PARDONING POWER OF THE PRESIDENT.

The President, in the exercise of the pardoning power vested in him by the Constitution, may remit penalties and fines adjudged, in the Circuit Court of the District of Columbia, against parties convicted of aiding the escape of slaves from their masters, and discharge them from imprisonment; or he may merely discharge them from imprisonment without remitting the fines.

The President.

J. J. CRITTENDEN.
SIR: I have now the honor to submit my reply to the questions, you were pleased some time ago to propound to me, in respect to the cases of Daniel Drayton and Edward Sears, and to your constitutional power to pardon and discharge them from the penalties, and imprisonment therefor, to which they were sentenced on an indictment for aiding and assisting slaves to escape from their owners.

Before stating or replying more particularly to those questions, it would be proper to present a more exact and circumstantial statement of the cases of Drayton and Sears.

These persons were severally indicted for numerous offences against a statute of the State of Maryland, passed in 1796, (Kilty's ed. of the laws of Maryland, chap. 67, sec. 19,) and adopted and continued by Congress as the law of that part of the District of Columbia, which was ceded by that State to the United States for the seat of the national government.

That statute is in the following words: "And be it enacted, that any person or persons, who shall hereafter be convicted of giving a pass to any slave or person held to service, or shall be found to assist, by advice, donation or loan, or otherwise, the transporting of any slave, or any person held to service, from this State, or by any other unlawful means depriving a master or owner of the service of his slave or person held to service, for every such offence, the party aggrieved shall recover damages in an action on the case, against such offender or offenders, and such offender or offenders also shall be liable, upon indictment and conviction upon verdict, confession, or otherwise, in this State, in any county court where such offence shall happen, be fined a sum not exceeding two hundred dollars at the discretion of the court, one-half to the use of the master or owner of such slave, the other half to the county school, in case there be any, if no such school, to the use of the county."

By an act of Congress of the 3d of March, 1801, (2 Stat. at large, p. 115, ch. 24, sec. 2,) it is enacted, "That all indictments shall run in the name of the United States, and conclude, against the peace and government thereof. And all fines,
penalties, and forfeitures, accruing under the laws of the States of Maryland and Virginia, which by adoption have become the laws of this district, shall be recovered with costs by indictment or information in the name of the United States, or by action of debt, in the name of the United States and of the informer; one-half of which fine shall accrue to the United States, and the other half to the informer; and the said fines shall be collected by or paid to the marshal, and one-half thereof shall be by him, paid over to the board of commissioners hereinafter established, and the other half to the informer; and the marshal shall have the same power regarding their collection, and be subject to the same rules and regulations as to the payment thereof, as the sheriffs of the respective States of Maryland and Virginia are subject to, in relation to the same."

Under these statutes, as it appears, many indictments, running in the name of the United States, were found against Drayton and Sears, severally to the number of seventy-four; each indictment being founded on the alleged "transporting" of a single slave: being convicted on all those indictments, Drayton was sentenced on each to a fine, less than $200 in each case, and costs, amounting to the aggregate sum of $11,802.26, and Sears to a fine of less than $200, in each case, and costs in each case, amounting in the whole, to the sum of $8,686.12. These proceedings were had in the criminal court for the District of Columbia, and county of Washington, and the judgment in each case seems to leave for the fine to be paid as directed by the Maryland statute, one-half to the owner of the slave named in the indictment, and the other half to the county school, to the board of commissioners for the use of the county, &c.

Upon the rendition of these judgments, the defendants, Drayton and Sears, were, on the motion of the district attorney of the United States, committed to prison until payment of the fines and costs adjudged against them respectively. In pursuance of this commitment, they have been imprisoned ever since the date of their sentence in 1848, and are yet in prison.

Upon the petition of these men for your clemency, a question has arisen as to the power of the President to pardon them in such a case, and by his pardon to discharge them either from
their imprisonment, or from their fines, or from both. On that question you have been pleased to require my legal opinion.

I have given to the subject the best consideration of which I am capable, and it has resulted in the conviction that under the Constitution, the President has the power to grant, in this case, a full pardon, and to discharge the parties from the penalties and imprisonment to which they have been sentenced.

