The original documents are located in Box 34, folder "Nixon Pardon Legal and Historical Precedents (1)" of the Philip Buchen Files at the Gerald R. Ford Presidential Library.

Burdick v. U.S.
236 U.S. 79 (1915)

Burdick, a newspaper man, refused to testify before a Grand Jury claiming his right under the 5th amendment. No immunity statute existed. President Wilson granted him a pardon for "for all offenses against the U.S. which he ... has committed or may have committed, or taken part in ...." No specific offense was cited. Burdick refused to accept the pardon and refused to testify. He was found guilty of criminal contempt.

Held - judgment reversed, Pardons must be accepted

The Court had no problem with the lack of specificity of the pardon or that it was issued before accusation. Case turns solely on point of "acceptance".

Sup. Court
brief

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Knote v. U.S.
95 U.S. 442 (1877)

Similar facts to Padelford. Knote had property taken from him by Union forces during the Civil War, later received Presidential Pardon, for all acts committed during war and now seeks compensation from US for value of items taken

Held- relief denied

No pending or current criminal case involved. Case acknowledge broad wide presidential power of pardon, disallowers and restricts scope not to include recoupment of money in U.S. treasury, compensation for incarceration or return of confiscated property.

Ex Parte A. H. Garland
71 U.S. 366 (1867)

Post Civil War case. Garland, an attorney, had been a resident of state of Arkansas at time of Arkansas' withdrawal from the Union. He served during the war in Congress of the Confederacy (legislative branch of Confederacy) Was a Confederate Senator at War's end. Received a full pardon from Pres. Lincoln in July 1865 for all offenses committed by his participation in the Rebellion. No trail, indictment or conviction was in being at time of pardon.

Present litigation involves Garland's post pardon attempt to be readmitted to practice before US Sup. Court.

Held: (at 370) - Relief granted

The power to pardon is unlimited, with sole exception of cases of impeachment. The power extends to every offense known to the law, "and may be exercized at any time after its (the criminal act) commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment."

"If granted before conviction, a pardon prevents any of the penalties and disabilities, consequent upon conviction, from attaching". (at 371)

U.S. v. Padelford
76 U.S. 788 (1870)

Action brought under the Captured and Abandoned Property Act for a Union taking of cotton during invasion of Savannah. Padelford reclaims ownership, in part, on the basis of Presidential Proclamation of pardon on Dec. 8, 1963. No trial pending.

Held- relief granted to U.S, denied Padelford.

"It follows that at the time of the seizure of the property he was guilty of whatever offense against the laws of the U.S. he had committed by the acts mentioned in the finds and relieved from any penalty which he might have incurred.

Illinois Central Railroad Co. v. Bosworth
133 U.S. 92 (1890)

Similar post civil war case, dealing with rights of the children of a pardoned deceased confederate soldier to claim an interest in their father's real estate which had transfered during his life.

Held - Yes - for reasoning other than pardons

Case cites favorable position of Court upheld in Garland and Knote.

Ruling of Court based on proposition that pardon removed Bosworth's disability and if being removed, his children's life estate in the property was regained.

Brown v. Walker
161 U.S. 591 (1896)

Not a pardon case. First exposure by Sup. Court into cases involving immunization of witness. Brown refused to comply, relying on 5th amendment, to ICC production of records investigation in though act of congress provided for mandatory production and No prosecution against witness on account of any transaction, matter or thing testified to.

Court upheld ICC statute

Action in case gives immunity to pardon (see Burdick), and compels waiver of 5th Amend.

Note that here no criminal case pending, etc.

While it may be that no one of these provisions relates to the railroads, telephones and telegraphs, they embrace all of the older establishments of the Government, and amply demonstrate the general purpose of Congress that the purchase of Government supplies shall be based on competitive bidding.

[redacted] of opinion, therefore, that the proposed plan of the Industrial Board of the Department of Commerce, viewed in any aspect, is unauthorized by law.

Respectfully,

A. MITCHELL PALMER.

To the SECRETARY OF COMMERCE.

NAVAL OFFICERS—PROMOTION—CONSTRUCTIVE PARDON.

The promotion of an officer of the Navy while under charges awaiting trial by general court-martial does not operate as a constructive pardon of the offenses charged against him.

Where an ensign in the Navy, while under charges general in their nature and not peculiar to his office of ensign, was commissioned a lieutenant, and was thereafter found guilty of such charges by a general court-martial and sentenced to be dismissed from the service, the Secretary of the Navy was authorized by the law in mitigating his sentence with reference to the grade in which he was permanently serving.

DEPARTMENT OF JUSTICE,
April 4, 1919.

SIR: I have the honor to acknowledge the receipt of your letter of March 13 requesting my opinion on the following questions of law arising in the administration of your Department:

"(*a*) Does the promotion of an officer of the Navy while under charges awaiting trial by general court-martial operate as a constructive pardon of the offenses charged against him?

"(*b*) If so, is it necessary for such officer, when later brought to trial by general court-martial for such offenses, to bring the fact of such promotion to the attention of the court-martial, by special plea or otherwise, in order to have the proceedings of the court-martial set aside by the reviewing authority, or is it sufficient if the fact of

such promotion is placed in the records of the case, after trial but before final action is taken by the reviewing authority?"

From the accompanying letter of the Judge Advocate General it appears that the specific case before you out of which the above questions arise is as follows:

Prior to September 21, 1918, Horace Roy Whittaker was an ensign in the United States Navy. On that date charges were preferred against him of "Absence from station and duty without leave" and "Conduct to the prejudice of good order and discipline." On October 25, while these charges were pending, he was commissioned temporarily a lieutenant (junior grade) from September 21, the commission stating that it was issued in accordance with the provisions of the act of May 22, 1917, 40 Stat. 84, as amended by the act of July 1, 1918, 40 Stat. 714. On October 30 he was placed on trial on the aforesaid charges before a general court-martial, found guilty by his own plea, and sentenced to be dismissed from the service. On January 3 following, the Judge Advocate General reviewed the proceedings of the court-martial and recommended that they be set aside for the reason that by the well-settled rule of the Navy Department the commission operated as a constructive pardon of the charges pending before the court-martial. This recommendation was, however, disapproved by you, the sentence of the court-martial approved, but mitigated to the loss of 10 numbers in the grade in which Whittaker was permanently serving.

After a careful investigation, no authority has been found for the possibility or validity of an implied pardon except the opinions of Attorney General Cushing in 6 Op. 123, and 8 Op. 237, and the opinion of Attorney General Legare in 4 Op. 8. The former rest entirely on the authority of the latter, without reasoning. The latter with a like lack of reasoning relies entirely on Sir Walter Raleigh's Case, 2 Rolle's Reps. 50. In that report of the case it is said that the Chief Justice, while holding that there could be no implied pardon of treason (the case before him), remarked that perhaps it might be different

in felony. In the report of the same case in 2 Howells State Trials, 1, 34, no such remark is given, the Chief Justice merely stating:

"* * * for by words of a special nature, in case of treason, you must be pardoned and not implicitly. There was no word tending to pardon in all your commission; and therefore you must say something else to the purpose."

A pardon by implication is not noticed in such authoritative English treatises as Hawkins (Pleas of the Crown, vol. 2, p. 542 *et seq.*), Blackstone (vol. 4, pp. 400, 401), Chitty (Criminal Law, vol. 1, p. 770 *et seq.*), Halsbury (Laws of England, vol. 6, p. 404). These writers are in accord in mentioning only absolute or full, and conditional, pardons. The American writers add partial pardons—in the nature of commutation of sentence—but none mentions an implied pardon except American and English Encyclopedia. (See e. g. Bishop, Criminal Law, vol. 1, sec. 914; Wharton, Criminal Procedure, 10th edition, vol. 2, secs. 1458–1474; Cyc., vol. 29, p. 1560.) In American and English Encyclopedia (vol. 24, p. 552), where implied pardons are mentioned, no authorities are cited but the opinions of Attorney General Cushing, *supra*, and of implied pardons it is said:

"* * * these, however, have been of very rare occurrence and are somewhat anomalous in their character."

No decision has been found either in the Federal or the State courts recognizing or even mentioning an implied pardon. On the other hand, the uniform tenor of the decisions is inconsistent with their legal possibility. The Constitution of the United States confers upon the President "power to *grant* pardons for offenses against the United States," thus assimilating a pardon to an express grant by deed, and the general constitutional provision is of this character. This was but an adoption of the English rule that a pardon was a grant under the great seal. Even an instrument in effect granting a pardon under the sign manual of the King was not sufficient. (*Bullock* v. *Dodds*, 2 B. & Ald. 258, 277; *Gough* v. *Davies*, 2 Kay & Johns. 623, 627.) Accordingly all the courts in this coun-

try, construing the constitutional provision, hold that a pardon is an express act of the Executive or legislature evidenced by something in the nature of a formal grant. In *United States* v. *Wilson* (7 Pet. 150, 160, 161), the court said:

"A pardon is an act of grace, proceeding from the power intrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed. It is the private, though official, act of the executive magistrate, delivered to the individual for whose benefit it is intended * * *."

This definition is approved by the court in *Burdick* v. *United States* (236 U. S. 79, 89, 90), where an acceptance of a pardon was held essential. Clearly this definition refers to an express act of the Executive, having his mind directed to a certain offense and consciously willing an exemption from the consequences of it. In *Ex parte Wells* (18 How. 307, 310), the court said:

"Such a thing as a pardon without a designation of its kind is not known in the law. Time out of mind, in the earliest books of the English law, every pardon has its particular denomination. They are general, special, or particular, conditional or absolute, statutory, not necessary in some cases, and in some grantable of course."

In *Commonwealth* v. *Halloway* (44 Pa. St. 210), as preliminary to a holding that a pardon must be delivered, the court pointed out its distinction from a commission to office such as is claimed by the Attorneys General, *supra*, to work a pardon. A commission is but the seal of approval upon former considered, effectual, legal acts, and therefore needs no delivery for its operation. A pardon is an act of grace having no legal antecedents to the formal grant, and needing therefore assent by the grantee to make it complete. This view is accepted by Judge (afterwards Justice) Blatchford in *Matter of de Puy*, 3 Ben. 307, 319–322, and he calls attention to the fact that Marshall, Chief Justice, delivered the opinion of the court in *Marbury* v. *Madison* (1 Cranch 137), as well as *United States* v. *Wilson* (7 Pet. 150), thereby recognizing and as-

serting the fundamental distinction between a commission and a pardon, viz, that the former is unilateral, requiring only the completed action of the appointing power, while the latter is bilateral, a meeting of the minds of the parties concerned being essential. This view of the nature of a pardon—clearly excluding an implied pardon—is evidently the basis of the decision of the court in *Burdick* v. *United States*, *supra*.

That a pardon is an express act based upon an intent directed to the particular offense and the reasons excusing it with a will to wipe out the punishment therefor, is also shown by the decisions that a pardon granted through fraud or misapprehension, the executive not being apprised of the true situation, is void;[1] that a pardon not clearly directed to the specific offense which it is claimed to cover is not effective as to that offense;[2] that a pardon varying only in a slight degree in its recitals from the truth, or expressed in clear but inartificial terms, is good.[3] It is safe to say that these cases would all have been differently treated both by counsel and by the court had anyone suspected that a right to a pardon could accrue from mere implication out of general circumstances beyond the record.

If a pardon by implication were held to be within the pardoning power as known to the common law and adopted in the several constitutions, the result would be that, in every case where it was pleaded or set up, an issue of fact would be necessary and a consequent inquiry into the actions of the Executive or the legislature, the inferences of fact to be drawn therefrom, whether the subject acted in reliance on them and to what extent, with many other matters of a similar nature, all unfitting, even dangerous considerations in the determination of the im-

[1] *State* v. *Leak*, 5 Ind. 359; *State* v. *McIn[illegible]* Jones Law (N. C.) 1; *Commonwealth* v. *Halloway*, *supra*.

[2] *Stetler's Case*, 1 Phila. 305, 306; *Ex parte Higgins*, [illegible] Mo. Apps. 601; *State* v. *Foley*, 15 Nev. 64, 70–72; *Hawkins* v. *State*, 1 Porter (Ala.) 475; *State* v. *McCarty*, 1 Bay (S. C.) 334; *Ex parte Weimer*, 8 Biss. 321.

[3] *Jones* v. *Harris*, 1 Strob. Law (S. C.) 160, 162; *Hoffman* v. *Coster*, 2 Whart. (Pa.) 453, 468; *Hester* v. *Commonwealth*, 85 Pa. St. 139, 154; *Lee* v. *Murphy*, 22 Gratt. (Va.) 789, 799, 800; *Redd* v. *State*, 65 Ark. 475, 484, 485; *Hunnicutt* v. *State*, 18 Tex. Apps. 498, 521.

portant question of public law, viz, whether an amnesty has been duly granted for an offense against the laws of the State. Nor would the offender have anything definite to show as his title to his freedom from punishment, open to all the world—a matter of considerable though lesser importance.

I have therefore reached the conclusion that a pardon by implication or construction is a thing not known to or recognized by the law, and I answer your first question in the negative. This makes an answer to your second question unnecessary.

To apply the above ruling to the facts of the case, it is necessary to go a step further. Whittaker was an ensign when the charges were filed against him—September 21. It is true that his commission, although not issued until October 25, recited that he was temporarily appointed a lieutenant from September 21. Such retroaction, however, while it might affect his rank and pay (*United States* v. *Vinton*, 2 Sumner 299), could not affect his actual status before the court-martial (29 Op. 254, 257). When sentence was pronounced, however—October 30—his commission had become effective for all purposes within its legal scope and his office of lieutenant had vested, acceptance, and execution of the oath not being necessary to this result (*Marbury* v. *Madison*, 1 Cranch 137).

If his appointment as lieutenant had been *permanent*, displacing for all purposes his office of ensign, there would be reason to claim that in law either the sentence of the court-martial was void or it was incapable of execution. In 4 Op. 8, Attorney General Legare had a case of this character before him, and while he held that the commission was an implied pardon his opinion really rested on a sounder basis. The officer, while a passed midshipman, had been suspended for two years, and the sentence had been approved and executed. Subsequently he was commissioned a lieutenant. The Attorney General said:

"I do not see how the sentence applies to the present rank of Lieutenant Hooe. The judgment of the court was, that Passed Midshipman Hooe should be suspended from his office of midshipman. But he ceased to be a midship-

man by his appointment to a higher office, and his acceptance of it. If he is a lieutenant at all, it is because the grant of the office took effect immediately, *non obstante* the suspension; and so it unquestionably did, and, *taking effect, it was a resignation or merger of the commission* Then, how could a sentence, of which the only effect was to deprive him for a time of his rank and emoluments as a midshipman, have any effect upon an office which he acquired after the sentence was passed; and, by acquiring which, he ceased *ipso jure* to hold the office to which alone the sentence related? * * *."

"But, even supposing the sentence of the passed midshipman might, by possibility, be made applicable to the lieutenant; how could it be enforced? * * * The sentence passed upon the offender was suspension from a passed midshipman's rank and pay; it is now become, by the act of Government itself, impossible to enforce that judgment, because the officer is no longer entitled to that rank and pay, but by those conferred by a higher commission. * * *"

Assuming these views to be sound, they would be applicable to the present case, *provided* Whittaker had been *permanently* appointed a lieutenant. In that case the Ensign Whittaker would have ceased to exist to the same extent in law as though he had died, and the court-martial proceedings would have been void for lack of jurisdiction *in personam.*

Does the same conclusion follow as to a temporary appointment made under the provisions of the act of May 22, 1917, as amended, *supra?* It would seem not. Such appointments are referred to throughout the act as "temporary," being carefully distinguished from "permanent" appointments. They are to "continue in force" only until a certain period (sec. 8), and it is expressly provided:

"That the permanent * * * commissions * * * of officers shall not be vacated by reason of their temporary advancement or appointment, nor shall said officers be prejudiced in their relative lineal rank as to promotion * * *."

"That upon the termination of temporary appointments in a higher grade or rank as authorized by this Act the officers so advanced * * * shall revert to the grade, rank, or rating from which temporarily advanced, unless such officers * * * in the meantime, in accordance with law, become entitled to promotion to a higher grade or rank in the permanent Navy * * * in which case they shall revert to said higher grade or rank * * *." (Sec. 7, 40 Stat. 86.)

The situation is similar to the detail of a line officer to the staff, with higher rank and pay. This does not disturb his office in the line, and, on the termination of his staff duties, he reverts automatically to his old office.

The opinion of Attorney General Legare does not, therefore, apply; the difference in the effect of a permanent, as distinguished from a temporary, appointment to a higher office being fundamental. Whittaker was still an ensign when the court-martial acted on his case, and when you revised it, the office being merely in abeyance for a definite time. The offenses charged against him, viz, "absence from station and duty without leave" and "conduct to the prejudice of good order and discipline," were general in their nature and not peculiar to his office of ensign nor rendered meaningless by his temporary promotion. You evidently took this view in mitigating the sentence with reference to "the grade in which he is permanently serving," and, in my opinion, your action was within the law.

Respectfully,

A. MITCHELL PALMER.

To the SECRETARY OF THE NAVY.

