TO THE SECRETARY OF THE TREASURY.

EFFECT OF PARDONS.

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on report to and decision by the Minister of the Interior. (Ubi supra, p. 122.)

There is an old statute of the State of New York which empowers the Justices of the Supreme Court of that State to order the destruction of such papers on file in the clerk's office of the same "as they shall judge to have become useless." (Act of April 4, 1807, ch. 133, s. 4.)

I am, very respectfully,

C. CUSHING.

Hon. JAMES GUTHRIE,
Secretary of the Treasury.

ATTORNEY GENERAL'S OFFICE,
January 1, 1857.

Sir: By your letter of the 8th of October last, and the papers accompanying the same, it appears that, on the 16th day of June, 1856, the President, in the exercise of pardoning power, remitted conditionally or in part a forfeiture to the United States, incurred by one Gourd, a Creole Indian, by judgment of the District Court of the western district of Arkansas; that at that time the proceeds of the forfeiture had been deposited by the marshal in one of the public depositaries to the credit of the United States, but had not yet been brought into the treasury by a covering warrant; whereupon you submit the question whether this sum of money can be refunded to the marshal, and through him to the party entitled, in execution of the remission granted by the President.

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The constitutional power of the President to pardon extends to all the elements of the subject-matter, including as well pecuniary penalties as other methods of punishment of any federal offence, except in the case of impeachment, and it cannot be controlled or curtailed by act of Congress.

But when a pecuniary penalty, accruing to the United States, has been actually paid into the Treasury, although it may be remitted of right by the President, still, by reason of constitutional prohibition, which is coequal in force with the constitutional power to pardon, the amount of the penalty cannot be drawn from the Treasury without appropriation by act of Congress.
If this money had actually passed into the treasury by a covering warrant or otherwise, it could not, in my opinion, be refunded without authority of Congress.

It is true, that the pardoning power is completely vested in the President, and does not require in its exercise any aid from Congress, nor can it be curtailed by Congress. If, therefore, the impediment in the case supposed were a mere enactment of ordinary legislation, it could not operate to obstruct the clemency of the President. But the obstacle, in the case supposed, is a provision of the Constitution itself, and of equal efficiency to restrict the pardoning power with the provision by which the latter is granted, to wit, the condition, that “no money shall be drawn from the treasury but in consequence of appropriations made by law.” (Art. i, s. 9.)

There are some cases in the statute-book of the refunding of penalties by express act of legislation, which have become historical by reason of the political interest of the matter or the importance of the party. I allude to the act refunding to the heirs of Matthew Lyon the fine imposed on him under the sedition law, so called, (viii Stat. at Large, p. 802;) to acts for the relief of heirs of Thomas Cooper, (i Stat. at Large, p. 799), and of Charles Holt (viii Stat. at Large, p. 931), in the like circumstances; and that to refund the fine paid by Andrew Jackson, at New Orleans, (v Stat at Large, p. 651.) But these were not in fact or in form acts to consummate a pardon granted by the Executive.

Other cases of legislation of the same nature have occurred in matters of a purely private character. The private acts to this effect are quite numerous. (Ex. gratia, viii Stat. at Large, p. 78, 122, 133, 300, 372, 631, 646, 841, 880, 937.) None of these acts seem to have been passed in order to give effect to an exercise of the pardoning power of the President. On the contrary, in most of them it distinctly appears that they belong to the class of cases, in which, by the general statute, or by acts supplementary thereto, the Secretary of the Treasury has power to remit, upon certificate of cause by the proper court (i Stat. at Large, p. 505; ii Ibid, p. 7. See also ii Ibid, pp. 549 and 532.) Moreover, in many of the cases cited it appears
that the matter had proceeded to a point, either judicially or administratively, beyond the jurisdiction of the Secretary of the Treasury. But, in others of these cases, this does not appear, but the contrary is implied, so as to indicate that the Secretary had refused to remit, for want, in his opinion, of sufficient cause, and that Congress had interposed to overrule him, or that he had declined to act from scruples touching his power, the extent of which had not then been so thoroughly explored as it has at the present time. (See Opinions, vol. vi., p. 393 and 498.)

So that, on the whole, these acts do not serve to throw light on the precise question of the power of the President in the premises.

I feel content to say, however, that, in my opinion, where the forfeiture has actually gone into the treasury, there is no power to refund, either under the statute authority of the Secretary to remit, or the constitutional authority of the President to pardon.