By the Constitution, the President has power "to grant reprieves and pardons for offences against the United States, except in cases of impeachment." With this single exception, the power of the President is unqualified and unlimited. It extends to and embraces all other offences against the United States; and includes the power of remitting fines, penalties and forfeitures. (Story, Commentaries on the Constitution, vol. 2, sec. 1,504.) Except in the case of impeachment, no offence against the United States is beyond the reach of pardon. That is a prerogative, which is believed to exist in every known government, and to be equally demanded by justice, policy and humanity. It would have been strange indeed, if that common attribute of sovereignty, the power of pardon, had been found wanting in our Constitution. But we do find it there in all its amplitude, delegated in general, unqualified terms; in plain, common, simple language, seeming to require for its proper understanding and interpretation, no reference or resort to any mere technical or legal knowledge, to be derived from the systems or practices of any other government or governments.

For myself, I should be reluctant to adopt any construction that would weaken or restrain the beneficent power of pardoning.

That power, whatever its extent may be, is vested in the President by the Constitution, and cannot be diminished or controlled by Congress.

It is equally indisputable that the offence of the petitioners, Drayton and Sears, is an "offence against the United States," that they have been prosecuted, convicted and sentenced for it, at the suit, and in the name of the United States. It is a prosecution by the United States, for an offence against the United States. So far, then, it is perfectly clear, that it is within the pardoning power of the President, according to the very letter, as well as the plain meaning of the Constitution.
Why then, so far as the question of power is concerned, may he not pardon the offence of these men, and discharge them from the fines and imprisonment they have incurred as the consequence of that offence? The answer given to this, is, that by the law above cited, and by the judgments of the court, the owner of said slaves and the board of commissioners aforesaid, have respectively become vested with a right to said fines, each party to a moiety thereof; that the President cannot divest them of that right by his pardon, or deprive them of the means of enforcing payment of said fines, by discharging the person fined from the imprisonment; and that his power of pardoning is therefore excluded from such a case.

This answer seems to me to be utterly fallacious, and in some respects offensive to public justice.

It is not necessary, in this case, to discuss the legal quality and character of the right or interest of the claimants of these fines, or to decide whether they can properly and legally be denominated as "vested" in contradistinction to less perfect or inchoate rights or interests. My opinion is that, so far at least as respects the governments, they are not, in any legal sense, vested rights or interests, or any thing more than a mere expectancy, dependent on the discretion of the government in enforcing the collection of said fines. Until these are collected and paid to them, the individual claimants have no vested interest. And this opinion, I think, is sustained by the argument and decision of the Supreme Court, in the case of the United States vs. Morris. (10 Wheat, Rep. 290 and 291.) Till that consummation, by collection and payment, the claimants have no absolute right or property in those fines. If this be correct, it follows that, as the fines have not yet been collected, the claimants have no vested interest; and if there be no vested interest in the way, it follows also, that the President's power to pardon is unquestionable.

But suppose the interests of these claimants to be, now, a vested interest, an interest vested in them by law; does such an interest, per se, frustrate and defeat the pardoning power of the President? Or is it not rather to be understood as an interest granted and vested in subordination to that power, and defensible by its exercise?
The pardoning power of the President is fixed by the Constitution. It is unalterable by the legislature. It was vested in him, not merely for the purpose of decorating or dignifying his high office, but for the public good. It extends to and embraces the case of Drayton and Sears, unless it has been curtailed and excluded by the statutes, which have appropriated to certain individuals and uses, the fines imposed on those men for a public offence. But no statutes could have that effect.—The Constitution would make void all such legislation.

Besides this want of power in the legislature, what ground is there to infer any intention on their part to exclude the President’s prerogative in this case, if they had had the power so to do? They have expressed no such purpose—they have but exercised their own proper legislative functions, in disposing of said fines, leaving all the other organs and departments of the government, to the free and unrestricted exercise of their proper functions in relation to the same subject. It will not be denied, but that the President might have directed a dismission of the prosecution from which these fines have resulted, at any time before judgment. The grant of these fines most certainly was not intended to deprive the President of that power of dismission; and if the rights of individual grantees were left subject to that power, what possible reason or pretense can there be for supposing that they were not left equally subject to his power to pardon, either before or after condemnation?

My strong conviction is, that the grant of the fines in this case must be understood to be subject to the pardoning power of the President, and defeasible by its exercise. The interest created by such a grant is no more than this, that if the prosecution be successful, and if the court shall thereupon adjudge a fine, and if the same shall not be pardoned, but its collection enforced, then the amount of it shall be paid to those to whom the law has given it.

