HON. JOHN Y. MASON

Power of President to Mitigate Sentences of Courts-Martial.

The authority of the President to mitigate the sentences of courts-martial, in cases where he deems the punishment unnecessarily severe, does not extend to the substitution of another punishment for that decreed by the court. He cannot suspend the pay of an officer under sentence of a court-martial, whose pay was not suspended by the court. The mitigation must be of the punishment adjudged, by reducing and modifying its severity, except in cases of sentences of death, where there is no inferior degree.

ATTORNEY GENERAL'S OFFICE,
October 16, 1845.

Sir: I had the honor to receive your communication of the 10th of April last, with the papers enclosed, in relation to a claim of Commander Ramsey for pay while suspended from duty; and, agreeably to your request, have examined the subject, and now communicate to you my opinion.

The circumstances of the case, and the delicate questions involved, have made it a very embarrassing question to me; and the delay has been mainly induced by the purchase and collection of all the authorities which I had reason to believe would afford me aid in arriving at a satisfactory conclusion. It appears that, in the month of May, 1843, Commander Ram-
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sey was sentenced by a naval court-martial to be suspended from all rank and command in the navy of the United States, for and during the period of five years. The court-martial was ordered by the Secretary of the Navy, and was convened, and held its sitting at Norfolk, in Virginia.

On the 17th of July, 1843, the President of the United States endorsed on the record: "Upon a full review of all the facts and circumstances in this case, I regard the sentence as too severe. Let it be commuted to a suspension of six months from this day, without pay." The term of suspension, thus reduced, expired on the 17th of January, 1844; and, during this period, it appears that Commander Ramsey made an application for pay, and none was allowed him. On the 9th of April, 1845, the Fourth Auditor announces that Commander Ramsey has made the application which gives occasion to this examination. It does not appear that the commutation of the sentence was made at Commander Ramsey's request, or that the condition was accepted by him. The question is, Has the order of the President deprived him of his pay for the six months during which he was suspended, under the mitigation of sentence? The 42d article of the 1st section of the act of April 23, 1800, gives to the President of the United States, or, when the trial takes place out of the United States, to the commander of the fleet or squadron, "full power to pardon any offence committed against these articles, after conviction, or to mitigate the punishment decreed by a court-martial." The 40th article declares "that, whenever a court-martial shall sentence any officer to be suspended, the court shall have power to suspend his pay and emoluments for the whole or any part of the time of his suspension." And, by the 41st article, all sentences of courts-martial, other than those extending to loss of life, or to the dismissal of a commissioned or warrant officer, may be carried into effect, on the approval of the sentence by the officer ordering the court-martial.

The sentence of the court in the case of Commander Ramsey did not involve the loss of life or of his commission, and did not require the approval of the President. It was submitted to him for the exercise of his power of pardon or of mitigation. The suspension from rank and command for five years was
the punishment inflicted. He would, under this sentence, have been entitled to receive pay. The court did not exercise the power given them to suspend his pay for any portion of the time; this, under the act of 1800, was an independent punishment which they did not inflict.

The first inquiry is, did the President, in his order of July 17, exercise his power of pardon, given not only by the act, but by the constitution; or did he exercise his power of mitigation? In the case of the United States vs. Wilson, (7 Pet. Reps., 150,) Chief Justice Marshall, in delivering the opinion of the court, says: "A pardon is an act of grace proceeding from the power intrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed. * * *

It is a deed, to the validity of which, delivery is essential; and delivery is not complete without acceptance. It may be rejected by the person to whom it is tendered, and we have discovered no power in a court to force it upon him. * * * A pardon may be conditional, and the condition may be more objectionable than the punishment inflicted by the judgment. "It is the private though official act of the executive magistrate, delivered to the individual for whose benefit it is intended, and not communicated officially to the court."

Applying these principles to the circumstances of this case, it is clear that the President did not exercise the power of pardon. Did his power to mitigate the sentence include the power to commute or substitute another and different punishment for so much of the sentence as he remitted?

