NAVAL OFFICERS—RELATIVE RANK—PARDON.

The granting of a pardon to a naval officer for the purpose of restoring him to his original position on the Navy list, under the belief that a nomination intended to accomplish that end had failed because it had not been directly confirmed by the Senate, but which, in reality, had been confirmed by the advancement of another officer nominated at the same time, did not operate to advance such officer beyond the relative position he originally held on the list.

The effect of a pardon is to put an end to the infliction of further punishment. In the present instance, it merely operated to end any doubt there might be as to the legality of the restoration of such officer to his original position.

DEPARTMENT OF JUSTICE,
March 3, 1903.

SIR: I have the honor to acknowledge the receipt of your letter of November 8 last, with inclosures, asking for my opinion "as to whether or not Captain McCalla is entitled, as he claims, of right and by law to a place on the Navy register five numbers above Captain Chadwick," which would be six numbers above his present position.

The facts upon which Captain McCalla bases his claim are as follows: On May 15, 1890, Capt. Bowman H. McCalla, then a commander in the Navy, ranking next after Commander Caspar F. Goodrich, was sentenced by a court-martial "to be suspended from rank and duty for a period of three years, and to retain his present number on the list of commanders while so suspended." On December 24, 1891, the unexpired portion of this sentence was remitted. Commander McCalla had then lost nine numbers, and, by reason of such loss of numbers, his name appeared nine numbers below his original position and immediately following that of Commander Charles H. Davis.

In a letter dated August 10, 1898, your Department invited the attention of the President to the meritorious services of certain naval officers in Cuban waters during the war with Spain and recommended prompt recognition by the Government of such services. The following recommendation was made in the case of Captain McCalla: "Commander Bowman H. McCalla, commanding the Marblehead,
for eminent and conspicuous conduct in battle off the coast of Cuba, to be restored to his original place on the Navy list, so that his name shall appear on the list of captains next after that of Capt. Caspar F. Goodrich."

This recommendation was approved by the President, and Captain McCalla was subsequently nominated accordingly. The Senate, however, failed to act directly upon this nomination, and Captain McCalla's name was therefore again placed in the position on the list which he held prior to such advancement—i.e., next after that of Capt. Charles H. Davis. While at the time this nomination was made he had lost nine numbers, he was really only six numbers below his original position, owing to changes by reason of death and advancement which had eliminated the names of three officers.

On March 3, 1899, Commander McCalla having in the ordinary course reached No. 1 on the list of commanders, and a vacancy occurring in the grade of captains, received and accepted the routine promotion and appointment to the grade of captain.

On February 6, 1900, certain questions affecting the status and pay of Captain McCalla and other officers were submitted to the Attorney-General by the Secretary of the Treasury upon the suggestion of the Comptroller; and on February 19 an opinion was rendered that the advancement of McCalla, on August 10, 1898, was not nugatory, as your Department had supposed, by reason of the failure of the Senate to confirm such advancement in terms; but that, on the contrary, the Senate, having confirmed the nomination of another officer (Lieutenant-Commander Pillsbury) "to be a commander from the 10th day of August, 1898, vice Bowman H. McCalla, advanced and promoted," thereby assented to and confirmed the advancement and promotion of McCalla.

As before seen, Captain McCalla, on August 10, 1898, had suffered a net loss of only six numbers by reason of his sentence. By operation of the "Personnel act" of March 3, 1899, Captains Andrade, Lowe, and Robinson, formerly engineers with relative rank below that of Captain McCalla
at the time his sentence took effect, were placed in the line above McCalla, your Department supposing that his advancement of August 10, 1898, had failed. Under date of March 9, 1900, the Secretary of the Navy, in a letter addressed to the Attorney-General, recommended that a pardon be granted Captain McCalla. It is apparent that your Department did not then know of the above-mentioned opinion of this Department concerning the advancement and promotion of McCalla on August 10, 1898, for, after reviewing briefly the history of the case, the Secretary said:

"Captain McCalla's name at this time appears upon the Navy list as No. 61, immediately below that of Capt. Charles H. Davis, instead of as No. 52, immediately below that of Capt. Caspar F. Goodrich, as would have been the case in the natural order of advancement if Captain McCalla had suffered no loss of numbers.