PHILIPPINE GOVERNMENT—ISSUANCE OF CERTIFICATES OF INDEBTEDNESS.

Certificates of indebtedness in the sum of $10,000,000 par value which the Government of the Philippine Islands proposes to issue to maintain the required parity between the silver and the gold peso and to meet an emergent exchange situation, provided by an act of Congress of March 2, 1903, and also by an act of the Philippine Legislature of May 6, 1918, will, if and when issued

NOTE.—Opinion of April 11, 1919, relating to reinstatement of former Government employees, p. 449.

searches and seizures, and the title from ...ment, except in the due course of legal ...ding.

...e state governments were prohibited from ... corresponding legislation, either in the fed... or state constitutions.

...power to interfere with private contracts ... of the most delicate and difficult, in its ...ise, of any belonging to the social sys... and one which there is constant tempta... to abuse. That its exercise is sometimes ...ary is proved by the history of every civ... state. Its judicious exercise constitutes ...title of Solon and Sulla to fame, and has ...vindicated by the most enlightened states... But the people reserved to themselves ...termine the exigences which should call it ...existence. The prohibition is a limitation ...the ordinary government, and not upon ...popular sovereignty. In Fletcher v. Peck, 6 ..., 87, the Chief Justice doubted whether ...repeal of a grant, issued under a legislative ...by the Executive of a state, was within ...competence of the legislative authority; and ...the distinction between Acts of legisla... and sovereignty, and treats the clause of ...Constitution under consideration as an in...tion on legislation. In Dartmouth College ...Woodward, 4 Wheat. 518, 553, Mr. Webster ...nts the distinction with prominence in his ...ment. He says: "It is not too much to as... that the Legislature of New Hampshire ... not have been competent to pass the ... in question, and make them binding on the ...ffs, without their assent, even if there ... been in the Constitution of the United ...es, or of New Hampshire, no special re...tion on their power, because these Acts are ... the exercise of a power properly legisla... . . . The British Parliament could not ... annulled or revoked this grant as an ordi... act of legislation. If it had done it at all, ...could only have been in virtue of that sov... foreign power *called omnipotent, which ... not belong to any Legislature of the United ...s. The Legislature of New Hampshire has ...same power over the charter which be...ed to the King who granted it, and no ... By the law of England, the power to ... corporations is a part of the royal pre...tive. By the Revolution this power may ...considered as having devolved on the Legis...re of the State, and it has been accordingly ...ised by the Legislature. But the King ... abolish a corporation, or new model it, ...ter its powers without its assent." . . . ...f Justice Marshall, in describing the ju...tion of the court over such contracts, says ...gs to it "the duty of protecting from ...tive violation those contracts which the ...itution of the country has placed beyond ...ative control." And in defining the ob... and extent of the prohibition, he says: ...re the formation of the Constitution, a ...e of legislation had prevailed in many, if ... all the States, which weakened the confi... of man in man, and embarrassed all ...actions between individuals by dispensing ... a faithful performance of engagements. ...rect this mischief by restraining the pow... which produced it, the state Legislatures ...forbidden to pass any law impairing the ...tion of contracts; that is, of contracts re... ...ed.

specting property under which some individual could claim a right to something beneficial to himself." These selections from opinions delivered in this court which have carried the prerogative jurisdiction of the court to its farthest limit, and portions of which are not easily reconciled with a long series of cases subsequently decided (Satterlee v. Matthewson, 2 Pet. 380; Charles River Bridge 11 Pet. 420; West River Bridge v. Dix, 6 How. 507; 8 How. 539; 10 How. 511), show with clearness that this court has not, till now, impugned the sovereignty of the people of a state over these artificial bodies called into existence by their own Legislatures.

I have thus given the reasons for the opinion that the constitution of Ohio and the acts of her government, done by its special authority and direction, are valid dispositions. It is no part of my jurisdiction to inquire whether these public acts of the people and the State were just or equitable. These questions belong entirely to themselves.

It may be that the people may abuse the powers with which they are invested, and even in correcting the abuses of their government, may not in every case act with wisdom and circumspection.

But, for my part, when I consider the justice, moderation, the restraints upon arbitrary power, the stability of social order, the security of personal rights, and general harmony which existed in the country before the sovereignty of governments was asserted, *and [*380 when the sovereignty of the people was a living and operative principle, and governments were administered subject to the limitations and with reference to the specific ends for which they were organized, and their members recognized their responsibility and dependence, I feel no anxiety nor apprehension in leaving to the people of Ohio a "complete power" over their government, and all the institutions and establishments it has called into existence. My conclusion is, that the decree of the Circuit Court of Ohio is erroneous, and that the judgment of this court should be to reverse that decree and dismiss the bill of the plaintiff.

Mr. Justice Daniel:

I concur in the preceding opinion of my brother Campbell.

Mr. Justice Catron:

I also dissent, and concur with the conclusions of the opinions just read.

Ex parte In the Matter of WILLIAM WELLS.

(See S. C. 18 How. 307-331.)

President can grant conditional pardon—can commute sentence of death to imprisonment for life—such pardon not absolute, on ground that condition is void.

The President can grant a conditional pardon under section two of second article of the Constitution giving him power to grant pardons.

NOTE.—Conditional pardons.

It seems agreed that the King may extend his mercy on what terms he pleases, and may annex any condition which he thinks fit, whether precod-

Such pardon is not absolute on the ground that the condition in it is void.

Legal meaning of the word "pardon," and kinds and incidents and extent and effects of, stated.

The condition, when accepted by the convict, is the substitution by himself of a lesser punishment than the law imposed, of which he cannot complain.

So held, where the President granted a pardon to one sentenced to be hung for murder, upon condition that he be imprisoned during life; commuting the sentence of death to imprisonment for life.

Argued Dec. 21, 1855. Decided Apr. 9, 1856.

ON PETITION for a writ of habeas corpus.

Motion for writ of habeas corpus, under the circumstances and fact set forth in the petition.

To the Honorable, the Justices of the Supreme Court of the United States.

"The petition of William Wells respectfully represents: That he was convicted of murder at the December Term, 1851, of the Criminal Court of the County of Washington, District of Columbia, and was sentenced by said court to be hanged on the 23d of April, 1852, on which said 23d of April, the President of the United States granted him a pardon.

For substance of pardon, see opinion of the court, "by virtue of which said pardon, the petitioner was removed from the place of execution by the Marshal of the District of Columbia, and was conveyed and received into the penitentiary of the District of Columbia where he still remains imprisoned; that petitioner had never prayed for nor desired a pardon with such conditions annexed, but that after he had been conveyed and imprisoned in the said penitentiary, and shut up for more than an hour in one of its cells; and while under restraint of duress of imprisonment, and duress per minas, the said pardon was presented to him by the warden of the penitentiary and the jailer of the said jail; and while under said duress, he did subscribe in their presence to the following acceptance of the said pardon and the conditions annexed." (See opinion of the court.)

The remainder of the petition recites the proceedings in the court below. A further statement of the case appears in the opinion of the court.

Mr. C. Lee Jones, for the petitioner:

It is an uncompromising principle of law, that the personal liberty of the individual cannot in any case be abridged without the explicit permission of the law,

1 Bl. Com. 135; 3 Bl. Com. 133.

The petitioner is now imprisoned, not by virtue of an judicial sentence inflicting this species of punishment for an ascertained offense, but by authority of the President, who after exercising the pardoning power, has assumed powers not delegated, by legislating a new punishment into existence, and then sentencing the petitioner to undergo that punishment. The pardon is valid, but the condition being illegal, is void and of no effect. 2 Bl. Com. 157.

Under the Constitution (art. 2, sec. 21), the President has power to grant reprieves and pardons in certain cases. The Constitution defines and limits his powers, and we are not to be guided by what may or may not be done by the English Executive.

Mr. C. Cushing, Atty.-Gen., contra:

The language used in the Constitution conferring the power to grant reprieves and pardons, must be construed with reference to its meaning at the time of its adoption.

When the word "pardon" was used, it conveyed to the mind the authority as exercised by the English Crown or its representatives in the Colonies, and we should give the word the same meaning as prevailed here and in England at the time when it found a place in the Constitution.

See Cathcart v. Robinson, 5 Pet. 264, 280; Flavell's case, 8 Watts & Serg. 197.

Conditional pardons at common law, are of eval with the law itself.

Guilliam's case, cited from the rolls of Hen. VI. by Coke; Co. Litt. 274, B; Clerk Hangley's case, Y. B. 3, N. 6; Fol. 7, No. Cole's case, Sir. F. Moore, 466.

Pardons may be "either absolute or on condition, exception or qualification."

Vin. Abr. Prerog. P. A. 3 Vol. XVII. p.

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ent or subsequent, on the performance whereof the validity of the pardon will depend. Co. Lit. 274. b; 2 Hawk. P. C. ch. 37, sec. 45.

If the condition is not performed the prisoner remains in the same state in which he was at the time that pardon was granted. If sentence had been passed, and he is at large, he may be remanded under his former sentence. Patrick Madan's case, Leach, 220; People v. James, 2 Caines, 57; People v. Potter, 1 Park. Cr. 47; State v. Smith, 1 Bailey 283; State v. Addington, 2 Bailey, 516; or the court may proceed to pass sentence. State v. Fuller, 1 McCord, 178.

Under the Constitution, the President may grant a conditional pardon or commutation of sentence. U. S. v. Wilson, 7 Pet. 150.

The President may grant a conditional pardon provided the condition be compatible with the genius of our Constitution. 1 Op. Atty-Gen. 341, 432.

Where a condition is annexed to a pardon granted, the fact that the person pardoned is in prison, and must accept the condition before receiving the benefit of the pardon, does not constitute such duress as will make his acceptance of the condition of no effect. Greathouse's case, 2 Abb. U. S. 382.

One who claims the benefit of a pardon granted upon conditions, must make clear affirmative proof that the conditions have been completely performed. The requirement of an oath to be taken after issue of pardon is not complied with by showing that an oath of the same character was taken before its issue. Haym v. U. S. 7 Ct. of Cl. 44; Scott v. U. S. 8 Ct. of Cl. 457.

Immaterial variations in the oath do not affect the pardon. Hamilton v. U. S. 7 Ct. of Cl. 44.

A pardon "to begin and take effect" from the day an oath is taken, does not take effect till the oath is taken. Waring v. U. S. 7 Ct. of Cl. 50.

A pardon on condition that the person pardoned should not claim any of his property or the proceeds thereof that had been sold by the order, judgment or decree of a court under the confiscation laws of the U. S. is a bar to his claim. U. S. v. Six Lots of ground, 1 Woods, 234.

Where the power is conferred upon the Executive by the Constitution to grant pardons, it includes the granting conditional pardons. People v. Potter, 1 Park. Cr. R. 47; Hunt, ex parte, 5 Env.

Banishment from U. S. is a lawful condition. People v. Potter, 1 Park. Cr. R. 47; or that he shall leave the state. State v. Smith, 1 Bailey, 283.

In Virginia, a condition annexed to a pardon held void and the pardon absolute. Commonwealth v. Fowler, 4 Call. 35.

In New York it was held that a clause declaring nothing contained therein is intended to relieve a prisoner from the legal disabilities arising upon his conviction and sentence, but solely from imprisonment, was incongruous and repugnant, and will be considered as surplusage. People v. Pease, 4 Johns. Cas. 333.

See, also, note to 14 L.R.A. 286. Power to impose conditions extending beyond term of sentence —see note, 5 L.R.A.N.S. 1003.

Co. 3, Inst. 233; see, also, Patrick Madan's case, 1 Leach, Crown Law, 223; 4 Bl. Com. 401; 1 Chit. Cr. Law, 70, 73; Bac. Abr. Pardon, E.

This has been the construction put, all but universally, upon similar language in the constitutions of the several States.

People v. James, 2 Cai. 57; Flavell's case, 8 Watts & Serg. 196; The State v. Smith, 1 Bailey, 283; The State v. Addington, 2 Bailey, 516; The People v. Potter, 1 Park. Cr. 47.

This court has held that the President may annex conditions to a pardon.

U. S. v. Wilson, 7 Pet. 150.

By the local law applicable to the District of Columbia, special pardons are conditionally authorized.

1 Maryland Laws, 1799; 2 Stat. at L. 103, sec. 1.

Mr. Justice Wayne delivered the opinion of the court:

The petitioner was convicted of murder in the District of Columbia, and sentenced to be hung on the 23d of April, 1852. President Fillmore granted him a conditional pardon. The material part of it is as follows: "For divers good and sufficient reasons I have granted, and do hereby grant unto him, the said William Wells, a pardon of the offense of which he was convicted, upon condition that he be imprisoned during his natural life; that is, the sentence of death is hereby commuted to imprisonment for life in the penitentiary of Washington." On the same day the pardon was accepted in these words: "I hereby accept the above and within pardon, with condition annexed."

An application was made by the petitioner [*309] to the Circuit Court *of the District of Columbia for a writ of habeas corpus. It was rejected and is now before this court by way of appeal.

The 2d article of the Constitution of the United States, section 2, contains this provision: "The President shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment."

Under this power, the President has granted reprieves and pardons since the commencement of the present government. Sundry provisions have been enacted, regulating its exercise for the Army and Navy, in virtue of the constitutional power of Congress to make rules and regulations for the government of the Army and Navy. No statute has ever been passed regulating it in cases of conviction by the civil authorities. In such cases the President has acted exclusively under the power as it is expressed in the Constitution.

This case raises the question, whether the President can constitutionally grant a conditional pardon to a convicted murderer, sentenced to be hung, offering to change that punishment to imprisonment for life; and if he does, and it be accepted by the convict, whether it is not binding upon him to justify a court to refuse him a writ of habeas corpus, applied for upon the ground that the pardon is absolute, and the condition of it void.

The counsel for the prisoner contends that the pardon is valid, to remit entirely the sentence of the court for his execution, and that the condition annexed to the pardon, and accepted by the prisoner, is illegal. It is also said that a President granting such a pardon, assumes a power not conferred by the Constitution—that he legislates a new punishment into existence, and sentences the convict to suffer it; in this way violating the legislative and judicial powers of the government, it being the province of the first to enact laws for the punishment of offenses against the United States; and that of the judiciary, to sentence convicts for violations of those laws, according to them. It is said to be the exercise of prerogative, such as the King of England has in such cases; and that, under our system, there can be no other foundation, empowering a President of the United States to show the same clemency.

We think this is a mistake, arising from the want of due consideration of the legal meaning of the word "pardon." It is supposed that it was meant to be used exclusively with reference to an absolute pardon, exempting a criminal from the punishment which the law inflicts for a crime he has committed.

But such is not the sense or meaning of the word, either in common parlance or in law. In the first it is forgiveness, release, remission. Forgiveness for an offense, whether it be one for which the person committing it is liable in law or otherwise. *Release from pe- [*310 cuniary obligation, as where it is said, I pardon you your debt. Or it is the remission of a penalty, to which one may have subjected himself by the non-performance of an undertaking or contract, or when a statutory penalty in money has been incurred, and it is remitted by a public functionary having power to remit it.

In the law it has different meanings, which were as well understood when the Constitution was made as any other legal word in the Constitution now is.

Such a thing as a pardon without a designation of its kind is not known in the law. Time out of mind, in the earliest books of the English law, every pardon has its particular denomination. They are general, special or particular, conditional or absolute, statutory, not necessary in some cases, and in some grantable of course. Sometimes, though, an express pardon for one is a pardon for another, such as in approver and appellee, principal and accessary in certain cases, or where many are indicted for felony in the same indictment, because the felony is several in all of them, and not joint, and the pardon for one of them is a pardon for all, though they may not be mentioned in it; or it discharges sureties for a fine, payable at a certain day, and the King pardons the principal; or sureties for the peace, if the principal is pardoned after forfeiture. We might mention other legal incidents of a pardon, but those mentioned are enough to illustrate the subject of pardon, and the extent or meaning of the President's power to grant reprieves and pardons. It meant that the power was to be used according to law; that is, as it had been used in England, and these States when they were colonies, not because it was a prerogative power, but as incidents of the power to pardon, particularly when the circumstances of any case disclosed such uncertainties as made it doubtful if there should have been a conviction of the criminal, or when they are such as to

show that there might be a mitigation of the punishment without lessening the obligation of vindicatory justice. Without such a power of clemency, to be exercised by some department or functionary of a government, it would be most imperfect and deficient in its political morality, and in that attribute of Deity whose judgments are always tempered with mercy. And it was with the fullest knowledge of the law upon the subject of pardons, and the philosophy of government in its bearing upon the Constitution, when this court instructed Chief Justice Marshall to say, in The United States v. Wilson, 7 Pet. 162: "As the power has been exercised from time immemorial by the Executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance, we adopt their prin-
311*] ciples respecting the operation *and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it." We still think so, and that the language used in the Constitution, conferring the power to grant reprieves and pardons, must be construed with reference to its meaning at the time of its adoption. At the time of our separation from Great Britain, that power had been exercised by the King, as the Chief Executive. Prior to the Revolution, the Colonies, being in effect under the laws of England, were accustomed to the exercise of it in the various forms, as they may be found in the English law books. They were of course to be applied as occasions occurred, and they constituted a part of the jurisprudence of Anglo-America. At the time of the adoption of the Constitution, American statesmen were conversant with the laws of England, and familiar with the prerogatives exercised by the Crown. Hence, when the words to grant pardons were used in the Constitution, they convey to the mind the authority as exercised by the English Crown, or by its representatives in the Colonies. At that time both Englishmen and Americans attached the same meaning to the word "pardon." In the convention which framed the Constitution, no effort was made to define or change its meaning, although it was limited in cases of impeachment.

