PARDON.

In September, 1882, Lieutenant N. was sentenced by a court-martial to reduction of rank in his grade, and the sentence was carried into effect. In September, 1883, the department commander remitted the sentence under the power to pardon conferred by article 112 of the Articles of War: Held that, the punishment imposed by the sentence being a continuing one, the sentence could be remitted by the pardoning power, and that the authority exercised by the department commander was in conformity to law.

DEPARTMENT OF JUSTICE,
February 11, 1884.

SIR: In your communication of the 17th of November last you request my opinion as to the lawfulness of the authority attempted to be exercised by the department commander in the case of Lieutenant Nordstrom, by General Order, No. 45.

In September 1882, Lieutenant Nordstrom, of the Tenth Cavalry, was sentenced "to be reduced in rank so that his name shall hereafter be borne on the rolls of the Army next after that of First Lieutenant Mason M. Maxon, Tenth Cavalry." His name was so placed on the rolls by the proper officer of the War Department, and to that extent the sentence was carried out. In September, 1883, the department commander remitted the sentence.

Where, as in this case, an officer is sentenced to reduction of rank (i.e., loss of steps or numbers) in his grade, the punishment imposed is a continuing one; since it is only by the continual operation of the sentence itself that the officer is thenceforth excluded from the place in his grade to which, under the law of the service, he would otherwise be entitled by the date of his commission, and made to occupy another place therein. So long, then, as the officer is thus excluded by operation of the sentence—in other words, whilst he is still undergoing the punishment thereby imposed—the sentence may be remitted by pardon, and a remission of it would necessarily carry with it the restoration of the officer to his pre-existing right to occupy the place in his grade corresponding with the date of his commission, he losing such opportunities for promotion as may in the mean time have occurred. (12 Opin., 547.)
Refund of Duties.

But you intimate that doubt is entertained whether the power to pardon conferred by article 112 of the Articles of War can be exercised after the proceedings of the court-martial have been completed by due confirmation by proper authority. There is no limitation in the article as to the time at which the pardon or mitigation may be granted, and by analogy it seems to me that completion or non-completion of the punishment would be the only test. Pardons are most usually granted after the finding of the jury has been reduced to judgment and the sentence pronounced—after the punishment has commenced or is about to be visited on the offender. Pardons can issue before trial, but instances of such are rare. Congress must have used the word pardon in its ordinary sense, and if its ordinary exercise was to be circumscribed, apt language should have been used. If the power was to operate only on the sentence before it was pronounced, Congress would have employed different language than that found in article 112.

I am accordingly of opinion that in the case under consideration the authority attempted to be exercised by the department commander was in conformity to law.

I am, sir, very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. ROBERT T. LINCOLN,
Secretary of War.

REFUND OF DUTIES.

The Secretary of the Treasury has power to refund excess of duties exacted in certain cases referred to.

DEPARTMENT OF JUSTICE,
February 12, 1884.

SIR: Yours of the 11th instant mentions cases in which certain decisions have been made as to the duty upon azo-benzole dye colors, which decisions were afterwards in other cases modified so as to impose a smaller rate of duty, the applicants in the earlier cases having in the mean time brought suit to recover the excess in the amount of duty paid by them, which suits are still pending.