"In a letter dated August 10, 1898, the Department invited the attention of the President to the case of certain officers of the Navy whose services in Cuban waters during the war with Spain were regarded as so meritorious as to entitle them to prompt recognition by the Government, and recommended advancement in rank as a suitable measure of reward. In the case of Captain (then Commander) McCalla, the Department's recommendation was as follows:

"'Commander Bowman H. McCalla, commanding the Marblehead, for eminent and conspicuous conduct in battle off the coast of Cuba, to be restored by the President to his original place on the Navy list, so that his name shall appear on the list of captains next after that of Capt. Caspar F. Goodrich.'

"This recommendation was approved by the President, and Captain McCalla was subsequently nominated accordingly, but the nomination was not confirmed by the Senate.

"In view of the fact that if this nomination had been confirmed Captain McCalla would have been thereby restored to his original place on the Navy list; in consideration of the gallant conduct and efficient services rendered by this officer during the recent war with Spain, I have the honor to recommend that a full and unconditional pardon be issued to Captain McCalla."
This letter of recommendation was transmitted to the President, and on March 12 an unconditional pardon was granted, the pardon setting forth that—

"Whereas, the services of the said Bowman H. McCalla in Cuban waters during the war with Spain are regarded as so meritorious as to entitle them to prompt recognition by the Government; and,

"Whereas the Secretary of the Navy recommends that the said Bowman H. McCalla be pardoned:

"Now, therefore, be it known that I, William McKinley, President of the United States of America, in consideration of the premises, divers other good and sufficient reasons me thereunto moving, do hereby grant unto the said Bowman H. McCalla a full and unconditional pardon."

Immediately upon the issuance of this pardon Captain McCalla was restored to the place on the Navy list held by him prior to his trial by court-martial in 1890. He was thus given No. 52 upon the Navy list instead of No. 61, which he bore before the pardon. Subsequently, the attention of your Department was called to the opinion of February 19, 1900, previously referred to, and in conformity with that opinion the Navy Register was corrected so as to show that McCalla attained his old position on the list and a captaincy on August 10, 1898, the date of the recess advancement above referred to. A commission as captain, dated April 22, 1901, but taking effect from August 10, 1898, was issued to him accordingly. On March 8, 1901, Captain McCalla was advanced three numbers in the grade of captain for eminent and conspicuous conduct in battle upon recommendation of your Department, nomination by the President, and confirmation by the Senate, thus placing him three numbers higher on the Navy list than he was before his trial by court-martial, which relative position he now holds. The nomination was in the following terms: "I nominate Capt. Bowman H. McCalla to be advanced three numbers in rank, from the 8th day of March, 1901, for eminent and conspicuous conduct in battles engaged in by relief column under Vice-Admiral Seymour, to take rank next after Capt. Richard P. Leary."
The Senate confirmed this nomination, and Captain McCalla accepted a commission issued in pursuance thereof. He now, in effect, claims that the commission which he then accepted should have given him rank six numbers higher on the Navy list than it in fact did.

The Coghan case cited by counsel for Captain McCalla can not be said to sustain the contention in this case. In 1876 Admiral Coghlan, then a lieutenant-commander, was sentenced by court-martial to be suspended one year and to retain his present number in grade. He lost thirteen numbers by reason of the sentence. In June, 1898, he was by advancement given six of the numbers he had lost. On April 5, 1902, he was pardoned and then given his original relative position on the Navy list, which carried him to No. 1 on the list of captains. On April 10, 1902, a vacancy occurring in the grade of rear-admiral through the retirement of Rear-Admiral Farquhar, Captain Coghlan was in regular course promoted to a rear-admiral. It will be noted that the pardon did not operate to carry Coghlan beyond his original relative position on the Navy list.