We must then give the word the same meaning as prevailed here and in England at the time it found a place in the Constitution. This is in conformity with the principles laid down by this court in Cathcart v. Robinson, 5 Pet. 264, 280; and in Flavell's case, 8 Watts & Serg. 197; Attorney-General's brief.

A pardon is said by Lord Coke to be a work of mercy, whereby the King, either before attainder, sentence or conviction, or after, forgiveth any crime, offense, punishment, execution, right, title, debt or duty, temporal or ecclesiastical, 3 Inst. 233. And the King's coronation oath is, "that he will cause justice to be executed in mercy." It is frequently conditional, as he may extend his mercy upon what terms he pleases, and annex to his bounty a condition precedent or subsequent, on the performance of which the validity of the pardon will depend. Co. Litt. 274–276; 2 Hawkins Ch. 36, sec. 46; 4 Black. Com. 401. And if the felon does not perform the condition of the pardon, it will be altogether void; and he may be brought to the bar and remanded, to suffer the punishment to which he was originally sentenced. Cole's case, Moore, 466; Bac. Abr. Pardon, E. In the case of Packer and others—Canadian prisoners—5 Mees. & Welsby, 32, Lord Abinger decided for the court; if the condition upon which alone the pardon was granted be void, the pardons *must also [*312 be void. If the condition were lawful, but the prisoner did not assent to it nor submit to be transported, he cannot have the benefit of the pardon—or if, having assented to it, his assents be revocable, we must consider him to have retracted it by the application to be set at liberty, in which case, he is equally unable to avail himself of the pardon.

But to the power of pardoning there are limitations. The King cannot, by any previous license, make an offense dispunishable which is malum in se—i. e., unlawful in itself, as being against the law of nature, or so far against the public good as to be indictable at common law. A grant of this kind would be against reason and the common good, and therefore void, 2 Hawk. ch. 37, sec. 82. So he cannot release a recognizance to keep the peace with another by name, and generally with other lieges of the King, because it is for the benefit and safety of all his subjects, 3 Inst. 238. Nor, after suit has been brought in a popular action, can the King discharge the informer's part of the penalty, 3 Inst. 238; and if the action be given to the party grieved, the King cannot discharge the same, 3 Inst. 237. Nor can the King pardon for a common nuisance, because it would take away the means of compelling a redress of it, unless it be in a case where the fine is to the King, and not a forfeiture to the party grieved. 2 Hawk. ch. 37, sec. 33; 5 Chit. Burn. 2.

And this power to pardon has also been restrained by particular statutes. By the Act of settlement, 12 & 13 Will. III. ch. 2 Eng. no pardon under the great seal is pleadable to an impeachment by the Commons in Parliament, but after the articles of impeachment have been heard and determined, he may pardon. The provision in our Constitution, excepting cases of impeachment out of the power of the President to pardon, was evidently taken from that Statute, and is an improvement upon the same. Nor does the power to pardon in England extend to the Habeas Corpus Act, 31 Car. II. c. 2, which makes it a premunire to send a subject to any prison out of England, etc., or beyond the seas, and further provides that any person so offending shall be incapable of the King's pardon. There are also pardons grantable as of common right, without any exercise of the King's discretion; as where a statute creating an offense, or enacting penalties for its future punishment, holds out a promise of immunity to accomplices to aid in the conviction of their associates. When accomplices do so voluntarily, they have a right absolutely to a pardon, 1 Chit. C. L. 76. Also, when, by the King's proclamation, they are promised immunity on discovering their accomplices and are the means of conviction them. Rex v. Rudd, Cowp. 334; 1 Leach 118. But except in these cases, accomplices, though admitted according to the usual phrase to be "King's evidence," have no [*313

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39 Eliz. ch. 4, and 5 Geo. IV. ch. 84, a
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& Serg. 197, "several propositions were
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the power of pardon by the Execu-
t they were overruled and the provision
it stood." "Now, no principle is better
than that for the definition of legal
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"And so may the King make a
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upon the *grantee to perform the con-
r if the condition is not performed, the
sentence remains in full vigor and may
d into effect."
is case we add those of The State v.
Bailey's S. C. 283, 288; also South
v. Addington, in the 2d volume of the
orter, p. 516; also Hunt, ex parte, 10
; also that of The People v. Potter, 4
gal Observer, 177; S. C. 1 Parker, Cr.
the case of the U. S. v. George Wilson,
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was urged by the counsel who repre-
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sents the petitioner, that the power to reprieve and pardon does not include the power to grant a conditional pardon, the latter not having been enumerated in the Constitution as a distinct power. And he cited the constitutions of several of the States, the legislation of others, and two decisions, to show that when the power to commute punishment had not been given in terms, that legislation had authorized it; and that when that had not been done, that the courts had decided against the commutation by the governors of the States. And it was said, so far from the President having such a power, that as the grant was not in the Constitution, Congress could not give it.

It not unfrequently happens in discussions upon the Constitution, that an involuntary change is made in the words of it, or in their order, from which, as they are used, there may be a logical conclusion, though it be different from what the Constitution is in fact. And even though the change may appear to be equivalent, it will be found upon reflection not to convey the full meaning of the words used in the Constitution. This is an example of it. The power as given is not to reprieve and pardon, but that the President shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment. The difference between the real language and that used in the argument is material. The first conveys only the idea of an absolute power as to the purpose or object for which it is given. The real language of the Constitution is general; that is, common to the class of pardons, or extending the power to pardon, to all kinds of pardons known in the law as such, whatever may be their denomination. We have shown that a conditional pardon is one of them. A single remark from the power to grant reprieves will illustrate the point. That is not only to be used to delay a judicial sentence when the President shall think the merits of the case, or some cause connected with the offender, may require it, but it extends also to cases ex necessitate legis, as where a female after conviction is found to be enceinte, or where a convict becomes insane, or is alleged to be so. Though the reprieve in either case produces *delay in the exe- [*315
cution of a sentence, the means to be used to determine either of the two just mentioned, are clearly within the President's power to direct; and reprieves in such cases are different in their legal character, and different as to the causes which may induce the exercise of the power to reprieve.

In this view of the Constitution, by giving to its words their proper meaning, the power to pardon conditionally is not one of inference at all, but one conferred in terms.

The mistake in the argument is, in considering an incident of the power to pardon the exercise of a new power, instead of its being a part of the power to pardon. We use the word "incident" as a legal term, meaning something appertaining to and necessarily depending upon another, which is termed the principal.

But admitting that to be so, it may be said, as the condition, when accepted, becomes a substitute for the sentence of the court, involving another punishment, the latter is substantially the exercise of a new power. But this is

not so, for the power to offer a condition, without ability to enforce its acceptance, when accepted by the convict, is the substitution, by himself, of a lesser punishment than the law has imposed upon him, and he cannot complain if the law executes the choice he has made.

As to the suggestion that conditional pardons cannot be considered as being voluntarily accepted by convicts so as to be binding upon them, because they are made whilst under dures per minas and duress of imprisonment, it is only necessary to remark, that neither applies to this case, as the petitioner was legally in prison. "If a man be legally imprisoned, and either to procure his discharge, or on any other fair account, seal a bond or deed, this is not duress or imprisonment, and he is not at liberty to avoid it. And a man condemned to be hung cannot be permitted to escape the punishment altogether, by pleading that he had accepted his life by duress per minas." And if it be further urged, as it was in the argument of this case, that no man can make himself a slave for life by convention, the answer is, that the petitioner had forfeited his life for crime, and had no liberty to part with.

We believe we have now noticed every point made in the argument by counsel on both sides, except that which deduces the President's power to grant a conditional pardon, from the local law of Maryland, of force in the District of Columbia. We do not think it necessary to discuss it, as we have shown that the President's power to do so exists under the Constitution of the United States.

We are of opinion that the Circuit Court of the District of Columbia rightfully refused the petitioner's application, and this court affirms it.

316*] *Mr. Justice McLean, dissenting:

William Wells was convicted of murder, in the District of Columbia, and sentenced to be hung on the 23d of April, 1852; on which day President Fillmore granted him a conditional pardon, for his acceptance, as follows: "The sentence of death is hereby commuted to imprisonment for life, in the penitentiary at Washington." On the same day this pardon was accepted, as follows: "I hereby accept the above and within pardon, with condition annexed." This acceptance was signed by Wells, and witnessed by the jailer and warden. Wells now claims that the pardon is absolute and the condition null and void, and that consequently he is entitled to a discharge from imprisonment.

Application was made in this case to the Circuit Court of the District of Columbia by petition for a writ of habeas corpus, and on the petition the following entry was made on the records of that court: "William Wells, who was convicted in the Circuit Court of this District of murder, and sentenced to be hung on the 23d of April, 1853, which sentence was on that day commuted by the President of the United States, to that of imprisonment for life in the penitentiary of the District, having been brought before that court on a writ of habeas corpus, the court after hearing the arguments of counsel, and mature deliberation being thereupon had, do order that the said William Wells be remanded to the penitentiary, the court being of opinion that the President of the United States has the power to commute the sentence of death to that of imprisonment for life, in the penitentiary."

A petition for a habeas corpus to this court has been presented, and the case has been argued on its merits, and it is now before us for consideration.

This case is brought here, not as an original application, but in the nature of an appeal from the decision of the Circuit Court. It is not an appeal in form, but in effect, as it brings the same subject before us, with the decisions of the Circuit Court on the habeas corpus, that the principles laid down by it may be considered.

In Ex parte Watkins, 7 Pet. 568, the court say: "Upon this state of the facts several questions have arisen and been argued at the bar, and one, which is preliminary in its nature, at the suggestion of the court. This is, whether, under the circumstances of the case, the court possess jurisdiction to award the writ; and upon full consideration, we are of opinion that *the court do possess jurisdiction. The [*317 question turns upon this, whether it is an exercise of original or appellate jurisdiction. If it be the former, then, as the present is not one of the cases in which the Constitution allows this court to exercise original jurisdiction, the writ must be denied. Marbury v. Madison, 1 Cranch, 137; 1 Pet. Cond. 267. If the latter, then it may be awarded, since the Judiciary Act of 1789, sec. 14, has clearly authorized this court to issue it.

"This was decided in the case of U. S. v. Hamilton, 3 Dall. 17; Ex parte Bollman & Swartwout, 4 Cranch, 75; and Ex parte Kearney, 7 Wheat. 38. The doubt was, whether, in the actual case before the court, the jurisdiction sought to be exercised was not original, since it brought into question, not the validity of the original process of capias ad satisfaciendum, but the present right of detainer of the prisoner under it. Upon further reflection, however, the doubt has been removed."

In that case, this court "considered Watkins in custody under process awarded by the Circuit Court, and that whether he was rightfully so was the very question before the court; and if the court should remand the prisoner, it would clearly be the exercise of an appellate jurisdiction." The same remark applies with equal force and effect to the case before us.

In this case the question is, whether Wells is rightfully detained, under the order of the Circuit Court, in virtue of the commutation of the original sentence by the President, and which the Circuit Court has held to be a legal detention.

It is not perceived that there is any difference, in principle, between this case and the case of Watkins. The court has no power to revise, in this form, the judgment of the Circuit Court under the law in a criminal case, but, as in the case of Watkins, we may decide whether the individual is held by a legal custody.

It is said the convict is now in prison under the original sentence of the court. So far as that sentence goes, the man is presumed to have been hung in April, 1852. But it is insisted the President had power to reprieve from the sentence of death. This is admitted; but no reprieve has been granted. On the contrary,

act has been done, entirely inconsistent with a reprieve, as that only suspends the punishment for a fixed period. The punishment of death has been commuted, for confinement to hard labor in the penitentiary during life. It is a perversion of the facts to say that Wells has been reprieved by the President; nor can it be said that he is now in confinement under a sentence of death. The sentence of death has been commuted for confinement. Since April, 1852, that sentence has been abrogated in effect; for if the President had power to commute the crime, the sentence is at an end. The culprit 318*] is detained in *prison under this commutation of the President, which the Circuit Court held he had the power to do, and remanded the prisoner on that ground; and whether this be legal, is the inquiry on the habeas corpus. It does not reach the original sentence of the court. That sentence is considered only as the ground of the commutation; and if the President had no power to make it, the detention of Wells is illegal. Is not this a legitimate subject of inquiry on a habeas corpus? It has been held to be a legal detention by the Circuit Court, and this opinion of the Circuit Court is brought before us on the habeas corpus, as the only cause of detention.

The 2d section of the 2d article of the Constitution of the United States declares, that "the President shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachments."

The meaning of the word "pardon," as used in the Constitution, has never come before this court for decision. It has often been decided in the States, that the Governor may grant conditional pardons by commuting the punishment. But in these cases the Governor acted generally, if not uniformly, under special provisions in the Constitution or laws of the State, or on the principles of the common law adopted by the State. This is the case in New York, Maryland, Ohio, and many other states.

It is argued by the Attorney-General, that the word "pardon" was used, in the Constitution, in reference to the construction given to it in England, from whence was derived our system of laws and practice; and that the powers exercised by the British Sovereign under the term "pardon" is a construction necessarily adopted with the term. If this view be a sound one, it has the merit of novelty. The executive office in England and that of this country is so widely different, that doubts may be entertained whether it would be safe for a republican Chief Magistrate, who is the creature of the laws, to be influenced by the exercise of any leading power of the British Sovereign. Their respective powers are as different in their origin as in their exercise. A safer rule of construction will be found in the nature and principles of our own government. Whilst the prerogatives of the Crown are great, and occasionally, in English history, have been more than a match for the Parliament, the President has no powers which are not given him by the Constitution and laws of the country; and all his acts beyond these limits are null and void.

There is another consideration of paramount importance in regard to this question. We have under the federal government no common law offenses, nor common law powers to punish in

our courts; and the same may be said of our Chief *Magistrate. It would be strange [*319 indeed if our highest criminal courts should disclaim all common law powers in the punishment of offenses, whilst our President should claim and exercise such powers in pardoning convicts.

The power of commutation overrides the law and the judgments of the courts. It substitutes a new, and, it may be, an undefined punishment for that which the law prescribes a specific penalty. It is, in fact, a suspension of the law, and substituting some other punishment which, to the Executive, may seem to be more reasonable and proper. It is true the substituted punishment must be assented to by the convict; but the exercise of his judgment, under the circumstances, may be a very inadequate protection for his rights.

If the law controlled the exercise of this power, by authorizing solitary confinement for life, as a substitute for the punishment of death, and so of other offenses, the power would be unobjectionable; the line of action would be certain, and abuses would be prevented. But where this power rests in the discretion of the Executive, not only as to its exercise, but as to the degree and kind of punishment substituted, it does not seem to be a power fit to be exercised over a people subject only to the laws.

To speak of a contract by a convict, to suffer a punishment not known to the law, nor authorized by it, is a strange language in a government of laws. Where the law sanctions such an arrangement, there can be no objection; but when the obligation to suffer arises only from the force of a contract, it is a singular instrument of executive power.

Who can foresee the excitements and convulsions which may arise in our future history? The struggle may be between a usurping Executive and an incensed people. In such a struggle, this right, claimed by the Executive, of substituting one punishment for another, under the pardoning power, may become dangerous to popular rights. It must be recollected that this power may be exercised, not only in capital cases, but also in misdemeanors, embracing all offenses punished by the laws of Congress. Banishment, or other modes of punishment, may be substituted and inflicted, at the discretion of the national Executive. I cannot consent to the enlargement of executive power, acting upon the rights of individuals, which is not restrained and guided by positive law.

I have no doubt the President, under the power to pardon, may remit the penalty in part, but this consists in shortening the time of imprisonment, or reducing the amount of the fine, or in releasing entirely from the one or the other. This acts directly upon the sentence of the court, under the law, and is strictly an *exercise of the pardoning power in [*320 lessening the degree of punishment, called for by mistaken facts on the trial, or new ones which have since become known.

The case of The U. S. v. Wilson, 7 Pet. 150, has been referred to by the Attorney-General as sanctioning conditional pardons. But the remarks of the court in that case arose on the pleadings, and not on the power of the President. He had pardoned Wilson, but that pardon had not been pleaded, or brought before the court by motion or otherwise, and the court

held that the pardon could not be considered unless it was brought judicially before it. In that case the Chief Justice said: "The Constitution gives to the President, in general terms, the power to grant reprieves and pardons for offenses against the United States."

And he says, "as this power has been exercised from time immemorial by the Executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance, we adopt their principles, respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it." And he goes on to show that a pardon, like any other defense, must be pleaded, to enable the court to act upon it. There is nothing in the case which countenances the power of the President, as in this case is contended, to commute the punishment of death for confinement during life in the penitentiary. The Chief Justice said, "a pardon may be conditional," in reference to grants of pardon in England, and by Governors of states.

