when the consent for such improvement has been granted by the municipal corporation. To authorize such a proceeding it is necessary that the highway extend through the limits of the corporation.

When an improvement is upon a street within a municipality which does not form part of a state highway running through the same, but is a continuation of a state highway, the Director of Highways is limited to maintenance and repair and the construction or reconstruction of bridges, and is not authorized to construct or reconstruct such street.

Respectfully,
GILBERT BETTMAN,
Attorney General.

511.

STATE WARRANT—FORGED BEFORE DELIVERY—PAYEE ENTITLED TO DUPLICATE—ISSUED ONLY WHEN DELIVERED TO PROPER PARTY.

1. *When state warrants are drawn by the state auditor in payment of obligations against the state and such warrants are lost before their delivery to the payee, or his agent, and without any fault on the part of the payee, the said payee is entitled to have warrants drawn and delivered to him in payment of the obligations for which the lost warrants had been drawn.*

2. *A state warrant is not "issued" until it is delivered to the person entitled to it.*

COLUMBUS, OHIO, June 12, 1929.

HON. H. H. GRISWOLD, *Director of Public Welfare, Columbus, Ohio.*

DEAR SIR:—This will acknowledge your request for my opinion, as follows:

> "On or about the first day of March of the present year vouchers were issued by this department in payment of certain items of indebtedness for supplies furnished. Warrants were drawn by the Auditor of State to cover the items and transmitted to this department. These warrants were stolen from the mailing desk, endorsements forged by the person who stole them and warrants cashed at various places finally clearing through various banks and paid by the Treasurer of State.
>
> This was not discovered until some ten days or two weeks after this incident occurred. The persons to whom these warrants were payable have never received compensation from the state and we desire to make payment to them at the earliest possible moment. Assuming that the obligations were incurred in such way as to be an encumbrance against the appropriation for the year 1929, will you kindly advise us as to whether we may issue duplicate vouchers for these amounts furnishing the Auditor of State with evidence that the original warrants had been cashed by persons other than the payees, and charge these disbursements against the proper appropriation made to our department or whether it will be necessary for the payees to be reimbursed through the action of the Sundry Claims Board and the General Assembly?"

By the terms of Sections 241, et seq., General Code, the Auditor of State is con-

stituted the chief accounting officer of the state and, as such, authorized to examine and audit claims against the state and to draw warrants for the payment of money from the state treasury in payment of such claims. No money shall be drawn from the state treasury except on his warrant. Section 242, General Code.

The only statutory authority for the auditor to issue a duplicate warrant, after once having issued a warrant for the payment of an obligation of the state, is that contained in Section 246, General Code, which reads in part as follows:

> "Whenever it is made to appear to the satisfaction of the auditor of state, 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, such auditor may issue to the proper person a duplicate of such lost or destroyed warrant, provided that before issuing such duplicate said auditor of state shall require of the person making such application a bond in double the amount of such claim, payable to the state of Ohio, with surety to the approval of said auditor and of the treasurer of state, and conditioned to make good any loss or damage sustained by any person or persons on account of the issuance of said duplicate and the subsequent presentation and payment of the original. * * * "

I take it that all the proceedings with reference to the indebtedness spoken of in your inquiry, except the delivery of the warrants to the persons entitled to them, had been regular. That is to say, at the time of incurring the obligation, in payment of which the warrants had been drawn, the director of finance had certified that there was a balance in the appropriation, pursuant to which such obligations were required to be paid, not otherwise obligated to pay precedent obligations, as required by Section 2288-2, General Code, and the Auditor of State had examined the vouchers presented to him and found them to be valid claims against the state and legally due and that there was money in the state treasury, duly appropriated, to pay them, and that all requirements of law with reference thereto had been complied with, as it is his duty to do, in compliance with Section 243 of the General Code, before drawing warrants therefor.

A state warrant is an instrument in writing drawn by the Auditor of State, acknowledging the debt and directing the treasurer of state to pay the same, upon presentation by the person named in the warrant, or his order. The issuing of the warrants is the method by which the ordinary and current expenses of a public corporation are paid from current moneys. It has been held that the grant of authority to make a contract or incur an obligation carries with it the implied power to issue warrants or orders in payment of the obligation. Where, however, the Legislature has provided the manner of issuing warrants and the person or officer who shall issue them, the law with respect thereto must be followed.