It is very much to be regretted that the question has not been definitively settled under the law and constitution. At the War Department it has always been considered that the Executive has not the power, by way of mitigation, to substitute a different punishment for that inflicted by sentence of a court-martial—the general rule being that the mitigated sentence must be a part of the punishment decreed. In 1820, Mr. Wirt gave an opinion recognising this rule, but made a substitution of a different punishment for the sentence of death an exception; and he places it on the ground that capital punishment can only be mitigated by a change of punishment.
In the navy the practical construction has not been uniform. I have procured and carefully examined the most approved authorities on the subject of military law and courts-martial; and the law seems to be established as laid down by Kennedy, (pages 236-7:) "The sovereign may either cause the sentence to be put into execution, mitigate, or remit it, but he cannot substitute a different punishment for the one awarded by the court; nor can he in any respect add to that punishment. He may mitigate it; that is, a sentence of twelve months may be reduced to six months; but the mitigated punishment must be ejusdem generis with that inflicted by the sentence quod omne majus continet minus."

And McArthur remarks, "that this mitigation may, on a superficial view, appear to be an alteration of the sentence; but when it is considered that it does not add to the judgment, and that it is a fundamental law of England, of which the martial is a branch, that a man cannot suffer more punishment than the law assigns, but that he may suffer less, the mitigation here alluded to from a greater to a less punishment exhibits, in a favorable view, the benign exercise of royal clemency."

The act of Congress has made a suspension of pay a punishment to be inflicted; or not, in a single class of cases, at the discretion of the court.

The Executive may dismiss from the service without trial, and he may suspend from duty by arrest; but he has no power while an officer retains his commission, and is not sentenced by a court martial to that effect, to take from him the pay which the law gives him.

When an officer is brought to trial, and is sentenced to be punished, the Executive may mitigate the severity of that punishment; but there is a guide—the discretion is a legal discretion, and the mitigation must not be according to a capricious will, but must have the sanction of the judgment of the court. It must inflict a part of the punishment awarded by the judgment, with the exception of those cases in which there is no degree, as where the whole punishment must be inflicted, or no part of it can be. Such is the case with a sentence of death. I am constrained to the opinion, therefore, that Commander Ramsey is entitled to pay during the period mentioned in the
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Fourth Auditor's letter, notwithstanding the terms in which the President commuted his sentence.

I have the honor to be, respectfully, sir, your obedient servant,

J. Y. MASON.

Hon. George Bancroft,
Secretary of the Navy.

COMPENSATION OF DISTRICT ATTORNEYS.

District attorneys residing in Louisiana and other States, whose legislatures have omitted to provide any rate or scale of fees for legal services in their supreme courts, are nevertheless entitled to a reasonable compensation for their official services; and as it has been the practice of the treasury, in such cases, to allow bills of costs according to the rates certified and taxed by the judges for district attorneys in neighboring States, as reasonable, when certified by one or more prominent members of the bar, such usage may be continued until Congress shall otherwise determine.

Baylie Peyton, the district attorney of the eastern district of Louisiana, is therefore entitled to compensation for official services rendered in civil and criminal suits in the circuit court of his district.

ATTORNEY GENERAL'S Office,
November 10, 1845.

Sir: On the 4th instant you made an endorsement on an account presented by Baylie Peyton, esq., to the treasury, in these words: "Referred to the Attorney General for his opinion on the legal question, whether any allowance can be made."

The amount purports to be a claim on the part of Mr. Peyton, as late district attorney for the eastern district of Louisiana, for official services rendered in the circuit court of the said district. From the description which accompanies your reference, the services of the district attorney, for which the claim to compensation is made, were rendered in cases of indictment, and of civil actions. Some of the latter were for real estate, and many were revenue cases. The legal question which I understand to be submitted for my opinion, is whether any compensation can be made for such official services. The magnitude of the interests involved, the amount of labor and professional service rendered, and the quantum of compensation, I do not regard as within the scope of the reference; but