There can be no doubt, where one punishment is substituted, under the laws of England, for another—as banishment for death—if the convict shall return he may be arrested on the original offense; and if he shall be found by a jury to be the identical person originally convicted, the penalty of death incurred by him may be inflicted. And the same thing may be done in regard to all offenses where, in this country, the law authorizes the pardoning power to modify the punishment and give effect to the commutation.

In 4 Call. 35, in Virginia, a case is reported where the prisoner was indicted for felony. On motion of the Attorney-General for an award of execution, the Governor's pardon was pleaded, and urged as absolute, because the Governor had no authority to annex the condition. The general court held that the condition was illegal, and therefore the pardon was absolute. Another case in North Carolina, reported in 4 Hawks, 193, the defendant was convicted of forgery, sentenced to the pillory, three years' imprisonment, thirty-nine lashes, and a fine of 321*] *$1,000; execution issued for fine and costs; conditional pardon by the Governor. The judge said "the Governor cannot add or commute a punishment—it was consistent with his power to remit."

We are told that when a term is used in our Constitution or statutes which is known at the common law, we look to that system for its meaning. Pardon is a word familiar in common law proceedings, but it is not a term peculiar to such proceedings. It applies to the ordinary intercourse of men, and it means remission, forgiveness. It is said, in a monarchy, the offense is against the monarch, and that consequently he is the only proper person to forgive.

Bacon says the power of pardoning is irreparably incident to the Crown, and is a high prerogative of the King. And Comyns, in his Digest, says: "The King, by his prerogative, may grant his pardon to all offenders attainted or convicted of a crime; and that statutes do not restrain the King's prerogative, but they are a caution for using it well."

The power to pardon is a prerogative power of the monarch, which cannot, it seems, be restrained by statute. Is this the usage or the common law meaning of the word "pardon," to which we are to refer as a guide in the present case? If the President can exercise the pardoning power, as free from restraints as the Queen of England, his prerogative is much greater than has been supposed. Instead of looking into the nature of our government, for the true meaning of terms vesting powers in the Executive, are we to be instructed by studying the regalia of the Crown of England; not to ascertain the definition of the word "pardon," but to be assured what powers are exercised under it by the monarch of England. This is a new rule of construction of the constitutional powers of the President. I had thought he was the mere instrument of the law, and that the flowers of the Crown of England did not ornament his brow.

In his commentary on the Constitution, Judge Story says, 346: "The whole structure of our government is so entirely different, and the elements of which it is composed are so dissimilar from that of England, that no argument can be drawn from the practice of the latter, to assist us in a just arrangement of the executive authority."

It is not the meaning of the word "pardon" that is objected to; but it is the prerogative powers of the Crown which are exercised under that designation. The President is the executive power in this country, as the Queen holds the executive authority in England. Are we to be instructed as to the extent of the executive power in this country, by looking into the exercise of the same power in England?

*In the Act for the Better Government [*322 of the Navy of the United States, passed the 23d April, 1800 (2 Stat. at L. p. 51, art. 42), it is declared: "The President of the United States, or, when the trial takes place out of the United States, the commander of the fleet or squadron, shall possess full power to pardon any offense committed against these articles, after conviction, or to mitigate the punishment decreed by a court-martial." If, in the opinion of Congress, the power to pardon included the power to commute the punishment, this provision would seem to be unnecessary.

But admit that the power of the President to pardon, is as great as are the prerogatives of the Crown in England, still the Act before us is unsustainable. The Queen of England cannot do what the President has done in this instance. She has no power, except under statutes, to commute a punishment, to which the prisoner has been judicially sentenced, for any other punishment at her discretion.

By the Act of George III. ch. 140, it is provided, "that if His Majesty shall be graciously pleased to extend his mercy to any offender liable to the punishment of death by the sentence of a naval court-martial, upon condition of transportation, or of transporting himself beyond seas, or upon condition of being imprisoned within any jail in Great Britain, or on condition of being kept to hard labor in any jail or house of correction, or penitentiary house, etc., it shall and may be lawful for any justice of the King's Bench, etc., upon such intention of mercy as aforesaid being notified in writing, to allow to such offender the benefit of such conditional pardon as shall be

pressed in such notification. And the judge is required to make an order in regard to the punishment, which is declared to be as effectual as if such punishment had been inflicted by the sentence of the court; and the sentence of death was made to apply to such offender should he escape."

And again; by the Act of George IV. 21st June, 1824, it is provided, "when His Majesty shall be pleased to extend his mercy, upon condition of transportation beyond seas, etc., one of His Majesty's principal secretaries shall signify the same to the proper court, before which the offender has been convicted; such court shall allow to such offender the benefit of a conditional pardon, and make an order for the immediate transportation of such offender. And the Act declares that any person found at large, who had been thus transported, should suffer death," etc.

Statute 28, 7 & 8 of George IV. sec. 13, declares that, "when the King's Majesty shall be pleased to extend his royal mercy to any offender, his royal sign-manual, countersigned 323*] by one of his *principal secretaries of state, shall grant to such offender a free or a conditional pardon," etc.

In 54 Geo. III. ch. 146, where there was a conviction for high treason, the King was authorized to change the punishment—that said person shall not be hanged by the neck—but that instead thereof such person should be beheaded, etc.

It is laid down in Coke's 3d Institute, Vol. VI. p. 52: "Neither can the King by any warrant under the great seal alter the execution, otherwise than the judgment of the law doth direct." In that same book, p. 211, he says, "it is a maxim of law, that execution must be according to the judgment."

The Sovereign of England, with all the prerogatives of the Crown, in granting a conditional pardon, cannot substitute a punishment which the law does not authorize. The law authorizes the Sovereign to transport, or inflict other punishments, for certain offenses, and this being signified to some one or more of the judges, effect is given to the condition through his or their instrumentality. So that the punishment inflicted is matter of record. And should the offender return into England, after banishment, the law subjects him to punishment under the original conviction. Here is certainty in limiting on the one hand the discretion of the pardoning power, and on the other the rights of the culprit.

With very few, if any, exceptions, conditional pardons have not been granted by the Governors of states, except where express authority has been given in the Constitution or laws of the states. So early as the 12th of March, 1794, a law of New York provided "that it shall and may be lawful for the person administering the government of the State, for the time being, in all cases in which he is authorized by the Constitution to grant pardons, to grant the same upon such conditions, and with such restrictions, and under such limitations, as he may think proper."

The distinguished Attorney-General, Mr. Wirt, being called on for his opinion in a case differing from the present, but involving, to some extent, the same principles, in his letter of 4th January, 1820, to the Secretary of the Navy, says: "Your letter of the 30th ultimo, submits, for my opinion, the power of the President to change the sentence of death, which has been passed by a general court-martial on William Bonsman, a private in the marine corps, into a sentence of service and restraint for the space of one year, after which to cause him to be drummed from the marine corps as a disgrace to it."

He refers to the 42d article of the Rules and Regulations of the Navy, which embrace the marine corps, and which declares that "the President of the United States shall possess full power to *pardon any offense [*324 against these articles after conviction, or to mitigate the punishment decreed by a court-martial." And he says, "the power of pardoning the offense does not, in my opinion, include the power of changing the punishment; but the 'power to mitigate the punishment,' decreed by a court-martial, cannot, I think, be fairly understood in any other sense than as meaning a power to substitute a milder punishment in the place of that decreed by the court martial, in which sense it would justify the sentence which the President proposes to substitute, in the case under consideration."

The power of mitigation, he says, "in general terms, leaves the manner of performing this act of mercy to himself, and if it can be performed in no other way than by changing its species, the President has, in my opinion, the power of adopting this form of mitigation;" and he observes, "to deny him the power of changing the punishment in this instance, is to deny him the power of mitigating the severest of all punishments. Congress foresaw that there were cases in which the exercise of the power of entire pardon might be proper; they therefore, in the first branch of the article, gave him the power to pardon. But they foresaw, also, that there would be cases in which it would be improper to pardon the offense entirely, in which there ought to be some punishment, but in which, nevertheless, it might be proper to inflict a milder punishment than that decreed by the court-martial; and hence, in another and distinct member of the article they give him, in general terms, the separate and distinct power of mitigation."

It will be seen that Mr. Wirt places the power of mitigation expressly under the article cited.

In a letter to the President on the power to pardon, dated 30th March, 1820, Mr. Wirt says: "The power of pardon, as given by the Constitution, is the power of absolute and entire pardon. On the principle, however, that the greater power includes the less, I am of opinion that the power of pardoning absolutely includes the power of pardoning conditionally. There is, however," he says, "great danger lest a conditional pardon should operate as an absolute one, from the difficulty of enforcing the condition, or, in case of a breach of it, resorting to the original sentence of condemnation; which difficulty arises from the limited powers of the national government.

"But suppose," he remarks, "a pardon granted on a condition, to be executed by officers of the federal government—as, for example, to work on a public fortification—and suppose this condition violated by running away, where is the power of arrest, in these

circumstances, given by any law of the United States? And suppose the arrest could be made, 325*] where is the *clause in any of our judiciary acts that authorizes a court to proceed in such a state of things? And without some positive legislative regulation on the subject, I know that some of our federal judges would not feel themselves at liberty to proceed, de novo, on the original case. It is true the King of England grants such conditional pardons by the common law; but the same common law has provided the mode of proceeding for a breach of the condition on the part of the culprit. We have no common law here, however, and hence arises the difficulty." And he says: "If a condition can be devised whose execution would be certain, I have no doubt that the President may pardon on such condition. All conditions precedent would be of this character; e. g., pardon to a military officer under sentence of death, on the previous condition of resigning his commission."

In his letter to the President, dated 18th September, 1845, Mr. Attorney-General Mason says: "I cannot doubt the power of the President to mitigate a sentence of dismission from the service, by commuting it into a suspension for a term of years without pay. A dismission is a perpetual suspension without pay; and the limited suspension without pay is the inferior degree of the same punishment. The minor is contained in the major." And he says: "The sentence of death for murder could be mitigated by substituting any punishment which the law would authorize the court to inflict for manslaughter. This is the inferior degree of the offense."

And again, in his letter to the Secretary of the Navy, dated 16th of October, 1845, Mr. Mason says: "Did this power to mitigate the sentence include the power to commute or substitute another and a milder punishment for that decreed by the court (referring to a court-martial), the mitigation," he says, "must be of the punishment adjudged, by reducing and modifying its severity, except as in sentences of death, where there is no degree." He says: "At the War Department it has always been considered that the Executive has not the power by way of mitigation, to substitute a different punishment for that inflicted by sentence of a court martial—the general rule being that the mitigated sentence must be a part of the punishment decreed." He further remarks, "that in 1820, Mr. Wirt gave an opinion recognizing this rule, but made a substitution of a different punishment for the sentence of death an exception; and he places it in the ground that capital punishment can only be mitigated by a change of punishment." Mr. Attorney-General should have said, that the power given in the article to mitigate was referred to by Mr. Wirt as authorizing the mitigation, and not the general power to pardon.

No higher authority than Mr. Wirt can be 326*] found, as coming *from the law officer of the government. It gives to the procedure now before us no countenance or support, but throws the weight of his great name against the exercise of the power assumed.

But it is said that the power of commutation may be exercised by the President under the laws of Maryland, adopted by Congress on the cession of the territory which now constitutes the District of Columbia.

The constitution of Maryland provides, that the Governor "alone may exercise all other the executive powers of government, where the concurrence of council is not required according to the laws of the State, and grant reprieves or pardons for any crime, except in cases where the law shall otherwise direct." This, I suppose, no one will contend, can be applied to the President of the United States. The constitutional provision is made subject to the action of the Legislature.

A Statute of Maryland was passed in 1847 (ch. 17), to make conditional pardons effectual. This law can only tend to show that there was no prior law by which such pardons could be made effectual.

The first law of Maryland on the subject of pardon was enacted in 1787. The 1st section provided, "that the Governor may, in his discretion, grant to any offender capitally convicted a pardon, on condition contained therein, and is and shall be effectual as a condition according to the intent thereof."

The 2d section provides, if the convict be a slave, he may be transported out of the State, and sold for the benefit of the State.

The 4th sec. declares, if a party who has been pardoned on condition of leaving the State shall return contrary thereto, he shall be arrested, and on being found by a jury to be the same person, the court shall pass such judgment as the law requires for the crime committed.

The second law on the same subject, was enacted in 1795.

The 1st sec. requires the Governor to issue a warrant to the sheriff, to carry the sentence of the court into effect. The 2d sec. that, in his discretion, the Governor may commute or change any sentence or judgment of death into other punishment of such criminal of this State, upon such terms and conditions as he shall think expedient. And if a slave, he may be transported and sold for the benefit of the State.

By an Act of Congress of the 27th of February, 1801, it was declared, "that the laws of Maryland, as they now exist, shall be and continue in force in that part of the said district which was ceded by that State to the United States, and by them accepted." This provision covers what is now the District of Columbia.

*That the general law of Maryland for[*327 the punishment of offenses, the practice of the courts, forms of action, contracts, etc., come under the laws of Maryland, is undoubted. But the question is, whether the above laws which regulate pardons by the Governor, apply to the President of the United States, in the exercise of the same power. After much reflection, I have come to the conclusion that they can neither justify nor control the exercise of the constitutional power of the President to grant a pardon, for the following reasons:

1. Their language is inappropriate, and some of their provisions are inconsistent with the duties of the President. The Governor is required to issue a warrant to execute the sentence of the court, and also to sell convicted slaves for the benefit of the State. Can the President do this?

For more than half a century these acts not been applied to the President, al-gh he has often granted pardons, until in case now before us. Nor have either of the been referred to by any one of the at-eys-general who have been consulted on the ect, and who have given elaborate opinions, particularly Mr. Wirt, who dwells upon difficulty, if not impracticability, of carry-out the condition on which the pardon was ted, without specific legislation. No ref-ce was made to these laws by the late At-ey-General, on whose advice the punish-t of death was commuted, in favor of is, to imprisonment for life.

ny regulation respecting the high preroga-power to pardon or commute the punish-t of a convict, must be general, and extend ar as the federal jurisdiction extends, and ot be restricted by any Act of Congress to particular state or territory. The power iven in the Constitution, and it may be ex-sed commensurate with that fundamental ; and any modification of the power, to be rcised at the discretion of the President, t be co-extensive with the constitutional er.

he 8th section of the 1st article of the Con-ution declares that Congress shall have er "to make all laws which shall be neces-y and proper for carrying into execution the going powers, and all other powers vested this Constitution in the government of the ted States, or in any department or officer reof."

The above Acts of Maryland can only op-e in this case as Acts of Congress, and in view they have been enacted more than years, without being referred to or acted during that period, although the subject of ditional pardon has been often discussed, the want of provisions which they contain bly felt and expressed. Under such circum-[*] stances, *is it possible to consider those , or either of them, as in force in this dis- since 1801? If this be so, it is the most ordinary event that has occurred in the history of any country.

he laws adopted from Maryland were not ified by name; of course, those only which local in their character, and were neces-in their nature to regulate local transac-, and the courts which settle controversies, adopted. The laws which regulate the and powers of the Governor, in regard to ons granted to offenders, no more apply to President than duties prescribed for the ac-of the Governor in any other matter. This s the reason why the above laws have been ant, as if unknown, for more than fifty . It is too late now to resuscitate them, ver strongly the present exigency may call hem.

m not opposed to commutation of punish-, where it may be called for by any great iple of justice or humanity; but the exer-f such power should be regulated by law, ot left to the discretion of the Executive. e law now stands, the punishment substi-, as well as the exercise of the power, upon discretion; and there is no legal of giving effect to the commutation; and s an unanswerable objection to it. No ed.

court would execute the convict on the original sentence under such circumstances.

If the condition on which a pardon shall be granted be void, the pardon becomes absolute. This, I think, is a clear principle, although there may be found some opinions against it. The President has the power to pardon, and if he make the grant on an impossible condition —for a void condition may be considered of that character—the grant is valid.

The condition being void, I think Wells is illegally detained, and should be discharged.

Mr. Justice Curtis, dissenting:

In Ex parte Kaine, 14 How. 117, I examined, with care, the jurisdiction of this court to issue writs of habeas corpus to inquire into causes of commitment. I then came to the conclusion that the mere fact that a circuit court had examined the cause of commitment and refused to discharge the prisoner, did not enable this court, by a writ of habeas corpus, to re-examine the same cause of commitment. Though subsequent reflection has confirmed the opinion then formed, I should have acquiesced in the jurisdiction assumed in this case, if a majority of the court, in Kaine's case has decided contrary to my opinion. But the question was then left undecided; and in this case, for the first time, in my judgment, has jurisdiction been assumed, on the *ground, not that [*329 the cause of commitment was originally examinable here—for that would be an exercise of original jurisdiction—but that though not thus originally examinable, yet, as the Circuit Court had the prisoner before it, and has remanded him, this court, by a writ of habeas corpus, may examine that decision and see whether it be erroneous or not.

