Power of President to Mitigate Sentence of Death.

The President may so far mitigate a sentence of death pronounced by a naval court-martial as to substitute a milder punishment in its stead.

Office of the Attorney General,

January 4, 1820.

Sir: Your letter of the 30th ultimo submits, for my opinion, the power of the President to change the sentence of death,
which has been passed by a general court-martial on William Bansman, a private in the marine corps, into a sentence of "service and restraint for the space of one year; after which, to cause him to be drummed from the marine corps as a disgrace to it."

By the 42d article of the rules and regulations for the government of the navy of the United States, (to which the marine corps is subjected by vol. 3, Laws United States, p. 96,) it is provided that "the President of the United States shall possess full power to pardon any offence committed against these articles, after conviction, or to mitigate the punishment decreed by a court martial," (same vol., p. 358.) The power of pardoning the offence does not, in my opinion, include the power of changing the punishment; but the power to mitigate the punishment decreed by a court-martial cannot, I think, be fairly understood in any other sense than as meaning a power to substitute a milder punishment in the place of that decreed by the court-martial; in which sense, it would justify the sentence which the President purposes to substitute in the case under consideration. The only doubt which occurs to me as possible, in regard to this construction, is, whether the power of mitigating a punishment includes the power of changing its species; whether it means anything more than lessening the quantity, preserving nevertheless the species of the punishment. But there is nothing in the force of the terms in which the power is given that ties us down to so narrow a construction. Had the phraseology been—"the President shall have power to remit in part, or in whole, the punishment decreed by the sentence of a court-martial," he would have been restricted to the single mode of mitigation which the objection supposes—that of lessening the quantity; but a power of mitigation, in general terms, leaves the manner of performing this act of mercy to himself; and if it can be performed in no other way than by changing its species, the President has, in my opinion, the power of adopting this form of mitigation. Such is precisely the case under consideration. A sentence of death cannot be mitigated in any other way than by changing the punishment. To deny him the power of changing the punishment in this instance, is to deny him the power of mitigating
TO THE SECRETARY OF THE NAVY.

Power of President to Mitigate Sentence of Death.

the severest of all punishments; while you leave open to him the comparatively insignificant power of mitigating the milder class of punishments; or, in other words, to refuse mercy in the case in which, of all others, it is most loudly demanded. To say that the President may pardon a capital offence altogether, and thereby annul the sentence of death, is no answer to this argument. Congress foresaw that there were cases in which the exercise of the power of entire pardon might be proper; they, therefore, in the first branch of the article under consideration, give to the President the power of entire pardon. But they foresaw, also, that there would be cases in which it would be improper to pardon the offence entirely; in which there ought to be some punishment; but in which, nevertheless, it might be proper to inflict a milder punishment than that decreed by the court-martial: and hence, in another and distinct member of the article, they give him, in general terms, the separate and distinct power of mitigation. To deny him the exercise of this power in relation to a sentence of death, and to throw him, in such a case, on his own power of entire pardon, as the only act of mercy which he can exercise, would be to compel him, contrary to his reason and judgment, to extend the greatest mercy to those who had deserved it least; for while it is true that sentences of death are those which appeal most strongly to mercy, because they deal in blood, it is no less true that they are precisely those which are least worthy of an entire pardon, because they are pronounced only in cases of enormity. In other words, they are those in which the power of mitigation applies with peculiar propriety. I think, therefore, from the generality of the terms in which the 42d article of the rules and regulations for the government of the navy of the United States gives to the President the power to mitigate the punishment (any punishment) decreed by a court-martial, as well as from the obvious reason of the power, that the President has the right to mitigate a sentence of death; and that every argument for the exercise of the power in inferior cases, applies a fortiori to such a sentence. And since a sentence of death can be mitigated only by changing it, my opinion is, that the President has the power, in the case of
William Bansman, to substitute the milder punishment which he contemplates.

It is proper to state, however, that a different construction is practically given to this power in the Department of War; for there the power of mitigation is not understood as giving the power to change the punishment. In how many instances this different construction has been given, or whether the President has, by any sentence which has reached him through that department, been called upon to pass on it, I am not informed. If this construction in that department has grown out of the exercise of the power of mitigation given to the commanding officers who order the courts martial, under the 89th article of the Rules and Articles of War, (see vol. 4, Laws United States, p. 26,) it is very easily understood why the power of mitigation has never been exercised in such cases by changing the species; but, on the contrary, has been exercised only in lessening the quantity; because, by that article the power is confined to mitigating sentences other and less than sentences of death and cashiering an officer—in which inferior sentences the power of mitigating may be exercised without changing the species, merely by lessening the quantity. But if this be the origin of this practical construction in the Department of War, it furnishes no rule for a case where there can be no mitigation without a change. The practice under the English law carries the power of mitigating the sentence of a court-martial much farther than is necessary to the construction for which I contend. McArthur (in his first volume, page 181) gives us the case of Lieutenant Colonel Jephson, who was sentenced to be suspended from rank and pay for six months. The King, from the circumstance of the detriment which the army would sustain from so long a suspension of a field officer at so critical a juncture, (it was in 1804, and in Ireland,) deemed it indispensable that Jephson should retire; permitting him to receive the regulated price for his commission from the officer who should be appointed to succeed him. "This," says McArthur, "on a superficial view, appears to be an alteration of the sentence." But he defends it on the ground that it does not add to the judgment; that it subjects
him to less punishment, not to more, than the court had prescribed; and was, in truth, merely a mitigation of the sentence.

I have the honor, &c.

WM. WIRT.

To the Secretary of the Navy.

TITLE TO THE PEA PATCH.

The United States, being in possession of the Pea Patch under title derived from the Duke of York, may require a prosecutor to show title in himself, before any proof of title need be deduced; and a prosecutor, under deed taking for its western boundary the east side of the Delaware river and bay, can never reach the Pea Patch.

OFFICE OF ATTORNEY GENERAL,

January 5, 1820.

Sir: It is only within a few days back that I have been put in possession of copies of all the documents that can be found relative to the title to the island in Delaware river, called the Pea Patch. Even yet, the grant from the Crown, on which the title of the State of Delaware to that island is founded, has not been procured and forwarded. If such a grant ever existed, (of which the district attorney for Delaware doubts,) and its production should hereafter become necessary, it may be, I presume, obtained through our minister at London. But I apprehend it will not be necessary on the trial of the suit which Doctor Gale has instituted against the officers of the United States: because the plaintiff must show a title in himself, before the defendant in possession can be required to produce any proof of title; and Doctor Gale, according to the evidence before me, can show no title in himself; and because, if he could exhibit proof which would call upon us to show our title, we can rest, I think, securely on our length of possession under the title derived from the Duke of York, afterwards King of England.

The territorial title of the State of New Jersey, under which Doctor Gale claims, takes for its western boundary, in the most express terms, the east side of the Delaware bay and river. Such is the language of the grant to the Duke of York; and