanuth, 146 N. Y. S. 583, aff. 115 N. E. 460; First Nat. Bank v. Brown, 230 Pac. 1038, 39 A. L. R. 1242; 38 C. J. 248.) There-

Opinion No. 124.

Warrants—State Warrants—Forged Endorsements—Possession, Payer Entitled to—State Auditor.

HELD: Where the payee's name has been forged in the endorsement of a state warrant but the warrant is not lost but is held by the person who cashed such warrant, the payee is not entitled to a duplicate warrant from the State Auditor. The payee is, however, entitled to possession of the warrant and may enforce his right in an action in claim and delivery.

June 22, 1935.

Mr. W. O. Whipps
Secretary, State Highway Commission
The Capitol

According to your request of June 3, for an opinion on the questions of law involved, the state auditor issued a warrant for \$165.00 in favor of A. W. Jones, a bridge inspector employed by the state highway commission, for services rendered by him from Jan-

fore, in this instance Section 159 does not authorize the state auditor to issue a duplicate warrant.

Jones is not remediless, however, though not entitled to a duplicate warrant. Being the owner of the original warrant (*First Nat. Bank v. Brown*, supra; *Flood v. City Nat. Bank*, 253 N. W. 509, 95 A. L. R. 1168), he may demand possession of it from the Hall Drug Company and, if possession be refused, he may institute an action in claim and delivery against the company. (Secs. 9220-9239, R. C. M. 1921.) The successful prosecution of such action would doubtless result in his being placed in actual physical control of the warrant.

The possibility of a criminal prosecution of the person responsible for the forged endorsement does not militate against the propriety of affirmative action on Jones' part. The warrant would be as effective as evidence after, as before, its payment by the state treasurer.