That this is the only ground on which the jurisdiction over this case can be rested, or that it cannot be considered to be an examination of the original cause of commitment, will clearly appear, if we attend to what that cause of commitment was. The petititoner was convicted capitally. His sentence is not brought before us in form, but we must infer that it ordered him to be imprisoned until the day which was by the court, or should be by the Executive, fixed for his execution. He received a conditional pardon. Regularly, I consider that he should have been brought before the Circuit Court upon a writ of habeas corpus, and have there pleaded his pardon, in bar of so much of his sentence as directed him to be hung; or, in bar of the entire sentence if the condition requiring him to continue in imprisonment for life, was inoperative. United States v. Wilson 7 Pet. 150. If this had been done, the Circuit Court would have pronounced its judgment upon the validity of such a plea; and in conformity with the decision which that court has made in this case, it must have entered a judgment vacating its former sentence, and sentencing the petitioner to imprisonment during life in the penitentiary of this District.

Over such a sentence this court could have exercised no control, either by writ of error or of habeas corpus. Not by writ of error, for none is allowed in criminal cases. Not by habeas corpus, for, as was held in Ex parte Watkins, 3 Pet. 193, a writ of habeas corpus cannot issue from this court to examine a criminal sen-

tence of the Circuit Court, even where the objection to the sentence is, that it appears on the face of the record, in the opinion of this court, that the Circuit Court had not jurisdiction, and its proceeding was merely void; because the circuit courts are the final judges of their own jurisdiction; and of all their proceedings in criminal cases. This court has no power to reverse one of their criminal judgments for any cause, and consequently no power to form any judicial opinion upon the correctness thereof.

In the case before us, so far as appears, the petitioner did not formally plead his pardon, nor did the Circuit Court, by an entry on its records, formally vacate the capital sentence, and sentence the prisoner anew. But that court, using its own final judgment as to the proper mode of proceeding in this criminal case, proceeded in such manner and form as it 330*] deemed to be according *to law. It remanded the prisoner, in execution of the original sentence, so far as that directed his imprisonment. After this had been done, the imprisonment may be viewed in one of two aspects. It may be considered as continued under the original sentence; the execution of that part of the sentence which commanded him to be hung being postponed by the pardon, so long as there shall be no breach of the condition; or the original sentence may be treated as modified by the proceedings under the habeas corpus in the Circuit Court, and that part of the sentence which commanded him to be hung, as annulled, the residue remaining in force.

As I view this case, therefore, it stands thus: the petitioner is imprisoned under a criminal sentence of the Circuit Court, either as originally pronounced, or as modified by the order of the Circuit Court made under the writ of habeas corpus. That original or modified criminal sentence is the cause of his commitment. Thought this court has no jurisdiction by writ of error to revise such a sentence, and has deliberately decided, in Ex parte Watkins, that a writ of habeas corpus cannot be made a writ of error for such a purpose, yet by a writ of habeas corpus we do revise such a sentence in this case.

It seems to me that the refusal of a writ of error in criminal cases is not only idle, but mischievous, if a writ of habeas corpus, which is certainly a very clumsy proceeding for the purpose, may be resorted to, to bring the record of every criminal case, of whatever kind, before this court.

With deference for the opinions of my brethren, in my judgment, it goes very little way towards avoiding the difficulty to hold that, before one under a criminal sentence of a circuit court can thus attack his sentence collaterally, in a court which cannot review it by any direct proceeding, he must first apply to the Circuit Court for a writ of habeas corpus; and if the writ, or his discharge under it, be refused, he may then bring into action the appellate power of this court, and by a writ of habeas corpus out of this court stop the execution of a sentence, which we have no power to reverse. Few questions come before this court which may affect the general course of justice more deeply than questions of jurisdiction. This great remedial writ of habeas corpus, so efficacious and prompt in its action, and so justly valued in our country, may become an instrument to unsettle the nicely adjusted lines of jurisdiction, and produce conflict and disorder. If the true sphere of its action, and the precise limits of the power to issue it, should become in any degree confused or indistinct, serious consequences may follow—consequences not only affecting the efficient administration of the criminal laws of the United States, but the harmonious action of the *divided [*331 sovereignties by which our country is governed. For these reasons, though sensible of the bias, which I suppose everyone has in favor of this process, I have heretofore felt, and now feel constrained to examine with care the question of our jurisdiction to issue it; and being of opinion that this court has not power to inquire into the validity of the cause of commitment stated in this petition, I think it should be dismissed for that reason.

In this opinion Mr. Justice **Campbell** concurs.

MARY ANN CONNOR, alias Mary Ann Van Ness, Tenant, etc., Plff. in Er.,

v.

SAMUEL A. PEUGH'S LESSEE.

(See S. C. 18 How. 394, 395.)

One, not party below, cannot bring error—matters in discretion of court below, not subject of appeal or writ of error.

In ejectment, the tenant in possession having neglected to appear and have herself made defendant in the court below, cannot have a writ of error to the judgment against the casual ejector.

To the action of the court below, on a motion to set aside the judgment, and for leave to intervene, it being a matter of discretion, no appeal lies, nor is it the subject of a bill of exceptions or writ of error.

Argued Apr. 4, 1856. Decided Apr. 10, 1856.

IN ERROR to the Circuit Court of the United States for the District of Columbia.

Messrs. **Bradley, Carlisle, and Lawrence**, for defendant in error:

At the October Term, 1854, judgment by default was rendered in an action of ejectment brought by Peugh's Lessee, and a writ of possession was ordered, which was issued March 24, 1855, returnable the fourth Monday of March, instant, and was returned with the indorsement, "came to hand too late for service." On the 23d of May, 1855, an alias writ was issued, returnable on the third Monday of October, thereafter.

Before the return of this writ, to wit: on the 5th June, 1855, a motion was made and a petition filed by the defendant below (Connor) to set aside the judgment and to quash the writ of possession, on the ground that the declaration was not duly served upon her, in proper time.

At the October Term, 1855, this motion was overruled and the petition was dismissed. Thereupon the defendant below prayed an appeal from the judgment aforesaid, so as aforesaid rendered, to this court, which was granted, and the proceedings were brought to this court by writ of error.

NOTE.—Who may appeal to, or sue out writ of error from, Federal Supreme Court—see note, 6 L.R.A. 854.

SUPREME COURT OF THE UNITED STATES.

No. 471.—October Term, 1914.

George Burdick, Plaintiff in Error, *vs.* The United States.	In Error to the District Court of the United States for the Southern District of New York.

[January 25, 1915.]

Mr. Justice McKenna delivered the opinion of the Court.

Error to review a judgment for contempt against Burdick upon presentment of the Federal grand jury for refusing to answer certain questions put to him in an investigation then pending before the grand jury into alleged custom frauds in violation of sections 37 and 39 of the Criminal Code of the United States.

Burdick first appeared before the grand jury and refused to answer questions as to the directions he gave and the sources of his information concerning certain articles in the New York Tribune regarding the frauds under investigation. He is the City Editor of that paper. He declined to answer, claiming upon his oath, that his answers might tend to criminate him. Thereupon he was remanded to appear at a later day and upon so appearing he was handed a pardon which he was told had been obtained for him upon the strength of his testimony before the other grand jury. The following is a copy of it:

"Woodrow Wilson, President of the United States of America, to all to whom these presents shall come, Greeting:

"Whereas George Burdick, an editor of the New York Tribune, has declined to testify before a Federal Grand Jury now in session in the Southern District of New York, in a proceeding entitled 'United States *v.* John Doe and Richard Roe,' as to the sources of the information which he had in the New York Tribune office, or in his possession, or under his control at the time he sent Henry D. Kingsbury, a reporter on the said New York Tribune, to write an article which appeared in the said New York Tribune in its issue of December thirty first, 1913, headed 'Glove Makers' Items may be Customs Size,' on the ground that it would tend to incriminate him to answer the questions; and,

"Whereas, the United States Attorney for the Southern District of New York desires to use the said George Burdick as a witness before the said Grand Jury in the said proceeding for the purpose of determining whether any employee of the Treasury Department at the Custom House, New York City, has been betraying information that came to such person in an official capacity; and,

"Whereas, it is believed that the said George Burdick will again refuse to testify in the said proceeding on the ground that his testimony might tend to incriminate himself;

"Now, Therefore, be it Known, that I, Woodrow Wilson, 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 George Burdick a full and unconditional pardon for all offenses against the United States which he, the said George Burdick, has committed or may have committed, or taken part in, in connection with the securing, writing about, or assisting in the publication of the information so incorporated in the aforementioned article, and in connection with any other article, matter or thing, concerning which he may be interrogated in the said grand jury proceeding, thereby absolving him from the consequences of every such criminal act.

"In testimony whereof, I have hereunto signed my name and caused the seal of the Department of Justice to be affixed. Done at the City of Washington this fourteenth day of February, in the year of our Lord One Thousand Nine Hundred and Fourteen, and of the Independence of the United States the One Hundred and Thirty-eighth."

He declined to accept the pardon or answer questions as to the sources of his information, or whether he furnished certain reporters information, giving the reason, as before, that the answers might tend to criminate him. He was presented by the grand jury to the District Court for contempt and adjudged guilty thereof and to pay a fine of $500, with leave, however, to purge himself by testifying fully as to the sources of the information sought of him, "and in event of his refusal or failure to so answer, a commitment may issue in addition until he shall so comply," the court deciding that the President has power to pardon for a crime of which the individual has not been convicted and which he does not admit and that acceptance is not necessary to toll the privilege against incrimination.

Burdick again appeared before the grand jury, again was questioned as before, again refused to accept the pardon and again refused to answer upon the same grounds as before. A final order of commitment was then made and entered and he was committed to the custody of the United States Marshal until he should

purge himself of contempt or until the further order of the court. This writ of error was then allowed.

The question in the case is the effect of the unaccepted pardon. The Solicitor General in his discussion of the question, following the division of the District Court, contends (1) that the President has power to pardon an offense before admission or conviction of it, and (2) the acceptance of the pardon is not necessary to its complete exculpating effect. The conclusion is hence deduced that the pardon removed from Burdick all danger of accusation or conviction of crime and that, therefore, the answers to the questions put to him could not tend to or accomplish his incrimination.

Plaintiff in error counters the contention and conclusion with directly opposing ones and makes other contentions which attack the sufficiency of the pardon as immunity and the power of the President to grant a pardon for an offense not precedently established nor confessed nor defined.

The discussion of counsel is as broad as their contentions. Our consideration may be more limited. In our view of the case it is not material to decide whether the pardoning power may be exercised before conviction. We may, however, refer to some aspects of the contentions of plaintiff in error, although the case may be brought to the narrow question, Is the acceptance of a pardon necessary? We are relieved from much discussion of it by *United States* v. *Wilson,* 7 Peters, 150. Indeed, all of the principles upon which its solution depends were there considered and the facts of the case gave them a peculiar and interesting application.

There were a number of indictments against Wilson and one Porter, some of which were for obstructing the mail and others for robbing the mail and putting the life of the carrier in jeopardy. They were convicted on one of the latter indictments, sentenced to death, and Porter was executed in pursuance of the sentence. President Jackson pardoned Wilson, the pardon reciting that it was for the crime for which he had been sentenced to suffer death, remitting such penalty with the express stipulation that the pardon should not extend to any judgment which might be had or obtained against him in any other case or cases then pending before the court for other offenses wherewith he might stand charged.

To another of the indictments Wilson withdrew his plea of not guilty and pleaded guilty. Upon being arraigned for sentence the court suggested the propriety of inquiring as to the effect of the pardon, "although alleged to relate to a conviction on another indictment." Wilson was asked if he wished to avail himself of the pardon, to which he answered in person that "he had nothing to say, and that he did not wish in any manner to avail himself, in order to avoid sentence in this particular case, of the pardon referred to."

The judges were opposed in opinion and certified to this court for decision two propositions which were argued by the district attorney of the United States, with one only of which we are concerned. It was as follows: "2. That the prisoner can, under this conviction, derive no advantage from the pardon, without bringing the same judicially before the court by plea, motion or otherwise." There was no appearance for Wilson. Attorney General Taney (afterwards Chief Justice of this Court) argued the case on behalf of the United States. The burden of his argument was that a pardon, to be effective, must be accepted. The proposition was necessary to be established as his contention was that a plea of the pardon was necessary to arrest the sentence upon Wilson. And he said, speaking of the pardon, "It is a grant to him [Wilson]; it is his property; and he may accept it or not as he pleases", and, further, "It is insisted that unless he pleads it, or in some way claims its benefit, thereby denoting his acceptance of the proffered grace, the court cannot notice it, nor allow it to prevent them from passing sentence. The whole current of authority establishes this principle." The authorities were cited and it was declared that "the necessity of pleading it, or claiming it in some other manner, grows out of the nature of the grant. He must accept it."

There can be no doubt, therefore, of the contention of the Attorney General and we have quoted it in order to estimate accurately the response of the court to it. The response was complete and considered the contention in two aspects, (1) a pardon as the act of the President, the official act under the Constitution; and (2) the attitude and right of the person to whom it is tendered. Of the former it was said that the power had been "exercised from time immemorial by the executive of that nation (England) whose language is our language, and to whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it." From that source of authority and principle the court deduced and declared this conclusion: "A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed. It is the *private* [italics ours] though official act of the executive magistrate, delivered to the individual for whose benefit it is intended." In emphasis of the official act and its functional deficiency if not accepted by him to whom it is tendered, it was said, "A private deed, not communicated to him, whatever may be its character, whether a pardon or release, is totally unknown and cannot be acted on."

Turning then to the other side, that is, the effect of a pardon on him to whom it is offered and completing its description and expressing the condition of its consummation, this was said: "A pardon is a deed, to the validity of which delivery is essential, and delivery is not complete without acceptance. It may then be rejected by the person to whom it is tendered; and if it be rejected, we have discovered no power in the court to force it on him."

That a pardon by its mere issue has automatic effect resistless by him to whom it is tendered, forcing upon him by mere executive power whatever consequences it may have or however he may regard it, which seems to be the contention of the Government in the case at bar, was rejected by the court with particularity and emphasis. The decision is unmistakable. A pardon was denominated as the "private" act, the "private deed," of the executive magistrate, and the denomination was advisedly selected to mark the incompleteness of the act or deed without its acceptance.

Indeed, the grace of a pardon, though good its intention, may be only in pretense or seeming; in pretense, as having purpose not moving from the individual to whom it is offered; in seeming, as involving consequences of even greater disgrace than those from which it purports to relieve. Circumstances may be made to bring innocence under the penalties of the law. If so brought, escape by confession of guilt implied in the acceptance of a pardon may be rejected,—preferring to be the victim of the law rather than its acknowledged transgressor—preferring death even to such certain

infamy. This, at least theoretically, is a right and a right is often best tested in its extreme. "It may be supposed", the court said in *United States* v. *Wilson*, "that no being condemned to death would reject a pardon; but the rule must be the same in capital cases as in misdemeanors. A pardon may be conditional; and the condition may be more objectionable than the punishment inflicted by the judgment."

The case would seem to need no further comment and we have quoted from it not only for its authority but for its argument. It demonstrates by both the necessity of the acceptance of a pardon to its legal efficacy, and the court did not hesitate in decision, as we have seen, whatever the alternative of acceptance—whether it be death or lesser penalty. The contrast shows the right of the individual against the exercise of executive power not solicited by him nor accepted by him.

The principles declared in *Wilson* v. *United States* have endured for years; no case has reversed or modified them. In *Ex parte William Wells*, 18 How. 307, 310, this court said, "It was with the fullest knowledge of the law upon the subject of pardons and the philosophy of government in its bearing upon the Constitution that this court instructed Chief Justice Marshall" to declare the doctrine of that case. And in *Commonwealth* v. *Lockwood* it was said by Mr. Justice Gray, speaking for the Supreme Judicial Court of Massachusetts, he then being a member of that court, it is within the election of a defendant "whether he will avail himself of a pardon from the executive (be the pardon absolute or conditional)," 109 Mass. 320, 339. The whole discussion of the learned justice will repay a reference. He cites and reviews the cases with the same accurate and masterful consideration that distinguished all of his judicial work, and the proposition declared was one of the conclusions deduced.

United States v. *Wilson*, however, is attempted to be removed as authority by the contention that it dealt with conditional pardons and that, besides, a witness cannot apprehend from his testimony a conviction of guilt, which conviction he himself has the power to avert, or be heard to say that the testimony can be used adversely to him, when he himself has the power to prevent it by accepting the immunity offered him. In support of the contentions there is an intimation of analogy between pardon and amnesty, cases are cited, and certain statutes of the United States are adduced whereby immunity was imposed in certain instances and under its unsolicited protection

testimony has been exacted against the claim of privilege asserted by witnesses. There is plausibility in the contentions; it disappears upon reflection. Let us consider the contentions in their order:

(1) To hold that the principle of *United States* v. *Wilson* was expressed only as to conditional pardons would be to assert that the language and illustrations which were used to emphasize the principle announced were meant only to destroy it. Besides, the pardon passed on was not conditional. It was limited in that—and only in that—it was confined to the crime for which the defendant had been convicted and for which he had been sentenced to suffer death. This was its emphasis and distinction. Other charges were pending against him, and it was expressed that the pardon should not extend to them. But such would have been its effect without expression. And we may say that it had more precision than the pardon in the pending case. Wilson had been indicted for a specific statutory crime, convicted and sentenced to suffer death. It was to the crime so defined and established that the pardon was directed. In the case at bar nothing is defined. There is no identity of the offenses pardoned, and no other clue to ascertain them but the information incorporated in an article in a newspaper. And not that entirely, for absolution is declared for whatever crimes may have been committed or taken part in "in connection with any other article, matter or thing concerning which he [Burdick] may be interrogated."

