

O. Peasley, Deputy, and Chris Sutherland, Deputy Game Warden, has been presented to the Board of Examiners for approval. This claim is approved and signed by W. P. Sullivan, Ray G. Lowe and W. C. Keil, a majority of the members of the Fish and Game Commission. I am requested to express my opinion whether this claim should be approved by the Board of Examiners.

I shall not attempt to review the details of the dispute over the membership of the Fish and Game Commission.

#### I.

The first question to be answered is whether the three persons who approved the claim are lawful members of the Fish and Game Commission and qualified to act as such. As to Lowe and Keil, no one raises any question.

Sullivan's right to the office was contested by A. C. Baumgartner, and as a result, a quo warranto proceeding was instituted to determine which one is entitled to the office. On September 12, 1934, a judgment was made and entered in the District Court sustaining the right of W. P. Sullivan to the office and denying the claim of A. P. Baumgartner. On September 15, 1934, a notice of appeal from such judgment was filed, but there has been no stay order issued by any court, nor any supersedeas bond filed.

If, by reason of the judgment, Sullivan has been confirmed as a member of the Fish and Game Commission, then he, acting with Lowe and Keil, constitute a majority of the Commission, legally qualified, and their acts will be binding. It is urged that because an appeal has been taken, Sullivan is powerless to act until the appeal has been decided favorably to him. In the absence of statute so providing, a judgment in a quo warranto proceeding is not stayed by appeal. (51 C. J. 363; *Olmstead v. Distilling etc. Co.*, 73 Fed. 44; *People v. Mortenson*, 224 Ill. A. 221; *People v. Stevenson*, (Mich.) 57 N. W. 115; *Welch v. Cook*, (N. Y.) 7 How. Pr. 282; *State v. Wilson*, (N. C.) 28 S. E. 554, 61 A. S. R. 672; 22 R. C. L. 728; *People v. Reinberg*, (Ill.) 105 N. E. 715, Ann. Cas. 1915C 343, L. R. A. 1915E 401; *Fawcett v. Sup. Ct.* (Wash.) 46 Pac. 389, 55 A. S. R. 894 Note.)

It is my opinion, therefore, that by reason of the judgment of the District

#### Opinion No. 622

#### Fish and Game Commission—Payroll —Salaries—Board of Examiners, Powers of—Appointments—Quo Warranto, Effect of.

HELD: In the absence of a statute so providing a judgment in a quo warranto proceeding is not stayed by appeal and, therefore, Sullivan is entitled to exercise the powers of the office until such time as the Supreme Court might decide against him, and his signature to a Fish and Game Commission payroll will be counted in determining that a majority of the members of the commission have signed the payroll.

Since the game warden and his deputies are not of the class mentioned in Section 273, R. C. M., 1921, as amended by Chapter 176, Laws 1931, the attempted discharge of Game Warden Carney and Deputy Game Warden Peasley by a majority of the Board of Examiners was without effect.

October 8, 1934.

A payroll from the Fish and Game Department for the salaries of J. W. Carney, State Game Warden, Thomas

Court, Sullivan is entitled to exercise the powers of the office until such time as the Supreme Court might decide against him. If that be true, then three Commissioners, each legally entitled to hold the office at this time, being a majority of the Commission, have approved the claim and have ratified the employment of, and have vouched for the services of, the persons named in the payroll. With such evidence the Board of Examiners would be justified in approving the claim.

## II

On the 15th day of May, 1934, however, a majority of the State Board of Examiners, assuming to act under the authority of Chapter 176, Laws of 1931, adopted a resolution assuming to discharge Carney and Peasley from their positions, respectively, of Game Warden and Chief Deputy Game Warden. The pertinent part of that statute reads as follows:

"Section 273. From and after the passage of this Act the State Board of Examiners of the State of Montana shall by resolution fix and designate the number, compensation, term, and tenure of office of all assistants, clerks, and stenographers for all civil executive state officers, boards, commissions or departments. Said board shall likewise have the power to discontinue in any or all state offices or to discharge any of said assistants, clerks, or stenographers, for cause or otherwise, whenever in their judgment the best interests of the service requires such actions."

It will be observed that the power of the Board to discharge is limited to "said assistants, clerks or stenographers". It is obvious that a game warden, or a deputy game warden, is not a "clerk" or a "stenographer." Neither, under the authorities, is an "assistant" the same as a "deputy." In *U. S. v. Adams*, 24 Fed. 348, the Court said: "An assistant, is one who stands by, helps or aids another. He is not a deputy, and cannot, therefore, act in the name of and for the person he assists, but only with him and under his direction, unless otherwise provided expressly by law." (See also: *Ellison v. Stevenson*, 6 T. B. Mon. (Ky.) 271, 276, 279; *Wright v. Wheeler*, 30 N. C. 184, 187; *U. S. v. Adams*, 24 Fed. 348; cases cited in note Ann Cas. 1912A 1270-72.)

It is obvious that the Game Warden himself is not an assistant, clerk, or stenographer.

The deputy game wardens are "deputies" within the full meaning of the term because they actually act for the game warden and exercise his powers within the limits of their duties. Such a deputy is a public officer, known and recognized as such by law. (*Mecham on Public Offices and Officers*, sec. 38.) The distinction between an officer and a mere employee is also recognized by the Supreme Court of Montana in the case of *State ex rel. Barney v. Hawkins*, 79 Mont. 506.

Since the game warden and his deputies are not of the class mentioned in the statute, it is my opinion that the attempted discharge by a majority of the Board of Examiners was without effect.

## III

In the case of *Sutherland*, no order was made discharging him. He was employed by the State Game Warden but no approval was given by the Board of Examiners. It is contended that his employment is invalid for two reasons: (1) That the Commission had no power to appoint him because the pending quo warranto proceedings put in to question the power of the commission; and, (2) that it was not approved by the Board of Examiners.

As to the first point, this is disposed of by what we have said concerning the effect of the judgment in the *Sullivan* case.

As to the first point, again it is pointed out that the authority of the board exists only with reference to "assistants, clerks and stenographers," and does not apply to deputies.

Upon the facts before me it is my opinion the payroll should be approved.