In this way the action of every branch or organ of the government is harmonized, and each is left free to exercise its appropriate function, thus allowing to the accused the full benefit of all those safeguards, which the law in its justice or in its mercy has given them; while, at the same time, it leaves to the legislative grantees of the fines imposed, the hope and the right
to receive whatever amount thereof may be finally exacted and collected. But what that amount shall be, is a matter determinable, in the last resort, by the President, in the exercise of his power to pardon. The imposition of these fines, into whatever pockets they may go when collected, is a punishment inflicted on a public prosecution, for an offence against the United States, and must be regarded as having for its primary, if not its sole purpose, the vindication of public law and public justice. And, in acting on such a case, the President should be governed only by those public considerations that ought to influence his general exercise of the pardoning power, with no other regard to the private interests that may have been interpolated, than is consistent with those public considerations.

But, on the other hand, it has been suggested, and may be contended, that the legislative grantees of these fines have, by that grant, acquired a vested interest, which forms an insuperable barrier to the power of the President, and which his pardon cannot divest or affect; and furthermore that it follows as a consequence, that they have an interest in the remedy or means of coercing payment of those fines by the commitment and imprisonment of the parties fined, and that those parties cannot, therefore, be discharged from their imprisonment by any exercise of the pardoning power.

I dissent from the proposition suggested, and the consequence attempted to be deduced from it. Such a doctrine would, in effect, convert a public prosecution into a civil suit, a public punishment into a private debt, and pervert the criminal law of the country from its high, just and merciful ends, to the petty purposes of personal interest or vindictiveness.

Most certainly I do not intend any reflection or imputation upon the many respectable parties, to whom these fines have been granted. I am discussing general propositions of law, and their possible and probable consequences, without any reference of a personal character, without any purpose of exciting sympathy on one side, or prejudice on the other.

In a previous part of this opinion, I have endeavored to show what was the true nature and quality of the statutory interest of the distributees of the fines in question, and on that I rely as answering all the arguments that are founded upon their supposed
vested interests, and all the consequences that can be deduced from those interests. These consequences, as above stated, seem to me so subversive of the plain principles and ends of public justice, that they work their own refutation.

This doctrine of the "vested interest," indefeasible by the pardoning power, has sometimes been attempted to be sustained by analogies drawn from the common law; and instances are cited of qui tam actions, brought by any informer who pleases to sue, or by the party aggrieved upon penal statutes, in respect to which it is said to be established, by the decisions of the English courts, that the king's pardon will not defeat the qui tam action of the common informer, unless it be granted before suit brought, and that it will not, if granted after suit brought, defeat the action of the aggrieved party. All this may be very correct. I shall not dispute it. But these are cases of actions, given by statute, brought in the name of private parties, at their own cost, and under their own control and management. These, it may be admitted, the king cannot defeat by his pardon, and he cannot do so, simply because they are the suit of private parties. Such authorities have no application to the case now under consideration, which is not that of a suit by private parties, it is a criminal prosecution, in the name of the United States, for a public offence. It is, in a word, the suit of the United States; and it must follow, therefore, that those decisions, in respect to qui tam actions, and the reasoning on which they are founded, have no application to the present subject.

The grantees of the fines in question were, in no sense, parties to the prosecution. They were liable for none of its costs or expenses, they contributed to it in no way, they do not even appear on the record as informers. They had no legal relation to, or connection with, the prosecution. They are merely the statutory recipients of the fines when collected, while, in the meantime, the prosecution, from beginning to end, is exclusively in the hands of the United States and their functionaries, for all the purposes of public mercy as well as public justice, of pardon or punishment.

To those recipients, it is a mere gratuity, a simple donation. To the board of commissioners it is clearly so; and so it is, also, to the owners of the slaves transported, for to them an action
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is expressly given by the statute to recover full satisfaction for the injury done to them; and, therefore, whatever share of the fines they may receive is just so much gratuity given. Their interests and, rights, as mere recipients, do not commence till the prosecution ends, and are limited to the amount actually collected, without impairing the pardoning power of the President.