It is hence contended by Burdick that the pardon is illegal for the absence of specification, not reciting the offenses upon which it is intended to operate; worthless, therefore as immunity. To support the contention cases are cited. It is asserted, besides, that the pardon is void as being outside of the power of the President under the Constitution of the United States, because it was issued before accusation, or conviction or admission of an offense. This, it is insisted, is precluded by the constitutional provision which gives power only "to grant reprieves and pardons for offenses against the United States," and it is argued, in effect, that not in the imagination or purpose of executive magistracy can an "offense against the United States" be established, but only by the confession of the offending individual or the judgment of the judicial tribunals. We do not dwell further on the attack. We prefer to place the case on the ground we have stated.

(2) May plaintiff in error, having the means of immunity at hand, that is, the pardon of the President, refuse to testify on the ground that his testimony may have an incriminating effect? A superficial consideration might dictate a negative answer but the answer would confound rights which are distinct and independent.

It is to be borne in mind that the power of the President under the Constitution to grant pardons and the right of a witness must be kept in accommodation. Both have sanction in the Constitution, and it should, therefore, be the anxiety of the law to preserve both,—to leave to each its proper place. In this as in other conflicts between personal rights and the powers of government, technical —even nice—distinctions are proper to be regarded. Granting then that the pardon was legally issued and was sufficient for immunity, it was Burdick's right to refuse it, as we have seen, and it, therefore, not becoming effective, his right under the Constitution to decline to testify remained to be asserted; and the reasons for his action were personal. It is true we have said (*Brown* v. *Walker,* 161 U. S. 501, 605) that the law regards only mere penal consequences and not "the personal disgrace or opprobium attaching to the exposure" of crime, but certainly such consequence may influence the assertion or relinquishment of a right. This consideration is not out of place in the case at bar. If it be objected that the sensitiveness of Burdick was extreme because his refusal to answer was itself an implication of crime, we answer, not necessarily in fact, not at all in theory of law. It supposed only a possibility of a charge of crime and interposed protection against the charge, and, reaching beyond it, against furnishing what might be urged or used as evidence to support it.

This brings us to the differences between legislative immunity and a pardon. They are substantial. The latter carries an imputation of guilt; acceptance a confession of it. The former has no such imputation or confession. It is tantamount to the silence of the witness. It is non-committal. It is the unobtrusive act of the law giving protection against a sinister use of his testimony, not like a pardon requiring him to confess his guilt in order to avoid a conviction of it.

It is of little service to assert or deny an analogy between amnesty and pardon. Mr. Justice Field, in *Knote* v. *United States,* 95 U. S. 149, 153, said that "the distinction between them is one rather of philological interest than of legal importance." This is so

as to their ultimate effect, but there are incidental differences of importance. They are of different character and have different purposes. The one overlooks offense; the other remits punishment. The first is usually addressed to crimes against the sovereignty of the State, to political offenses, forgiveness being deemed more expedient for the public welfare than prosecution and punishment. The second condones infractions of the peace of the State. Amnesty is usually general, addressed to classes or even communities, a legislative act, or under legislation, constitutional or statutory, the act of the supreme magistrate. There may or may not be distinct acts of acceptance. If other rights are dependent upon it and are asserted there is affirmative evidence of acceptance. Examples are afforded in *United States* v. *Klein,* 13 Wall. 128; *Armstrong's Foundry,* 6 Wall. 766; *Carlisle* v. *United States,* 16 Wall. 147. See also *Knote* v. *United States, supra.* If there be no other rights, its only purpose is to stay the movement of the law. Its function is exercised when it overlooks the offense and the offender, leaving both in oblivion.

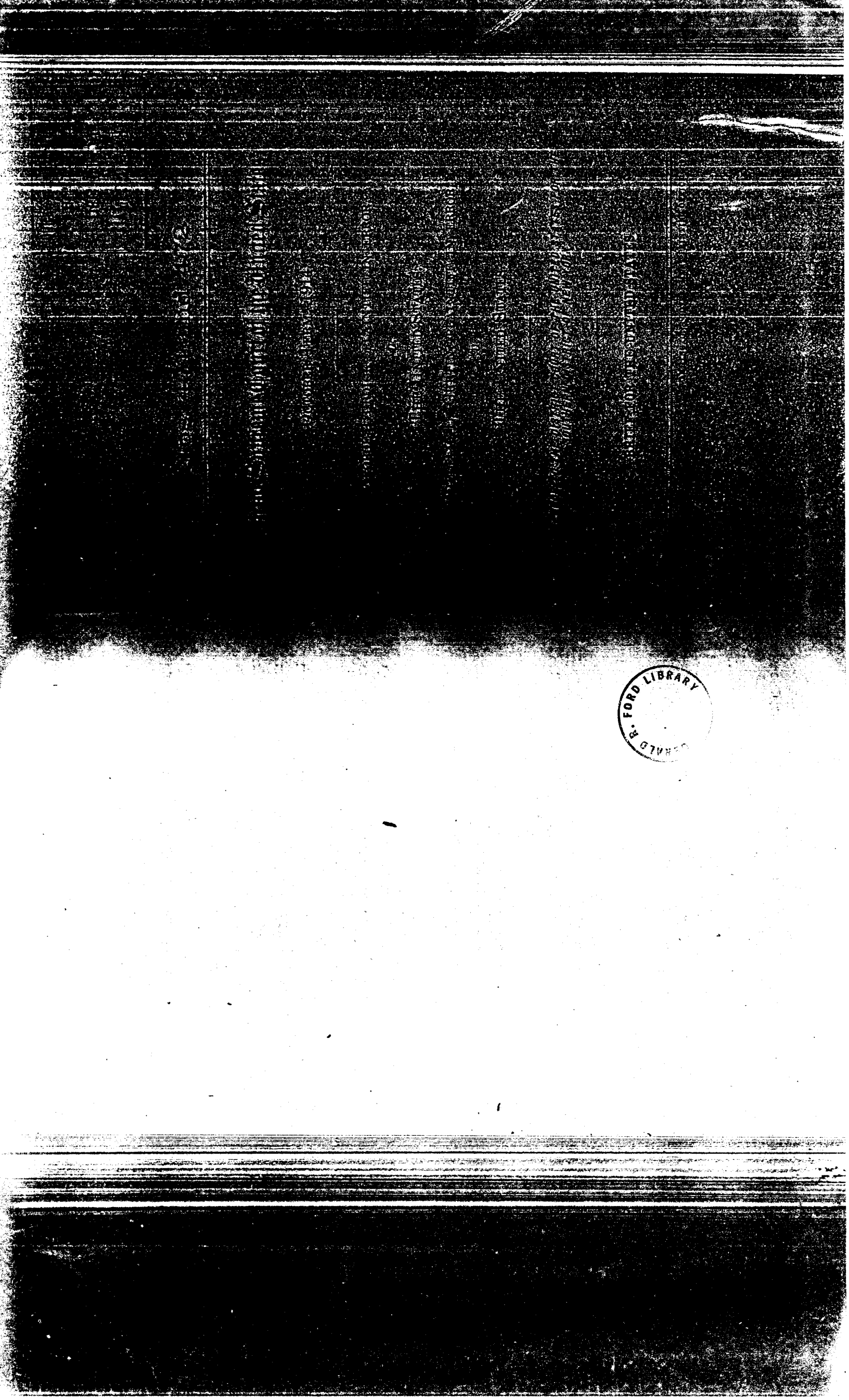
Judgment reversed with directions to dismiss the proceedings in contempt and discharge Burdick from custody.

Mr. Justice McReynolds took no part in the consideration and decision of this case.

True copy.

Test:

Clerk Supreme Court, U. S.



purge themselves by testifying, but that they persisted in their refusal to testify (Records, p. 2). Orders committing each of the defendants for contempt were thereafter made (Burdick, R. 46; Curtin, R. 40).

The question presented is whether the unaccepted tender to a witness of the President's warrant of pardon for offenses against the United States, of which the witness has not, however, been convicted, and which he does not admit, has the effect of tolling his constitutional privilege against self-crimination.

ARGUMENT.

I.

The President has the power to pardon a person for an offense of which he has not been convicted.

In England, as shown in the opinion of the court below, the power of the Crown to grant a pardon before conviction was recognized at an early date. Lord Coke says expressly that the royal prerogative extended as well before as after "attainder, sentence, or conviction." 3 Inst. 233, ch. 105, Of Pardons. Two pardons by Edward I of indicted, but not yet convicted, men are given in full on pages 234, 235. Blackstone, volume IV, chapter XXVI, subdivision IV, 4, gives a pardon as a special plea in bar to an indictment and, rather strangely, in view of later practice, observes that they are good "as well after as before conviction." Later, in chapter XXVIII, he notes the advantage to the

defendant of pleading a pardon in arrest of judgment, in that it avoided the attainder of felony. Chapter XXXI deals with reprieves and pardons, and subdivision II, 1, shows clearly that pardons before conviction were valid except in impeachments, where they were, however, valid after conviction. And in 6 Halsbury's Laws of England, page 404, it is said: "Pardon may, in general, be granted either before or after conviction."

In this country from the very first, Presidents have exercised not only the power to pardon in specific cases before conviction, but even to grant general amnesties. The instances are collected in an opinion of President Taft, while Solicitor General, Opinions of the Attorney General, volume XX, pages 339 *et seq.* And in *Ex parte Garland,* 4 Wall. 333, while the decision did not necessarily depend upon the validity of a pardon which the President had granted Garland, who had never been convicted, Mr. Justice Field, in delivering the opinion of the court, said that the constitutional power of the President to grant pardons (p. 380)—

> extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment.

This language was quoted with approval in the case of *Brown* v. *Walker,* 161 U. S. 591, both in the prevailing opinion (p. 601) and in the dissenting opinion by Mr. Justice Field (p. 638).

In the constitutions of some of the States the power of the governor to grant pardons is expressly limited by the words "after conviction," but in the States in which this limitation is not contained in the constitutions the governor may pardon before conviction. *Dominick* v. *Bowdoin,* 44 Ga. 357; *Grubb* v. *Bullock,* 44 Ga. 379; *Com.* v. *Bush,* 2 Duv. (Ky.) 264; *State* v. *Woolery,* 29 Mo. 300.

II.

A pardon may be granted for an offense which has neither been admitted nor proved.

It is, of course, true that a pardon can not be granted as a license for future misdoing, for that would, in effect, be an invasion of the legislative power to render lawful in the future that which is now unlawful.

But the pardons involved in the cases at bar do not relate to future offenses, but to offenses which the plantiffs in error have "committed or may have committed, or taken part in."

It is well settled that a pardon may be granted before conviction, and there is no authority whatever which limits the exercise of this power to cases in which the person pardoned has confessed his guilt; the pardon may be granted even though he denies the offense. Indeed a belief in the innocence of the person pardoned is a familiar reason for granting pardons before, as well as after, conviction.

And it is yet more certain that a person may be pardoned for an offense which has not been proved. Saying that a pardon can be granted only where there is proof that an offense has been committed by the person pardoned is equivalent to saying that a pardon can not be granted until the person pardoned has been convicted, for, it can not be said, legally speaking, that a person has committed an offense until he has been convicted of that offense.

It is submitted that an acknowledgment by the person pardoned that his answer will tend to incriminate him is basis enough for granting a pardon, without any other proof of the offense or of his connection with the offense. This is the basis of immunity statutes.

III.

A pardon may be granted for the purpose of affording to a witness immunity from prosecution.

These pardons were granted, as the recitals therein show, for the purpose of making available the testimony of the plaintiffs in error, notwithstanding their constitutional privilege, by affording them absolute immunity against future prosecutions for any past offense concerning which they may be questioned, and it is argued that the exercise of the pardoning power of the President for this purpose amounts to a usurpation of legislative functions.

It is true that it is within the powers of Congress to enact laws securing to witnesses immunity from prosecution in lieu of the constitutional prohibition

against compelling incriminating testimony. In *Brown* v. *Walker,* 161 U. S. 591, wherein a statute of this kind was upheld, Mr. Justice Brown, in delivering the prevailing opinion, said (p. 601):

> The act of Congress in question securing to witnesses immunity from prosecution is virtually an act of general amnesty and belongs to a class of legislation which is not uncommon either in England (2 Taylor on Evidence, §1455, where a large number of similar acts are collated) or in this country. Although the Constitution vests in the President "power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment," this power has never been held to take from Congress the power to pass acts of general amnesty.

But the exercise of this power by Congress can have no effect in limiting the constitutional power of the President to grant pardons. The President's power of pardon "is not subject to legislation," and "Congress can neither limit the effect of his pardon nor exclude from its exercise any class of offenders." *United States* v. *Klein,* 13 Wall. 128, 141. It can not be interrupted, abridged, or limited by any legislative enactment. *The Laura,* 114 U. S. 411, 414. Similar language is employed in *Ex parte Garland,* 4 Wall. 333, at page 380.

Since Congress can not restrict the power, and since the Constitution imposes no limitation upon

the exercise of the power, except that cases of impeachment are excluded, it follows that, with this single exception, the power is plenary and may be exercised upon any ground and for any purpose which the President may regard as sufficient to call for its exercise.

And, since the Constitution which confers this power upon the President also provides that "he shall take care that the laws be faithfully executed," it seems that there can be no question but that the President may extend immunity to witnesses by the exercise of the power to pardon.

Indeed this has perhaps never been doubted; it appears that the only question that has been made is whether the power vested in the President is exclusive. *Brown* v. *Walker,* 161 U. S. 591, 601.

And, whatever may have been the view which was at one time taken by the English judges, there is now no doubt but that a witness can not set up his constitutional privilege if he has been pardoned for the offense in regard to which his testimony is sought. *Brown* v. *Walker,* 161 U. S. 591, and English cases cited at page 599. Surely it can not be true that a pardon, granted on one of the usual grounds, such as probable innocence, and with no expectation that the recipient will be called upon to testify, will nevertheless prevent him from invoking the constitutional privilege, but that the same pardon will have no such effect if granted in express contemplation of his appearance as a witness.

Order of Commitment dated April 20, 1914.
Petition for Writ of Error, dated April 20, 1914.
Writ of error, and order *following* writ, dated April 20, 1914.
Citation dated April 20, 1914.
Assignments of Error dated April 20, 1914.
New York, April 29th, 1914.

HENRY A. WISE,
Attorney for Plaintiff-in-Error,
H. SNOWDEN MARSHALL,
U. S. Attorney, S. D. of N. Y.

60 United States District Court, Southern District of New York.

WILLIAM L. CURTIN, Plaintiff-in-Error,
vs.
UNITED STATES OF AMERICA, Defendant-in-Error.

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated May 4th, 1914.

HENRY A. WISE,
Attorney for Plaintiff-in-Error,
H. SNOWDEN MARSHALL,
Attorney for Defendant-in-Error.

61 UNITED STATES OF AMERICA,
Southern District of New York, ss:

WILLIAM L. CURTIN, Plaintiff-in-Error,
vs.
UNITED STATES OF AMERICA, Defendant-in-Error.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the Above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 5th day of May in the year of our Lord one thousand nine hundred and fourteen and of the Independence of the said United States the one hundred and thirty-eighth.

[Seal District Court of the United States, Southern District of N. Y.]

ALEX. GILCHRIST, JR., *Clerk.*

Endorsed on cover: File No. 24,205. S. New York D. C. U. S. Term No. 472. William L. Curtin, plaintiff in error, vs. The United States. Filed May 9th, 1914. File No. 24,205.

FILE COPY.

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SUPREME COURT OF THE UNITED STATES.

October Term, 1914.

No. 471.

GEORGE BERDICK, *Plaintiff-in-Error,*
against
THE UNITED STATES, *Defendant-in-Error.*

No. 472.

WILLIAM L. CURTIN, *Plaintiff-in-Error,*
against
THE UNITED STATES, *Defendant-in-Error.*

Brief on Behalf of Plaintiffs-in-Error.

HENRY A. WISE,
Attorney for Plaintiffs-in-Error.

ARGUS PRINTING COMPANY, NEW YORK.

LIST OF ALL CASES REFERRED TO, ALPHABETICALLY ARRANGED, WITH PAGES WHERE CITED.

Statement.