But suppose, although the forfeiture be consummated so far as the guilty party is concerned, and the money value of such forfeiture has passed into the hands of some officer of government, may the money then be refunded by executive warrant in execution of a pardon? I think it may, in certain circumstances.

In the first place, it must be a forfeiture accruing to the United States. (See Opinions, vol. vi., p. 488.)

Secondly, the payment must not in form be such as to constitute a complete severance from intermediate official custody, and absolute entry into the Treasury of the United States.

There is but one exception to the President’s power to pardon, which is the case of impeachment. There is no other exception. In all other respects the power is perfect, and co-extensive with the subject-matter. The President may grant an absolute pardon, or a conditional one. (Ex parte Wells, xviii Howard, p. 307.) He may pardon before trial and conviction. (See Opinions, vol. vi., p. 20.) His power extends to all penalties and forfeitures, as well as other punishment. (Ibid p. 393.) He may do this by order of nolle prosequi pending a prosecu-
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(Opinions, ed. 1851, pp. 798, 807.) He may do it by warrant of remission in all cases, even those to which the statute authority of the Secretary of the Treasury extends. (Opinions, vol. vi., p. 488.) And he may do it by the common form of a general warrant of pardon. And in my judgment he may do it for and at any time, either anterior to prosecution, or pending the same, or subsequently to the execution in part or in whole of sentence—subject in the latter case only to the limits of legal, moral, or physical possibility.

Whatever of controversy there may have been or still be, on the latter point, will be found to resolve itself into a question of the form of the pardon, or of its legal consequences and effect.

Thus, while it is admitted that a general pardon under the great seal restores the competency of the party as a witness, yet it has been doubted whether that effect follows a special remission merely of the residue of a sentence. (Perkins v. Stevens, xxiv Pickering, p. 277.) On the other hand, it has been held, that a proviso, affixed to a general pardon, that it shall not relieve the party from such a disability, is null for repugnancy. (The People v. Pease, iii Johns. Cases, p. 333.) These, it is manifest, are questions of form.

As to the matter of incidental disabilities of conviction for crime, it has seemed to me that a pardon by the proper pardoning power of one jurisdiction does not affect disabilities imposed by another jurisdiction. (Opinions, vol. vii., p. 760.) That is a question of substance, not of form.

As to the general question of consequences, it is clear enough that if a party has gone through the whole or a part of the physical incidents of prosecution and sentence, what is thus done, cannot be undone. Stripes, confinement, maiming, death, when inflicted, have become irremissible. There, the pardoning power encounters physical impeachment. So it may encounter legal impediment, as when a penalty, accruing to private persons, has become vested in them of right; and in all cases of rights, acquired by others in virtue of the judgment and sentence. (Hawkins, P. C., ch. 37, § 34, 54.) Thus, if, by the law of the country, conviction of felony have the effect of dissolv-
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ing marriage, and the innocent party contract new bonds of matrimony, these are not affected by the subsequent pardon of the felon. (In re Denning, x Johns., p. 232.) So it is in the case of lawful disposition made of the convict's property during the time of his civil incapacity. (The King v. Turril, iii Mad. R., p. 52.)

Misapprehension has arisen as to the import of some old cases in England, to the effect that the king's pardon cannot divest any interest, which, by the conviction, has vested either in private persons or in the king himself. (Viner's Abr. Prerog. S. a; Bacons' Abridg. Pard., Bouvier's ed., vol. vii., p. 418.) But, on examination, the decision in those cases appears to involve only a condition of form, namely, that, in order to divest interests thus vested in the state, the pardon must contain words of restitution. That the king might, by the use of apt words, restore penalties acquired to him, and lands or powers forfeited, was never denied: although it has been held that restitution of blood requires an act of Parliament. (Hale's H. P. C., p. 358; Tomes v. Ethrington, Levinz, p. 120; The King v. Amery, ii D. & E., p. 515, 569.)

I conclude, therefore, that in this case no question remains, except whether, by intendment of law, this money was actually in the Treasury. If it was, a law will be requisite to draw it out, in execution of the pardon—if not, it may be refunded by you for that purpose. In the judgment of the Treasurer, it would seem, as that is reported by the Solicitor, the money is still subject to your order, and not yet technically in the Treasury. I am not sufficiently well informed on that point to undertake to anticipate your decision therein, presuming that it must have come up in practice, and been determined during your administration of the Department.

I am, very respectfully,

C. CUSHING.

Hon. JAMES GUTHRIE,
Secretary of the Treasury.