In my limited examination of English authorities on this subject, I have met with no decision, which directly and clearly determines that the king cannot, by his pardon, remit fines in cases like the present, where the fines imposed were the result of a public prosecution. Some of those authorities seem to look that way, and even if they ought to be regarded as having gone to the whole extent of excluding the king’s pardoning power from such cases, it does not seem to me that any conclusive effect ought to be allowed them in this country.

In England, the king’s prerogative of pardon is subject to the power of parliament, and may be diminished or curtailed by statutes withdrawing cases from its operation; and the question, in an English court, as to the efficacy of such pardon, would be one simply of interpretation of the statute, and whether it was the intent of parliament, thereby, to exclude or withdraw from the pardoning power the particular case to which the pardon applied.

If such an intent was indicated by the statute, and was inferable either from the private interest granted to, or vested in, individuals, or from any language of the statute, the pardon would be unavailing, because the power of parliament was superior to the prerogative of the king.

But the case is quite different in the United States. The power of the President to pardon is given by the Constitution, and cannot be taken away or curtailed in any degree by the authority of Congress. No such unconstitutional intention ought, by mere construction, to be imputed to Congress, or to its acts; and if such intention was ever so apparent, it could have no effect upon the pardoning power of the President, nor upon any pardon granted by him, within the wide scope of that power.

The difference between the prerogative of the king, and the constitutional power of the President to pardon, forms a marked ground of distinction between the doctrine that might very
legitimately prevail in England, and that which ought to be adopted in the United States, in relation to the present subject.

The views, which I have endeavored to present, are fully sanctioned, as it seems to me, by the judicial decisions of the Supreme Court of the United States, (United States vs. Morris, 10 Wheat. p. 281,) and the Supreme Court of the State of Kentucky (Rout vs. Feemster, 7 J. J. Marshall, 132.)

In the first of these cases, the principal question was, as to the effect of a remission by the Secretary of the Treasury; and it was decided that he had authority under the remission act of the 3rd of March, 1797, (1 Stat. at large, p. 506, ch. 13,) to remit forfeitures on penalties accruing under the revenue laws, either before or after penal judgment, and until the money arising from the forfeiture or penalty was paid over to the collector for distribution, and that such remission extends to the shares of the forfeiture or penalty, to which the officers of the customs are entitled, as to the interest of the United States.

Under the collection act of 1799, (1 Stat at large, p. 695, &c., sections 89 and 91,) the officers of the customs were to have one-half of those forfeitures or penalties, and the question in the case was, whether the Secretary could remit that half under the authority given him by the said act of the 3rd of March, 1797. That act provides "that whenever any person or persons, who shall have incurred any fine, penalty, forfeiture or disability" under the present or any future revenue laws of the United States, shall, in the manner prescribed, prefer his petition, &c.; the Secretary of the Treasury "shall thereupon, have power to mitigate or remit such fine, forfeiture or penalty, or remove such disability, or any part thereof, if, in his opinion, the same shall have been incurred without wilful negligence, or any intention of fraud in the person or persons incurring the same; and to direct the prosecution, if any shall have been instituted for the recovery thereof, to cease, and to be discontinued upon such terms or conditions as he may deem reasonable and just."

It is admitted by all American jurists and commentators upon the Constitution, that the President’s power to pardon includes the power to remit fines, penalties or forfeitures. That power in him is plenary, and is conferred by the Constitution in terms at least as ample, absolute and comprehensive as those used in
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the statute to confer on the Secretary the power to "remit" fines, forfeiture, and penalties. And as it has been solemnly decided by the Supreme Court, that the statutory authority of the Secretary does enable him, by his remission, to release and discharge after judgment, the share of the custom officers in those penalties and forfeitures, it seems to me that it must necessarily follow, upon the same rules of construction and the same principles of law, that the more unlimited constitutional power of the President enables him, by his pardon, to remit fines adjudged in criminal prosecution, although those fines may by law have been distributable to informers or other individuals. The interest of such informers and individual distributees is altogether conditional and subordinate to the power of pardon, or remission; and vests no absolute right in them "until the money is received." So says the Supreme Court.

The analogy of the case of the United States vs. Morris, to the present question, is too obvious and decisive to require further remark or illustration.