Curtin is a reporter for the Tribune, a newspaper published in New York City (Record, p. 22). Pursuant to a subpœna he appeared and was sworn as a witness before the United States Grand Jury for the Southern District of New York (Record, p. 22). Certain questions being then and there propounded to him he declined to answer, claiming, upon his oath, that his answer to such questions might tend to criminate him (Record, p. 24). Thereupon he was remanded to appear before said jury at a later day (Record, p. 22). Subsequently he appeared before said Grand Jury again and was then and there handed a paper which purported to be a warrant of pardon issued by the President of the United States (Record, pp. 4, 23); he stated that he did not wish the pardon and declined to accept the same (Record, pp. 5, 25); after such tender and refusal the Assistant United States Attorney, who was apparently conducting some investigation before said Grand Jury, repeated the questions which had formerly been propounded to Curtin, and which he had declined to answer, and he again declined to answer the same, reasserting his privilege and claiming, upon his oath, that his answers thereto might tend to criminate him (Record, pp. 6, 14). Thereupon the Grand Jury filed into Court and presented him as for contempt (Record, p. 15); a formal presentment was handed up by said Grand Jury (Record, pp. 2, 18) to which an answer was filed by Curtin (Record, pp. 18, 40). Argument having been heard, by the Court, an order was entered wherein and whereby Curtin was adjudged to be in contempt of Court and for his continued refusal to answer said questions it was adjudged that he pay a fine of $500 and stand committed until the same

should be paid and until he should have answered said questions (Record, pp. 39, 41). Curtin thereupon sued out his writ of error which was allowed (Record, p. 1) and was released upon bail until this Court shall have passed upon his writ of error. The proffered warrant of pardon reads as follows:

"WOODROW WILSON

President of the United States of America, To all to whom these presents shall come, GREETING:

"Whereas William I. Curtin, a reporter on the New York Tribune, has declined to testify before a Federal Grand Jury now in session in the Southern District of New York in a proceeding entitled 'United States *v.* John Doe and Richard Roe' as to the source of his information from which he wrote an article that appeared in the issue of the New York Tribune of December nineteenth, 1913, on the ground that it would tend to incriminate him to answer the questions; and

"Whereas, the United States Attorney for the Southern District of New York desired to use the said William I. Curtin as a witness before the said Grand Jury in the said proceeding for the purpose of determining whether any employee of the Treasury Department at the Custom House, New York City, has been betraying information that came to such person in an official capacity; and

"Whereas, it is believed that the said William I. Curtin will again refuse to testify in the said proceeding on the ground that his testimony might tend to incriminate himself;

"Now, Therefore, Be it Known, That I, Woodrow Wilson, 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 William I. Curtin a full and unconditional pardon for all offenses against the United States which he, the said William I.

Curtin, has committed or may have committed, or taken part in, in connection with the securing, writing about, or assisting in the publication of the information so incorporated in the aforementioned article, and in connection with any other article, matter or thing, concerning which he may be interrogated in the said grand jury proceeding,—thereby absolving him from the consequences of every such criminal act.

"In Testimony Whereof I have hereunto signed my name and caused the seal of the Department of Justice to be affixed.

"Done at the City of Washington this fourteenth day of February in the year of our Lord one thousand Nine Hundred and Fourteen, and of the Independence of the United States the One Hundred and Thirty-eighth.

"WOODROW WILSON.

"(Seal Department of Justice.)

"By the President:

"J. C. McReynolds,

"Attorney General."

(Record, p. 23.)

Assignments of Error.

The Circuit Court erred:

(1) In adjudging plaintiff-in-error to be guilty of a contempt of Court.

(2) In not adjudging him to have been not guilty of contempt of Court.

(3) In ordering him committed as for contempt of Court.

(4) In refusing to make and grant an order adjudging that he was not in contempt of Court.

(5) In adjudging that the alleged warrant of pardon had any force or effect whatsoever.

(6) In not adjudging that the alleged warrant of pardon was null, void and of no effect.

(7) In adjudging that the alleged warrant of pardon unaccepted operated to take away from plaintiff-in-error his constitutional right against self crimination.

(8) In not adjudging that plaintiff-in-error having refused to accept said warrant of pardon could not be compelled to give evidence which might tend to criminate him.

(9) In not adjudging that the President of the United States has no power to issue or grant a pardon in the absence of evidence that the person to whom such pardon is attempted to be issued and granted has committed any offence against the United States.

(10) In not adjudging that the attemptel issuance and granting of the warrant of pardon was an unauthorized exercise or attempt to exercise a power not vested in the President of the United States.

(11) In not adjudging that the said warrant of pardon not having been accepted had no force or effect whatsoever.

Note: The assignments of error appear in full upon pages 41 and 42 of the transcript of record.

POINTS AND AUTHORITIES.

I.

The proceeding before the Grand Jury was a "criminal case" within the meaning of the Fifth Amendment to the Constitution.

Counselman *v.* Hitchcock (142 U. S., 547).

II.

Plaintiff-in-error was privileged to decline to answer the questions upon the ground that his answers thereto might tend to criminate him.

Fifth Amendment, U. S. Constitution.
Burr's Trial, 1 Burr's Trial, 244. (Coombs).
Counselman *v.* Hitchcock (142 U. S., 564).
Sanderson's Case (3 Cranch., 638).

III.

The refusal of a witness to answer questions upon the ground that his answers may tend to criminate him does not constitute either an admission or proof of his guilt of any offense.

American & English Encyclopedia of Law (Vol. 30, p. 1170, and cases cited).
Rose *v.* Blakemore [21 E. C. L. (Ryan & Moody, 382), 774].
Phelin *v.* Kinderline (20 Penn. St., 354).
State *v.* Bailey (54 Iowa, 414).

Dorendinger v. Tschechtelin [12 Daly (N. Y.), 34].
Greenleaf on Evidence (Vol. 1, Section 469d, 16th Edition).
Wigmore on Evidence, Section 2272.
Act of Congress of March 16, 1878 (20 Stat., 30).
Wilson *v.* United States (149 U. S., 60).
Fitzpatrick *v.* United States (178 U. S., 304, 315).
Boyle *v.* Smithman (146 Pa., 255).
Beach *v.* United States (46 Fed. Rep., 754).

IV.

The President was without power to issue any pardon to plaintiff-in-error; and consequently the warrant tendered is null, void and of no effect.

Article II, Section 2, U. S. Constitution.
Martin *v.* Hunter's Lessee (1 Wheat., 304).
Cooley's Constitutional Limitations, page 11.
Ex parte Wells (18 How., 307).
Ex parte Garland (4 Wallace, 333).
20 Opinions, Attorney General, 330.
Am. & Eng. Ency., Vol. 24, pp. 575-6.
2 Hawkins P. C. C., 37, Section 9, page 543.
In re Nevitt (117 Fed. Rep., 448).
11 Ops. Atty. Gen'l, 227.
Howard's Case [Sir T. Raymond, 13; 83 English Reports (Full Reprint), 7].
United States *v.* Klein (13 Wall., 128).
Armstrong's Foundry (6 Wall., 766).

Carlisle *v.* United States (16 Wall., 147).
Lapeyre *v.* United States (17 Wall., 191).
Osborn *v.* United States (91 U. S., 474).
Wallach *v.* Van Riswick (92 U. S., 202).
United States *v.* Padelford (9 Wall., 531).
Armstrong *v.* United States (13 Wall., 155).
Pargoud *v.* United States (13 Wall., 157).

V.

Plaintiff-in-error having refused to accept the tendered pardon, the same is of no effect.

Wilson *v.* United States (7 Peters, 150).
Commonwealth *v.* Lockwood (109 Mass., 323).
Cooley, Const. Law, 3rd Ed., p. 115.

VI.

The decision of the Court below is equivalent to the conviction of plaintiff-in-error of an offense against the United States without trial by jury, and consequently in violation of his rights under the Constitution of the United States.

Fifth and Sixth Amendments, U. S. Constitution.
24 Am. & Eng. Ency., 579.
11 Opinions Attorney General, 227.
Dominick *v.* Bowdoin (44 Ga., 357).
Manlove *v.* State (153 Ind., 80).
Commonwealth *v.* Lockwood (109 Mass., 323).
People *v.* Marsh (125 Mich., 410).
U. S. *v.* Armour, 142 Fed. Rep., 808.

VII.

The tendered pardon is not an equivalent of the constitutional privilege of plaintiff's-in-error.

Counselman *v.* Hitchcock (142 U. S., 564).
Brown *v.* Walker (161 U. S., 591).
Cooley's Constitutional Limitations, pp. 5, 365.

The Argument.

I.

The facts in the case at bar are so similar to those in the case of *Counselman* v. *Hitchcock* (142 U. S., 547), and it has been so often decided by this Court that an investigation before a grand jury is a "Criminal Case" within the meaning of the language of the Fifth Amendment, that it is now asserted as a fact, and not by way of argument, that plaintiff-in-error was a witness in a "Criminal Case."

II.

The foregoing proposition being accepted there can be no question of the right of plaintiff-in-error

self to such a charge (2 Phillips, Evidence, 417). * * * But when such a question is put, it is due to the witness that the Court should advise him of his privilege to answer it or not, as he thinks proper, that he may be fully informed of his rights, *and if he refuses to answer, in the exercise of his privilege, no inference of the truth of the fact inquired about is to be drawn from that circumstance.*"

In *Boyle* v. *Smithman* (146 Pa., 255, at p. 276), the Court very tersely states the rule in the following language:

> "The privilege of the defendant to decline to furnish evidence against himself, would be of very little value if the fact that he claimed its protection could be made the basis of an argument to establish his guilt. *To extend to a defendant the formal protection of his privilege, and then allow the fact that he had claimed it, to be used as affording a presumption against him, would be a sort of mockery of which the law is not guilty.*"

Nor can the assertion of the privilege by a witness be the basis of any inference or argument that the witness is shielding some other person (*Beach* v. *United States,* 46 Fed., Rep., 754).

It is an accepted principle of law, in the United States, that every man is presumed to be innocent until he shall have been proven guilty in a competent tribunal. This presumption assuredly remains with a man, even though when he is upon the witness stand he invokes his privilege against criminating himself. For in doing so he does not admit that he has committed a crime, nor does he admit that he has been guilty of *any "offence against the United States,"* even though the question which he refuses to answer may possibly relate to some such offence.

IV.

We come, therefore, to the consideration of the attempted exercise of the pardoning power by the President.

Plaintiff-in-error was a witness in a "criminal case" before the grand jury; and upon being asked certain questions, he refused to answer and asserted his privilege against self crimination. Thereupon the President affixed his signature to a paper by which he apparently purposed to grant unto the plaintiff-in-error a pardon. And right here the inquiry arises, for what? The answer is found by reference to the so-called pardon, which says that plaintiff is pardoned "*for all offenses against the United States which he * * * has committed or may have committed or taken part in, in connection with the securing, writing about, or assisting in the publication of the information so incorporated in the aforementioned article, and in connection with any other article, matter or thing, concerning which he may be interrogated in the said grand jury proceeding,* thereby absolving him from the consequences of every such criminal act." The plaintiff-in-error naturally and properly rejected and refused to accept any such paper. And his reasons for so doing were three-fold: first, because the President was without power to issue any such pardon; second, because even had power existed plaintiff-in-error could not be compelled to accept the same, and,

third, because this purported pardon does not afford plaintiff-in-error an equivalent for his constitutional privilege not to be a witness against himself.

For the consideration of these propositions we must have reference to the applicable provisions of the Constitution. By Article II, Section 2, of the Constitution, the President *"shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment."* Under this provision the President can exercise no power except that expressly given or given by necessary implication [*Martin* v. *Hunter's Lessee* (1 Wheat., 304, 326)].

> "The Government of the United States is one of *enumerated powers;* the national constitution being the instrument which specifies them, and in which authority should be found for the exercise of any power which the national Government assumes to possess."
>
> *Cooley's Constitutional Limitations,* page 11.

The above quoted provision of the Constitution conferring power upon the President to grant pardons *"for offences against the United States"* means just what it says, no more, no less. *There must be an offence before he can grant a pardon.* He cannot by his *ipsi dixit* create an offence in order to grant a pardon. He cannot surmise, speculate or guess that some person may have committed or taken part in an offence against the United States and then issue a pardon to the person who he assumes may have committed this imaginary offence. What is the "offence" for which he issues this alleged pardon? Until the offence exists he is powerless to act. And if the person sought to be pardoned has not been convicted of, or admitted that he has committed any

offence against the United States, how can the President exercise the power? There seems to be but one possible answer to these questions. And as the plaintiff-in-error has not been convicted of any offence, and has not admitted that he has committed any offence, and the President in his warrant cannot even specify any offence which he "may have committed or taken part in" or that he has committed or taken part in, it is apparent that the President's act in signing this alleged warrant of pardon was and is a nullity and of no force or effect whatsoever.

Assuming that the witness had answered the questions which he refused to answer, it is confidently asserted that, while such answers might tend to criminate the witness of some offence which he need not disclose, they do not afford any proof of the commission of any "offence against the United States" for which the President can grant a pardon. The very language of the proffered pardon refutes the idea that the President had in mind the granting of a pardon for any offence against the United States. The motive for its issuance is found in the preamble of the alleged pardon which reads: *"Whereas the United States Attorney for the Southern District of New York desires to use the said William I. Curtin as a witness before the said grand jury in the said proceeding for the purpose of determining whether any employe of the Treasury Department at the Custom House, New York City, has been betraying information that came to such person in an official capacity."*

The attempted exercise of the power under such circumstances is an usurpation of a power not granted to the President; it is no more and no less than attempted legislation, by him, of an immunity under the guise of an exercise of the par-

doning power. The action is lacking in every element of a pardon.

This Court in construing the meaning of the President's power to grant reprieves and pardons in the case of *Ex parte* Wells (18 How., 307-311), said:

> "It meant that power was to be used according to law; that is, as it had been used in England, and these states when they were colonies; not because it was a prerogative power but as incidents of the power to pardon particularly when the circumstances of any case disclosed such uncertainties as made it doubtful if there should have been a conviction of the criminal, or when they are such as to show that there might be a mitigation of the punishment without lessening the obligation of vindicatory justice. Without such a power of clemency, to be exercised by some department or functionary of a government, it would be most imperfect and deficient in its political morality, and in that attribute of Deity whose judgments are always tempered with mercy. And it was with the fullest knowledge of the law upon the subject of pardons, and the philosophy of government in its bearing upon the Constitution, when this Court instructed Chief Justice Marshall to say, in the United States *v.* Wilson, 7 Pet., 162: 'As the power has been exercised from time immemorial by the Executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance, we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it.' We still think so, and that the language used in the Constitution, conferring the power to grant reprieves and pardons, must be construed with reference to its meaning at the time of its adoption. At the time of our separation from Great Britain, that power had

been exercised by the king, as the chief executive. Prior to the revolution, the colonies, being in effect under the laws of England, were accustomed to the exercise of it in the various forms, as they may be found in the English law books. They were, of course, to be applied as occasions occurred, and they constituted a part of the jurisprudence of Anglo-America. At the time of the adoption of the Constitution, American statesmen were conversant with the laws of England, and familiar with the prerogatives exercised by the crown. Hence, when the words to grant pardons were used in the constitution, they conveyed to the mind the authority as exercised by the English crown, or by its representatives in the colonies. At that time both Englishmen and Americans attached the same meaning to the word pardon. In the convention which framed the Constitution, no effort was made to define or change its meaning, although it was limited in cases of impeachment.

"We must then give the word the same meaning as prevailed here and in England at the time it found a place in the Constitution. This is in conformity with the principles laid down by this Court in Catheart *v.* Robinson, 5 Pet., 264, 280; and in Flavell's case, 8 Watts & Sargent, 197; Attorney-General's brief.

"A pardon is said by Lord Coke to be a work of mercy, whereby the king, either before attainder, sentence, or conviction, or after, forgiveth any crime, offence, punishment, execution, right, title, debt or duty, temporal or ecclesiastical (3 Inst., 233). And the king's coronation oath is, 'that he will cause justice to be executed in mercy.' It is frequently conditional, as he may extend his mercy upon what terms he pleases, and annex to his bounty a condition precedent or subsequent, on the performance of which the validity of the pardon will depend (Co. Litt., 274, 276; 2 Hawkins, Ch. 37, Sec. 45; 4 Black. Com. 401). And if the felon does not perform the con-

dition of the pardon, it will be altogether void; and he may be brought to the bar and remanded to suffer the punishment to which he was originally sentenced. Cole's case, Moore, 466; Bac. Abr., Pardon E. In the case of Packer and others—Canadian prisoners—5 Meeson & Welsby, 32, Lord Abinger decided for the Court, if the condition upon which alone the pardon was granted be void, the pardon must also be void. If the condition were lawful, but the prisoner did not assent to it, nor submit to be transported, he cannot have the benefit of the pardon—or if, having assented to it, his assent be revocable, we must consider him to have retracted it by the application to be set at liberty, in which case he is equally unable to avail himself of the pardon.

"But to the power of pardoning there are limitations. The king cannot, by any previous license, make an offence dispunishable which is *malum in se, i. e.*, unlawful in itself, as being against the law of nature, or so far against the public good as to be indictable at common law. A grant of this kind would be against reason and the common good, and therefore void (2 Hawk., C. 37, Sec. 28). So he cannot release a recognizance to keep the peace with another by name, and generally with other lieges of the king, because it is for the benefit and safety of all his subjects (3 Inst., 238). Nor, after suit has been brought in a popular action, can the king discharge the informer's part of the penalty (3 Inst., 238); and if the action be given to the party grieved, the king cannot discharge the same (3 Inst., 237). Nor can the king pardon for a common nuisance, because it would take away the means of compelling a redress of it, unless it be in a case where the fine is to the king, and not a forfeiture to the party grieved (Hawk., C. 37, Sec. 33; 5 Chit. Burn., 2).

