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WARRANT, WHEN ISSUED—LOST OR DESTROYED BEFORE DELIVERY TO PAYEE; §115.38 RC NOT APPLICABLE—BOND REQUIRED FOR EVERY DUPLICATE WARRANT ISSUED.

SYLLABUS:

1. A warrant drawn by the auditor of state on the treasurer of state in favor of a specified payee is not issued until delivered to such payee, and when such a warrant is lost or destroyed before delivery to such payee it is not issued, and Section 115.38, Revised Code, does not apply to the issuance of a substitute warrant to such payee. Third paragraph of the syllabus of Opinion No. 1110, Opinions of the Attorney General for 1939, page 1605, overruled.

2. When under Section 115.38, Revised Code, the auditor of state issues a duplicate warrant, he must require the bond prescribed therein.

Columbus, Ohio July 29, 1957

Hon. James A. Rhodes, Auditor of State
Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“Your advice is sought on the following:

“Under Section 115.38 R. C., the Auditor of State is duty bound, before issuing a duplicate warrant, to require the person making an application for a duplicate warrant, to furnish bond conditioned as the section outlines.

“Recently, the State Auditor issued a group of warrants to ‘A’ an agency of State Government. Among this group of warrants were five in which the payee was another agency of State Government, herein called ‘B’. ‘A’ admits receiving the warrants and claims to have mailed the five warrants to the payee, ‘B’. ‘B’ disclaims ever receiving the five warrants and desires five duplicate warrants. The five warrants in question total in excess of \$36,000 and are essential to ‘B’ to perform some official duty.

“‘A’, for reasons of economy, or otherwise, is reluctant to spend the money for premium on a surety bond and under the second branch of the syllabus of Opinion No. 1110, in the 1939 Ohio Attorney General’s Opinions, it appears that the Auditor of State cannot require ‘B’ to furnish a bond.

“Our questions on this subject are as follows:

‘1. How can ‘B’ obtain payment for these warrants and at the same time afford the Auditor of State the protection offered in Section 115.38 R. C.?’

‘2. Is the presumption that for every duplicate warrant issued there must be a surety bond issued under Section 115.38, R. C., correct?’”

Section 115.38, Revised Code, reads:

“If the auditor of state is satisfied, by affidavit or otherwise, that any warrant on the state treasury by him issued has been lost or destroyed prior to its presentation for payment and there is no reasonable probability of its being found or presented, he may issue to the proper person a duplicate of such lost or destroyed warrant, provided that before issuing such duplicate he shall require of the person making the application a bond in double the amount of the claim, payable to the state, with surety to the approval of the auditor of state and of the treasurer of state, and conditioned to make good any loss or damage sustained by any person on account of the issuance of said duplicate and the subsequent presentation and payment of the original. The form of said bond shall be prepared by the attorney general. The bond when executed shall be filed in the office of the treasurer of state. The duplicate warrant issued shall be plainly stamped or marked so that its character may be easily ascertained. The treasurer of state shall not be liable because of his paying any duplicate warrant issued under this section.”

You have referred to Opinion No. 1110, Opinions of the Attorney General for 1939, page 1605. The syllabus of that opinion reads:

“1. When a warrant is drawn by the Auditor of State upon the Treasurer of State, it does not become issued until delivered by the Auditor to the person lawfully authorized to receive it.

“2. If a warrant is drawn by the Auditor of State upon the Treasurer of State in favor of a particular payee but is lost or destroyed before delivery, the Auditor of State is not authorized by Section 246, General Code (Section 115.38, Revised Code) to require a bond from the payee as a condition precedent to the issuance and delivery of a substitute warrant, there having been no issuance of the lost or destroyed warrant.

“3. When the Auditor of State has drawn a warrant on the Treasurer of State and delivered it to a state official in order to enable him to perform his official duties and such warrant becomes lost or destroyed before delivery by such official to the payee, such public official may under authority of Section 246, General

Code, (Section 115.38, Revised Code) furnish proof of loss or destruction and a bond conditioned as specified on such section.