The Kentucky case of Routt vs. Feemster, (7 J. J. Marshall, 132,) is almost identical with the present, with this difference only, that the question there related to the pardoning power of the Governor of the State, and here to that of the President. The constitutional power of each, in that respect, was the same, and the decision of the court was so precisely upon the point now in discussion, that I must be excused for making a long quotation from it. In rendering that decision the court says:

"The act of 1823, under which Routt was prosecuted, says that any prosecuting attorney who shall prosecute any person to conviction under it, shall be entitled to twenty-five per cent. of the amount of such fine as shall be collected. In rendering judgment in favor of Feemster, for one-fourth of the fine, we presume the Circuit Court construed this act to vest the prosecuting attorney with the absolute right to that portion of it, and for that much of it, as curtailing the gubernatorial power of remission.

"We can see no room for any such construction. The act gives the prosecuting attorney one-fourth of the money when collected, but vests with him no interest in the fine or sentence, separate and distinct from that of the Commonwealth, that would
screen his share from the effect of any legal operation which should, before collection, abrogate the whole, or a part of it. It would require language of the strongest and most explicit character to authorize a presumption, that the legislature intended to confer any such right. We could never presume an intention to control the governor's constitutional power to remit fines and forfeitures. If he can in this way be restrained in the exercise of his power to remit for the fourth of a fine, so can he be for the half or the whole. This part of his prerogative cannot be curtailed. With the exception of the case of treason, his power to remit fines and forfeitures, grant reprieves and pardons, is unlimited, illimitable and uncontrolable. It has no bounds but his own discretion. It is no doubt politic and proper for the legislature to incite prosecuting attorneys and informers by giving them a portion of fines when collected; but, in so doing, the citizen cannot be debarred of his right of appeal to executive clemency. If, therefore, Feemster's recovery is to be graduated by the amount of the fine not remitted, it should have been for the fourth of $20, instead of the fourth of the whole $250. He was entitled to recover nothing. The covenant on which he sues is illegal and void."

I shall trouble the President with no further authorities or remarks on the question he has been pleased to refer to me. I regret the length to which they have been already extended; and will close by a simple and brief statement of the conclusions to which my mind has been brought, and which seems to me to be sustained by the remarks and authorities I have herein before presented. They are:

First.—That the pardoning power of the President extends over the whole case of Drayton and Sears; and that, by his pardon, he may discharge them from prison, and remit the fines for which they were imprisoned.

Second.—That if the President cannot remit the fines in this case, because they have become private property, he can still pardon and release the offending parties from imprisonment, because that is part of the proceedings against them, as criminals, and at the instance of the United States, and is a thing distinct from any individual right of property in the fines.

Third.—That the President may pardon the offence and im-
prisonn'ent, with an exception or saving as to the fines; in which case, as I suppose, the fines would remain as a debt to the United States, or to those to whom the United States had granted or transferred it; and would be recoverable accordingly by the appropriate legal remedies. And such remedies, I suppose, the distributees of the fines, in this case, will have, if they are entitled to any absolute right or property in said fines.

It has been my intention to confine my remarks exclusively to the question of your constitutional power to pardon, a question of much greater or graver consequence than the disposition to be made of this particular case.

Whether that power should be exercised, in this instance, is another and very different question, not referred to me, and on which it is not my intention or province to pronounce here any opinion, though I shall be quite ready to express my sentiments on that subject also, whenever it may be proper for me to do so.

I have the honor to be, very respectfully, yours, &c.

J. J. CRITTENDEN.

To the President.

COMPENSATION OF COMMANDER OF EXPLORING EXPEDITION.

By the remedial act of 3d March, 1843, Lieut. Wilkes, as superintendent of the exploring expedition to the Pacific ocean and South seas, is entitled to an extra compensation, equal to the pay allowed the superintendent of the Coast Survey, for the period from 23d March, 1838, to 22d June, 1842.

ATTORNEY GENERAL'S OFFICE,
August 4, 1852.

Sir: The questions of law propounded, and the conclusion to which my mind has been led, in the case of Lieut. Charles Wilkes of the Navy, will be best understood by the history of the events upon which the act of Congress is founded, out of which the question has arisen.

The act approved 14th May, 1836, (5 Stat. at large, p. 29, sect. 2; Bioren's edition, vol. 9, chap. 451, sect. 2, p. 335,) authorized the President of the United States "to send a surveying and exploring expedition to the Pacific Ocean and the South Seas, and for that purpose to employ a sloop of war, and to