The law may impose on certain officials the ministerial duty merely of issuing warrants upon the presentation to them of a claim or charge, audited or allowed by certain other designated officials. Here the duty is obligatory and the official has no discretionary powers in the matter. The audit and allowance of a claim is a recognition of its existence as a valid outstanding indebtedness. The auditing and allowance of claims is of a quasi-judicial character, while the issuing of the warrant in payment of the claims is a ministerial act. The two acts are different and involve the exercise of separate and distinct functions. The duty of auditing and allowing claims and thereafter drawing or issuing warrants in payment of such claims may be imposed on the same official. The auditor of state is charged with the duty, by force of Section 243, General Code, of auditing claims presented for payment, and, after per-

forming this quasi-judicial duty, with the further ministerial duty of issuing warrants therefor. Inasmuch as the mere drawing or issuing of warrants is a ministerial duty, the auditor in performing such duty acts as a ministerial officer of limited power, fixed by statute, and it would seem clear that in the absence of authority therefor, he is not authorized to issue a duplicate warrant except as this authority is given to him by Section 246, supra, that being the only statute authorizing the issuance of duplicate warrants by the Auditor of State. It will be noted that the authority granted to the Auditor, by Section 246, supra, to issue a duplicate warrant, is limited to the cases where "any warrant on the state treasury by him issued has been lost or destroyed *prior to its presentation for payment.*"

Under the circumstances related in your inquiry, it becomes important to inquire whether or not the warrants in question had actually been issued. There is a marked difference between drawing a warrant and issuing a warrant. Warrants of the kind here under consideration are not negotiable instruments in the full sense of the term as used by the law merchant. They are non-negotiable and merely prima facie evidence of a valid claim against the corporation issuing them. Abbott on Public Securities, Section 450, and cases cited. They do, however, possess some of the characteristics of commercial paper and one of these characteristics is that delivery is essential to their validity. In Abbott on Public Securities, Section 448, it is said:

> "In common with other evidences of indebtedness, a warrant is not issued until it is delivered and this involves the question of its issue and delivery to the proper person."

In McQuillin on Municipal Corporations, Second Edition, Section 2406, it is said:

> "A warrant is not 'issued' nor valid until delivered into the hands of a person authorized to receive it. It follows that if a municipal officer obtains possession of warrants before delivery to the payee, and collects payment thereof and then absconds, the payee may compel the issuance to him of new warrants."

In *Stiffen* vs. *Long,* 165 Mo. App. 254, 147 S. W. 191, it is said:

> "A county warrant is in legal effect a promissory note, and until delivered to the payee therein is a nullity and he has no title or right of possession."

In *American Bridge Company* vs. *Wheeler,* 35 Wash. 40, 76 Pac. 534, it is said:

> "The issuance of a county warrant as required by Ballenger's Annotated Code, and Section 393, providing that the county auditor shall 'issue' warrants for claims allowed by the county commissioners and when the warrant is issued the stub shall be carefully retained, is not limited to the mere drawing of the warrant but includes the delivery thereof to the person entitled thereto."

Concededly, under the facts presented by you in your inquiry, the warrants had not been delivered and, therefore, in the light of the authorities considered above, these warrants were not "issued" in the sense that the term is used in the statute. The claims for which the warrants were meant to be in payment had been audited and allowed, else the warrants would not have been drawn. Inasmuch as they had not been delivered, it is my opinion that the persons to whom the obligations are owing

are now entitled to have warrants drawn payable to their order and delivered to them.

In reaching this conclusion, I am not unmindful of the holding of the Supreme court in the case of *State ex rel Creager* vs. *Billig, Auditor*, 104 O. S. 380. In that case it appears that William Creager had entered into a contract with Henry County for the construction of a road. Thereafter he sublet the grading of the road to one Schroeder, whereupon Schroeder took unto himself a partner, one Vajen, and commenced the performance of the contract. After Schroeder's contract had been partially performed, and before its completion, the county surveyor of Henry County issued to Creager two estimates of the work done. The commissioners duly allowed the estimates and the county auditor issued warrants thereon, drawn to the order of William Creager & Co. The auditor gave one of these warrants to Schroeder and the other to Vajen. The treasurer paid Schroeder the amount called for in the first warrant, upon his endorsement of the warrant in blank, and paid Vajen the amount of the second warrant, Vajen having endorsed the second warrant "William Creager & Co., Henry L. Vajen."

Creager claimed that he never authorized Schroeder or Vajen to receive the warrants and, in fact, had never authorized the issuance of the estimates upon the contract.

Creager, in an action in mandamus, sought to compel the auditor to issue and deliver to him warrants to cover the estimates. The court held that the relator, Creager, had failed to show a clear legal right and had failed to show any failure of a clear legal duty on the part of the county auditor in this case.