“4. When a warrant drawn by the Auditor of State on the State Treasurer has been delivered to the Director of Highways of the State of Ohio for the purpose of enabling such official to perform some official duty, the Director of Highways may under authority of Section 6, General Code, (Section 3.32, Revised Code) give a surety bond to the Auditor of State in order to comply with Section 246, General Code, in obtaining a duplicate warrant and pay therefor from funds appropriated by the legislature to his department for such purpose.”

The first two paragraphs of the syllabus of Opinion No. 1110 contain a correct statement of the law, and it remains only to apply it to your two questions.

In reply to your first question, it is my opinion that in this situation the auditor of state cannot have the protection afforded by Section 115.38, Revised Code.

The five missing warrants, payable to agency B as payee were delivered to agency A, which mailed them to B. B never received them. I invite your attention again to the second paragraph of the syllabus of Opinion No. 1110, *supra*. You will recall that Section 115.38, *supra*, applies only in cases where warrants have been *issued*. A warrant drawn by the auditor of state upon the treasurer of state is a negotiable instrument. Section 1301.01, Revised Code, defines the term “issue,” as applied to a negotiable instrument, as follows:

“ ‘Issue’ means the first delivery of the instrument, complete in form, to a person who takes it as a holder;”

The same section defines “holder” as follows:

“ ‘Holder’ means the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof;”

Thus an order instrument, payable to a specified payee, is not issued until delivered to that payee. The five missing warrants with which we are here concerned have not been issued. New warrants issued to B will not be duplicates but original warrants. Therefore, Section 115.38, Revised Code, does not apply.

Although your letter says the lost warrants were essential to performance of an official duty of B, later conversation developed that they were

thus essential to both A and B. The third paragraph of the syllabus of Opinion No. 1110, *supra*, states an exception to the above rule in cases where a warrant has been delivered to a state official in order to enable him to perform some official duty. The reasoning in Opinion No. 1110 in support of that paragraph of the syllabus indicates that it was the writer's view that delivery of a warrant to a public official in order to enable him to make delivery in connection with a duty of his office might be considered as a conditional issuance. In view of the clear provisions of the negotiable instruments law, I am unable to concur in that reasoning or in the exception stated.

This conclusion results, of course, in an unfortunate situation in which the auditor will be denied the protection afforded by Section 115.38, Revised Code, in cases where unissued warrants are lost. This, however, is beyond my power to remedy, for relief in this regard can be afforded only by the General Assembly.

The five warrants were undoubtedly drawn by the auditor in pursuance of some lawful duty or obligation. Since no warrants have been issued, that lawful duty or obligation has not been satisfied. Agency B is as much entitled to the five warrants now as it was originally, and the auditor cannot impose any new condition upon their issuance.

Your second question may be answered by reference to the language of Section 115.38, Revised Code. That section says that before issuing a duplicate warrant the auditor *shall require* bond. Thus the answer to your question is in the affirmative; for every duplicate warrant issued there must be a bond.

It must be kept in mind, however, that a warrant is not issued merely by the mechanical preparation of the paper and sending it out of the auditor's office. A warrant is a negotiable instrument, and as noted above is issued only when delivered to a holder. And until a warrant is issued, Section 115.38, Revised Code, does not apply, no duplicate is issued, and no bond may be required.

In specific response to your two questions, it is my opinion, and you are advised, that :

1. A warrant drawn by the auditor of state on the treasurer of state in favor of a specified payee is not issued until delivered to such payee, and when such a warrant is lost or destroyed before delivery to such payee it is

not issued, and Section 115.38, Revised Code, does not apply to the issuance of a substitute warrant to such payee. Third paragraph of the syllabus of Opinion No. 1110, Opinions of the Attorney General for 1939, page 1605, overruled.

2. When under Section 115.38, Revised Code, the auditor of state issues a duplicate warrant, he must require the bond prescribed therein.

Respectfully,
WILLIAM SAXBE
Attorney General