The contention made in behalf of Captain McCalla that "degradation from or diminution of relative rank and position" is a continuing punishment, and thus subject to revision by the President, is conceded. In the Coghlan case, Attorney-General Devens, in 17 Opin., 32, said:

"The law of the service assigns to each officer a rank in his grade and in the line of promotion corresponding with the date of his commission, and 'when this order or disposition is interrupted, as in the case under consideration, through the intervention of a court-martial proceeding, it can only remain so by the continuing operation of the penalty imposed, which may be said to act as a punishment from day to day as long as the officer affected is excluded from the enjoyment of his previous status.'

"It has therefore been held that a pardon of the President will restore an officer, whose rank has been reduced by a court-martial, to his former relative rank according to the date of his commission, the officer losing, of course, such opportunities for promotion as might in the meantime have occurred. (12 Opin., 547.)"
It is clear that when the Secretary recommended and the President granted a pardon to Captain McCalla they both supposed the advancement of August 10, 1898, abortive, since the recommendation is based upon that assumption and the pardon is predicated upon the recommendation. The Senate had, as we have seen, failed to act directly upon this appointment, and Captain McCalla had been in fact again reduced in number and to the grade of commander, which position he held prior to said appointment. It is apparent that when Captain McCalla received and accepted the routine promotion and appointment to the grade of captain on March 3, 1899, he understood that the appointment of August 10, 1898, was without effect. It is also apparent that the Senate, in directly consenting to this routine appointment, supposed the previous appointment had failed for want of such consent.

But, even assuming that the President when he granted the pardon knew that Captain McCalla was then entitled without a pardon to his original place on the list, it does not follow that he is now entitled to an additional six numbers. If, as has been contended and conceded, the sentence of the court-martial was a continuing sentence, the President on August 10, 1898, by advancing the captain six numbers, or all that he had lost, thereby did away with the penalty and put an end to the punishment. It might well be said that the President, entertaining some doubt about the legality of this advancement, which, as we have seen, the captain had at the time of the pardon received no benefit from, granted the pardon to supplement and make sure such advancement.

The effect of a pardon is to put an end to the infliction of further punishment. The punishment in this case was the loss of numbers, and the President put an end to that punishment when he advanced the captain six numbers "to restore him to his original place on the Navy list." If any doubt remained as to the legality of the advancement, the pardon put an end to that doubt.

In view of the fact that when the pardon was granted the Executive had in effect already remitted the penalty attached to the sentence of the court-martial, I am of the opinion
that Captain McCalla is not entitled, because of such pardon, to an additional advance of six numbers.

Respectfully,

P. C. KNOX.

The Secretary of the Navy.

CUSTOMS LAWS—TOBACCO GROWN IN PORTO RICO.

Tobacco grown in Porto Rico after the cession of that island to the United States and brought into this country for warehousing, and afterwards exported to Canada and thence returned to the United States, is within the benefits of paragraph 483 of the act of July 24, 1897 (30 Stat., 195), but subject to the internal-revenue tax provisions of section 3 of the act of April 12, 1900 (31 Stat., 77).

DEPARTMENT OF JUSTICE,
April 1, 1903.

SIR: I have the honor to acknowledge the receipt of your letter of March 2 last, relative to certain 5 bales of leaf tobacco which were brought from Porto Rico by Hamburger Bros. & Co., and entered for warehousing at New York on January 6, 1900, and afterwards exported to Canada and thence returned to the United States. It appears that this tobacco was grown in Porto Rico after April 11, 1899, the date the ratifications were exchanged of the treaty with Spain under which the Island of Porto Rico was ceded to the United States.

You ask whether these 5 bales of tobacco can be considered "articles the growth, produce, or manufacture of the United States" exported and returned within the meaning of paragraph 483 of the act of July 24, 1897.

Since this tobacco was grown in Porto Rico after that island was ceded to the United States, the reasons assigned for my opinion of May 19, 1902 [ante, p. 55], relative to certain articles of Porto Rican origin exported from Porto Rico seem to be applicable here. I am therefore of the opinion that this tobacco is within the benefits of said paragraph 483, subject, however, to the internal-revenue tax provisions in section 3 of the Foraker act of April 12, 1900.

Respectfully,

P. C. KNOX.

The Secretary of the Treasury.