The situation in the Creager case does not appeal to me as being parallel with the situation about which you inquire. In the Creager case delivery had been made to persons whom the Auditor had at least thought were agents of Creager and not without reason, inasmuch as both of these parties were connected with the road job and, in the last analysis, were probably entitled to a part, if not all, of the money paid on the warrants. In other words, the Auditor used due care and diligence in the delivery of the warrants in question in the Creager case and thus complied with the intent and meaning of the law, while in the case here under consideration no delivery was made at all.

In fact, in the Creager case the court seems to base its opinion on the fact that there was a substantial compliance with the law in the delivery of the warrants. In the course of the opinion by Judge Hough, it is said:

> "He issued the warrants in the usual form, corresponding in amount to the allowance made by the county commissioners, and payable to the contractor or order, and then handed the warrants so drawn, in the first instance to Schroeder, and in the second instance to Vajen, who were connected with the road contract, of which fact there is probably no doubt that the auditor had information, although the record is silent as to whether or not he knew of their connection with the contract."
>
> There can be no doubt that public officials charged with the duty of issuing warrants for public funds should use due care and diligence in the delivery of warrants to the proper persons. On the other hand, it cannot be said that the auditor is an insurer, in the absence of a clear statutory mandate of that character. He must issue his warrants in conformity with the provisions of the statute and thereafter act in accordance with the rules of improved business methods. The warrants so issued were regular on their face, payable to the contractor or his order. Those warrants were transferable only upon the legal endorsement of the payee, the same as any commercial paper. There is nothing in the record tending to show that he did not act in the utmost faith, nor is there anything to show that he did not comply with the intent and meaning of the law."

In the case here under consideration, the warrants had been drawn by the state auditor and given to the director of public welfare or one of his subordinates for delivery to the payee. There is nothing before me to show that the director of public welfare, or his subordinate entrusted with the mailing of the warrants, was the agent of the payee named in the warrants, which, of course, might be possible if those payees had made him their agent, either by express direction or acquiescence, in a course of dealing so that such agency might be implied. In any case, that question would be a question of fact dependent upon the circumstances.

In the absence of any facts showing that the director of public welfare, or his mailing clerk, was the agent of the payee of the warrants, I assume for the purposes of this opinion that he was the agent of the state auditor to consummate delivery of the warrants to persons entitled to them.

Inasmuch as the warrants were stolen before the director of public welfare or his mailing clerk could accomplish their purpose, delivery was not made, and, therefore, the warrants were not "issued" in a legal sense. The theft might as well have taken place from the desk of the clerk who actually drew the warrants in the auditor's office, and after the auditor's records and the records of the director of finance had shown the appropriation against which warrants were charged to have been encumbered. In that case, it could not be said the warrants had been issued so as to charge the payees with the loss of the warrants. The present case presents no different situation.

In line with the authorities cited, to the effect that a warrant is not "issued" and is not legal or valid warrant until delivered to the party entitled to it, the paper writings which were stolen from the mailing desk in the department of public welfare were not "warrants of the auditor of state" as the term is used in Sections 301, 302 and 304 of the General Code, which provide in part as follows:

> "Sec. 301. "No money shall be paid out of the state treasury * * * except on the warrant of the auditor of state. * * * "
>
> Sec. 302. "The treasurer of state shall keep a record * * * of the number, date and amount of each warrant of the auditor of state, paid by him * * * . "
>
> Sec. 304. "The treasurer of state, on presentation, shall pay all warrants drawn on him by the auditor of state. * * * "

Although the treasurer treated these paper writings as warrants when they were presented for payment in the regular course of business, brought about through forged endorsements and paid them with state moneys in his possession, they were in reality not paid "out of the state treasury" in compliance with the statute, nor has the money used to meet these payments been drawn from the treasury in pursuance of the appropriation made for the purpose of meeting the obligations for the payment of which the warrants had been drawn, for the reason that the warrants were not legal or valid. Although this money has been paid, in a physical sense, out of state moneys kept in the state vaults, it has not in a legal sense been paid from the state treasury any more than would moneys which had been taken from these vaults without any authority whatever be withdrawing money from the state treasury. The amount of money so paid out by the state treasurer on these invalid warrants should be collected from the persons responsible for the payment by recognizing and giving validity to the forged endorsements, and returned to the state vaults from which it came.

Respectfully,

GILBERT BETTMAN,

Attorney General.