TO THE SECRETARY OF THE NAVY.

Court Martial—Pardon.

to see the fallacy of all the objections to the jurisdiction of the District Court of California, and will therefore remand Collier to the custody of the Marshal of the State of Ohio.

I am, very respectfully, your obedient servant,

(Signed,) C. CUSHING.

Hon. JAMES GUTHRIE,
Secretary of the Treasury.

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COURT MARTIAL—PARDON.

A general, commanding the forces of the United States in the field, does not possess power to commute the sentence of cashiering, pronounced by a court-martial, but only the power to execute the sentence, or to suspend it and take the direction of the President.

The appointment of an officer of the marine corps to a new commission is constructive pardon of a previous sentence pronounced but not yet executed.

ATTORNEY GENERAL'S OFFICE,
September 20, 1853.

SIR: The case of John S. Devlin, late a lieutenant in the marine corps, referred to this office in 1850, and accidentally passed over, it would seem, has been called up for consideration by your letter of the 20th of July.

From the report of the Fourth Auditor it appears, that Mr. Devlin, being a lieutenant of marines on service with the Army in Mexico, was sentenced to be cashiered by a court-martial held there; that the general-in-chief, after approving of the sentence, directed that the sentence should be commuted to twelve months' suspension from rank, command, and emoluments; that the proceedings of the court-martial and the order of the general-in-chief thereon have not been submitted to, or acted on, by the President of the United States; that Mr. Devlin continued in the service, in effect, under suspension, until he, with other officers, was displaced by the President, not upon the above-mentioned sentence of court, but in virtue of the act of Congress of the 2d of March, 1847, and in restoring the peace establishment of the marine corps, (ix Stat. at Large, 155;) and that he was afterwards re-appointed by the President, with advice and consent of the Senate, under the power conferred by the act of March 3d, 1849 (ix Stat. at Large, 377.)
Upon these facts the Auditor submits inquiry as to the legality of the order of the general-in-chief, commuting the punishment of Mr. Devlin.

By the 65th article of the rules and regulations for the government of the Army, (Military Laws, p. 117,) it is declared that;

"Any general officer commanding an army, or colonel commanding a separate department, may appoint general courts-martial whenever necessary. But no sentence of a court-martial shall be carried into execution until after the whole proceedings shall have been laid before the officer ordering the same, or the officers commanding the troops for the time being; neither shall any sentence of any general court-martial, in time of peace, extending to the loss of life, or the dismissal of a commissioned officer or which shall, either in time of peace or war, respect a general officer, he carried into execution; until after the whole proceedings shall have been transmitted to the Secretary of War, to be laid before the President of the United States for his confirmation or disapproval and orders in the case. All other sentences may be confirmed and executed by the officer ordering the court to assemble, or the commanding officer for the time being, as the case may be."

And, by the 89th article, it is declared, p. 120, that:

"Every officer, authorized to order a general court-martial, shall have power to pardon or mitigate any punishment, ordered by such court, except the sentence of death, or of cashiering an officer, which, in the cases where he has authority (by article 65) to carry them into execution, he may suspend until the pleasure of the President of the United States can be known; which suspension, together with copies of the proceedings of the court-martial, the said officer shall immediately transmit to the President for his determination."

By the 65th article, the general-in-chief had the full power to confirm the sentence of cashiering against Lieutenant Devlin. The power is plenary, the only exception being that no sentence shall be carried into execution in time of peace, extending to the dismissal of a commissioned officer, until after the proceedings have been laid before the President for his confirmation or disapproval, and orders in the case.

But the commander-in-chief had no power whatever to pardon
or mitigate the sentence against Devlin, the 89th article expressly excepting the cashiering of an officer from his power to pardon or mitigate. All the authority he had was to suspend the carrying of the sentence into execution until the pleasure of the President could be known.

I think it cannot be said here that the state of war conferred the power of commutation in this case; for it is only the state of war which would, by the 65th article, have given to the commander-in-chief the power to execute the sentence of cashiering; and the language of the 68th article is express, that, in the cases where the general-in-chief has authority to carry into execution such a sentence, to wit, in time of war, he shall not pardon or mitigate, but may suspend execution and make report to the President.

I do not think it would be a fair construction of the approval of the sentence by the general-in-chief, to take it by itself, without the subsequent portion commuting it to suspension from rank, command, or emoluments for twelve months. Lieutenant Devlin was not, in fact, cashiered.

It seems to me, therefore,—without going into the question of what is mitigation and what substituted punishment, (see Mr. Taney's opinion, October 12, 1848, and Mr. Mason's opinion of October 16th, 1845)—and assuming that what the general-in-chief here intended was mitigation,—yet that it was done without authority, and, at any rate, unless approved by the President, is a nullity.

The Fourth Auditor, assuming that the general-in-chief had, of himself, no authority to commute the sentence of Mr. Devlin, further suggests whether the order of the general-in-chief may not be treated as a suspension of the sentence, and the same be now considered and disposed of by the President.

There is one fact in the case, which disposes of this inquiry, without looking into other legal relations of it; namely, the reappointment of Mr. Devlin under the subsequent act of Congress. If the proceedings against Mr. Devlin are to be deemed as pending at this time,—and, unless they were so deemed, they could not be approved or disapproved by the President—then the appointment of Mr. Devlin is a constructive pardon, according to the decision in the case of Lieutenant Hooe. (Mr. Legare's
opinion, 18th March, 1842. See ii Rolle's Rep. 50, Sir W. Raleigh's Case.)

So that, in either point of view, I feel constrained to come to the conclusion that neither the sentence of cashiering, nor the order of commutation, took effect against Mr. Devlin.

I am, very respectfully, yours, &c.,
(Signed,) C. CUSHING.

Hon. JAMES C. DOBBIN,
Secretary of the Navy.

RELIEF OF SEAMEN.

Expenditures for the ransom of the crew and passengers of a wrecked American vessel, held prisoners by the Indians of Queen Charlotte's Island, do not come within the scope of the appropriations for the relief of American seamen, administered by the Secretary of State.

ATTORNEY GENERAL'S OFFICE,
September 22, 1853.

SIR: By the letters, invoice of purchases, bill of exchange, and protest, accompanying your letter of the 20th inst., it appears that in December, 1851, Simpson P. Moses, Collector of the District of Puget's Sound, chartered the schooner Damariscon, for an expedition to Queen Charlotte's Island, with intent to obtain the release of the crew and passengers of the American Sloop "Georgiana," wrecked on the east side of Queen Charlotte's Island, then prisoners held in captivity by the Indians on that island, within the dominion of the Government of Great Britain.

In the same month, Captain B. H. Hill, of the Army of the United States, acting as commandant of a post in Oregon, instructed J. Dement, first lieutenant of artillery, to proceed on board of the Damariscon, with a non-commissioned officer, five soldiers, and ten citizens, who had volunteered their services to the collector, for the guard and protection of the schooner in this expedition against the Indians.

The collector, Moses, by letter of the 16th December, 1851, instructed Lieutenant Dement to make, at Port Victoria, on