"When the words to grant pardons were used in the Constitution, they conveyed to the mind the authority as exercised by the English

crown, or by its representatives in the colonies" (*Ex parte* Wells, *supra*).

This being so it is apparent from the English decisions that the President in attempting to grant the pardon involved in the case at bar exceeded any authority ever exercised by the English crown.

> "In England the King's pardon must name the offence upon which it is intended to operate except in cases of general pardons and amnesties."
>
> Am. & Eng. Ency., Vol. 24, p. 575.

> "In England it appears to be the rule that the King cannot pardon an offence without specifically naming it, for a pardon by the King without reciting the offense upon which it is intended to operate will be held invalid by the Court, the theory being that the King was not informed of the particular offense of which the recipient of the pardon had been convicted."
>
> Am. & Eng. Ency., Vol. 24, pp. 575-6, citing Hawkins P. C., Chap. 37, Sec. 9, p. 543; 1 Chit. Cr. Law, 771; Anonymous, 6 Coke 13 (b); Howard's Case, T. Raym., 13.

In Howard's Case, Sir T. Raymond, 13 (English Reports, Vol. 83, p. 7), a pardon was held invalid because it did not describe the offense. In 2 Hawkins' Pleas of the Crown, Chapter 37, Section 8, pages 382-3, it is said:

> "It seems to be laid down as a general rule in many Books, that where-ever it may be reasonably intended that the King, when he granted such Pardon, was not fully apprised both of the Heinousness of the Crime, and also how far the Party stands convicted thereof upon the Record, the Pardon is void, as being gained by imposition upon the King. And

this is very agreeable to the Reason of the Law, which seems to have intrusted the King with the high Prerogative, upon a special Confidence that he will spare those only whose Case, could it have been foreseen, the Law itself may be presumed willing to have excepted out of its general Rules, which the Wit of Man cannot possibly make so perfect as to suit every particular Case. And upon this Ground it hath been holden, that if one be indicted by these Words, that he hath slain a Man for having sued him in the King's Court, and the King make him a Charter of all Manner of Felonies; this Charter shall not be allowed, because it shall be intended that the King was not acquainted with the Heinousness of the Crime, but deceived in his Grant."

And in Section 9, pages 383-4, it is said:

"for if a Felony cannot be well pardoned where it may be reasonably intended that the King when he granted the Pardon was not fully apprised of the State of the Case, much less doth it seem reasonable that it should be pardoned where it may be well intended that he was not apprised of it at all. And if a Felony whereof a Person be attainted cannot be well pardoned, even tho' it appear that the King was informed of all of the Circumstances of the Fact, unless it also appear that he was informed of the Attainder; much less doth it seem reasonable that a Felony should be well pardoned where it doth not appear that he knew any Thing of it: For by this Means, where the King in Truth intends only to pardon one Felony, which may be very proper for his Mercy, he may by Consequence pardon the greatest Number of the most heinous Crimes, the least of which, had he been apprised of it, he would not have pardoned. And for these Reasons, as I suppose, general Pardons are commonly made by Act of Parliament; and have been of late Years very rarely granted by the Crown, without a particular Description of the Offence intended to be pardoned. As to the Precedents of such general Pardons in *Rastal's Entries*, it may be answered, That their Authority seems to be of less weight when compared with those many Precedents of Pardons in the Register, every one of which particularly describes the Offence which is pardoned, and even those which relate to Homicide by Lunaticks, or Infants, or in Self-Defence, etc. except only one which pardons Escapes, but expressly excepts all voluntary ones. And therefore where the Books speak of Pardons of all Felonies in general as good, perhaps it may be reasonable for the most part to intend that they either speak of a Pardon by Parliament, or that they suppose, that the particular Crime is mentioned in the Pardon though they do not express it."

A careful examination of the English reports prior to the adoption of our Constitution fails to disclose any case in which the King attempted to grant a pardon in the absence of any evidence that the person pardoned had been guilty of any offence.

All authorities are in accord on the proposition that a pardon is an act of grace, an exercise of clemency and mercy partaking of the attributes of Deity.

It can hardly be argued that the offer of a pardon for any unknown offence that a man may possibly have committed, and the enforced acceptance of the same, by the person to whom it is issued, in order to compel him to testify in violation of his constitutional privilege, because the United States Attorney desires to use him as a witness, is an act of mercy, or an exercise of clemency or that it has any attribute of Deity.

In every reported case, in which the President's power to grant pardons, has been involved, the existence of the offence pardoned was either proven or admitted.

In *Ex parte* Garland (4 Wallace, 333) the warrant of pardon recited the facts constituting the offense, and the person to whom the pardon was granted was required to accept the pardon in writing, thereby admitting his guilt. He availed himself of the pardon and sought thereby to avoid taking an oath to the effect that he had not so offended, at the same time admitting the offense by asserting that by taking such oath he would commit perjury.

In *United States* v. *Klein* (13 Wallace, 128), the proof was before the Court that Wilson had given aid and comfort to the Confederacy in violation of the Federal Statutes.

In *Armstrong's Foundry* (6 Wallace, 766) there was evidence of the commission of the offense and Armstrong pleaded the pardon and his acceptance thereof and compliance therewith. The commission of the offense was adjudicated.

In *Carlisle* v. *United States* (16 Wallace, 147), the Court actually found that the claimants had committed the offense.

In *Lapeyre* v. *United States* (17 Wallace, 191), the Court had before it the facts constituting the offence for which the pardon was granted.

In *Osborn* v. *United States* (91 U. S., 474), the property of the claimant had been forfeited, the offense had been adjudicated. The same situation existed in the case of *Wallach* v. *Van Riswick* (92 U. S., 202); so also in *United States v. Padelford* (9 Wallace, 531). In *Armstrong* v. *United States* (13 Wallace, 155), the Court of Claims had found that the person claiming the benefit of the pardon had committed an offense against the United States, and in *Pargoud* v. *United States, id.*, 157, Pargoud admitted "that he was guilty of participating in the rebellion against the United States."

The power of the President to grant pardons is

very elaborately dealt with in a learned opinion written by Solicitor General Taft (20 Opinions Attorney General, 330). Throughout this opinion the Attorney General recognizes the necessity for the existence of an offence and an offender before the power may be exercised. In delivering this opinion the question to be decided was the power of the President to grant a pardon to a group or class of "offenders," to wit, "to all persons residing in Utah Territory, who have been guilty of polygamy, unlawful cohabitation or adultery, as denounced by the Acts of March 22, 1882 (22 Stat., 30), and March 3, 1887 (24 Stat., 635)."

Thus the sole question involved in that opinion was as to the power of the President to grant a pardon to "offenders" "guilty" of specific acts denounced as "offences against the United States." And nothing more was decided by that opinion.

In all of the above cited cases there was abundant evidence of the commission of an offence against the United States and in each case the benefit of the pardon was being claimed.

Judge Sanborn tersely states the proposition in the following language: "A pardon is a grant, a deed. But a deed does not and cannot convey that which the grantor has never had." *In re Nevitt* (117 Fed. Rep., 448, 460).

Attorney General Speed, in 11 Op. Atty. Gen., 227, at page 228 says:

> "there can be no pardon where there is no actual or imputed guilt. The acceptance of a pardon is a confession of guilt, or of a state of facts from which a judgment of guilt would follow."

And at page 229, he says:

> "As a pardon presupposes that an offence has been committed, and ever acts upon the past, the power to grant it never can be exer-

cised as an immunity or license for future misdoing."

From the foregoing it seems apparent that the President in the absence of any proof of any offence against the United States has no power to grant a pardon; and a review of all reported cases fails to disclose any authority for any such action.

V.

This brings us to the consideration of the next proposition, *i. e.,* that plaintiff-in-error having refused to accept the tendered pardon the same is null, void and of no effect. The authorities hereinbefore cited are all to the effect that "a pardon is a gracious act of mercy." Throughout these authorities it is referred to as a "grant."

In *Wilson* v. *United States* (7 Peters, 150), the grand jury had found an indictment against the prisoner for robbing the mail, to which he had pleaded not guilty. Afterwards, he withdrew this plea, and pleaded guilty. On a motion by the district attorney, at a subsequent day, for judgment, the Court suggested the propriety of inquiring as to the effect of a certain pardon, understood to have been granted by the President of the United States to the defendant, since the conviction on this indictment, alleged to relate to a conviction on another indictment, and that the motion was adjourned till the next day. On the succeeding day the counsel for the prisoner appeared in Court, and, on his behalf, waived and declined any advantage of protection which might be supposed to arise from the pardon referred to; and thereupon the following points were made by the District Attorney:

1. That the pardon referred to is expressly restricted to the sentence of death passed upon the defendant under another conviction, and as expressly reserves from its operation the conviction now before the Court.

2. That the prisoner can, under this conviction, derive no advantage from the pardon without bringing the same judicially before the Court.

Six indictments had been returned against Wilson and one Porter; (a) for obstructing the mail of the United States from Philadelphia to Kimberton; (b) for obstructing the mail from Philadelphia to Reading; (c) for the robbery of the Kimberton mail, and putting the life of the carrier in jeopardy; (d) for the robbery of the Reading mail, and putting the life of the carrier in danger; (e) for the robbery of the Kimberton mail; (f) for the robbery of the Reading mail.

The defendants were found guilty upon the indictment (d) charging them with the robbery of the Reading mail and putting the life of the carrier in jeopardy, and sentenced to be executed. Thereafter Wilson withdrew his pleas of not guilty and pleaded guilty to indictments a, b, d, e, and f.

After these pleas of guilty were entered, and before being arraigned for sentence thereon, and before the above mentioned questions were raised by the District Attorney, the President of the United States granted to Wilson a pardon for *"the crime for which he has been sentenced to suffer death, remitting the penalty aforesaid, with this express stipulation, that this pardon shall not extend to any judgment which may be had*

contract with him for the use of the patent in consideration of the payment of a royalty by the United States.

This case, unlike that of Lieut. Dunn (19 Opin., 407), to which you call my attention, does not fall within section 3718 (Rev. Stat.), requiring that provisions, etc., for the use of the Navy shall be furnished, when time will permit, by contract by the lowest bidder, but falls within section 3721, Revised Statutes, which expressly exempts from the operation of section 3718, purchases of "*ordnance*, gunpowder, or medicines." Your power of contracting for supplies of the excepted classes being uncontrolled by legislative regulation, I see no reason why you may not lawfully contract with Ensign Dashiell for the purchase or the use of his patent rights.

In 1858 the Secretary of War made a contract with Maj. Henry B. Sibley, of the U. S. Army, to pay him a royalty for the use of his patent conical tent, which, together with the fact that section 1673 (Rev. Stat.) prohibits the paying of a royalty to any officer or employé of the United States for the use of any patent for "the Springfield breechloading system" or any part thereof, or for any such patent in which such officers or employés may be directly or indirectly interested, shows that to make contracts of that character, in proper cases, has not been foreign to the practice of the Government.

Very respectfully, yours,

W. H. H. MILLER.

The SECRETARY OF THE NAVY.

AMNESTY.—POWER OF THE PRESIDENT.

The President has the constitutional power, without Congressional authority, to issue a general pardon or amnesty to classes of foreigners.

The question of the President's pardoning power reviewed and the authorities collated. Various proclamations of general amnesty appended.

DEPARTMENT OF JUSTICE,
March 9, 1892.

SIR: A petition has been presented to you, praying you to issue a pardon or amnesty to all persons residing in Utah Territory, who have been guilty of polygamy, unlawful

cohabitation or adultery as denounced by the acts of March 22, 1882 (22 Stat., 30), and March 3, 1887 (24 Stat., 635). You have asked the opinion of the Attorney-General upon the question whether you have the constitutional power, without Congressional authority, to issue such a general pardon or amnesty. Upon this question the following is respectfully submitted:

Section 2 of Article II of the Constitution, in defining the powers of the President, provides that "he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment."

It has been decided by the Supreme Court that the power herein conferred upon the President is unlimited (*ex parte* Garland, 4 Wall., 333). The pardon may be granted before or after conviction, and absolutely or upon conditions. The ground for the exercise of the power is wholly within the discretion of the Executive. He may, therefore, if he thinks fit, pardon an offender because his offense is one of many like offenses, arising from a widespread, popular feeling and without regard to the character or the particular circumstances of the individual. He may, for the same reason, grant, by separate acts of pardon, immunity from punishment to each of a thousand such offenders. If he may do so, it is difficult to see why he does not exercise the same power, when by public proclamation he extends a pardon to ten thousand offenders, without naming them, but describing them as persons committing, or participating in, the same kind of offenses.

It is said that the power to grant pardons is a power to examine the circumstances of each case and then confer immunity on the offender. If the right to pardon were dependent on the existence of any particular grounds in the case of each offender, the argument, it seems to me, would be of more force. There is, however, no such restriction on its exercise. The ground may be as properly one which has equally and the same application to ten thousand or a hundred thousand cases, as one which is peculiar to the case under consideration. If so, does not the contention in favor of the narrower view become an argument in favor of a formality rather than a substantial and logical distinction? No one will deny that the President, without Congressional

authority, may issue separate pardons to every individual of the thousands of Mormons who have lived in polygamy in Utah. Only those would have to be omitted whose position is so obscure, or humble, that the President can not learn their names. Does not the power of amnesty, therefore, depend only on the question whether pardons can be made sufficiently definite in respect to the beneficiaries by a description other than by name? If the grantor is certain, the extent of the grant is certain, and the grantees are so described that they can be made certain, what is the inherent difference between the power involved in the grant of an individual pardon, and that in an amnesty to a class of persons to each one of whom the power to grant separate pardon, for a reason applicable to all, is conceded?

It is suggested that offenders can not be pardoned as a class any more than they can be tried and convicted as a class. This argument is not of force unless there is an analogy between a sentence of conviction and a pardon. The sentence is a judgment supported by a verdict rendered by a jury, on lawful evidence and full hearing, with the issue of the accused's guilt or innocence clearly defined. A pardon is a gracious act of mercy resting on any ground which the Executive may regard as sufficient to call for its exercise.

There is no hearing of evidence; there is no issue made. The recital in the act of pardon may show a ground which in law and logic would be wholly irrelevant to the guilt or character of the offender, and not in the slightest degree affect the validity of the pardon. State policy may require the Executive to grant it. Such considerations show the absence of any parallel between the trial of an offender and the exercise of Executive clemency in his case, and wholly destroys an analogy which would require the same procedure in both.

But it is urged against this view that it intrusts too great a power to the Executive. In what way? It only enables him to do that in one act which he might do by a thousand. The power which the Executive exercises is still the pardoning power, and that the Constitution gives him. It is no argument against its exercise that it may be abused. That is true of every power intrusted to the Executive.

On principle, it seems to me, therefore, the unlimited

power to grant pardons for all offenses against the United States, except in cases of impeachment, includes power to issue a general pardon or amnesty to any class of offenders. Practice and authority confirm this view. Alexander Hamilton, in the seventy-third number of the Federalist, referring to this clause of the Constitution, said:

"But the principal argument for reposing the power of pardoning in this case in the Chief Magistrate is this: In seasons of insurrection or rebellion there are often critical moments when a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth and which, if suffered to pass unimproved, it may never be possible afterwards to recall. The dilatory process of convening the Legislature or one of its branches, for the purpose of obtaining its sanction to the measure, would frequently be the occasion of letting slip the golden opportunity."

Such language leaves no doubt that in the mind of this, one of the greatest of the framers and expounders of the Constitution, the pardoning power included the authority to offer and grant pardon and amnesty to a whole body of insurgents or rebels, i. e., to a class of offenders. This language was quoted and used by Mr. Justice Story in his work on the Constitution. (Sec. 1500 *et seq.*)

The practice, contemporaneous with the adoption of the Constitution, supports the existence of the power of the President to grant amnesty without legislative sanction. In 1794 President Washington issued a proclamation extending pardon to the whisky insurrectionists, and Gen. Lee, as Commander-in-Chief of the United States forces, issued a similar proclamation in the name of the President, and by his authority. Copies of these proclamations are appended. Governor Mifflin, of Pennsylvania, acting under a constitutional authority conferred in the same words as that of the President, issued a similar proclamation of pardon (also appended) to the insurgents for their offenses against the State of Pennsylvania. President Adams issued a proclamation of pardon to the same insurgents in 1800, a copy of which is appended. President Madison granted pardon by proclamation to a class of offenders known as the "Barataria" pirates, who were a large band of men engaged in smug-

gling and violations of the revenue and navigation laws of the United States. I have appended a copy of this proclamation. By the thirteenth section of the act of July 17, 1862 (12 Stat., 592), the President was authorized, at any time thereafter, by proclamation, to extend to persons participating in the then existing rebellion pardon and amnesty, with such exceptions and conditions as he should deem expedient. On December 8, 1863 (12 Stat., 737), President Lincoln issued a proclamation offering pardon and amnesty to the rebels. The recitals of this proclamation show that he did not admit that he had not the power to issue such a proclamation, without Congressional authority, but that he distinctly asserted the contrary. The two recitals on this subject are as follows: "Whereas, in and by the Constitution of the United States, it is provided that the President shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment and * * *

"Whereas * * * laws have been enacted by Congress * * * declaring that the President was thereby authorized at any time thereafter, by proclamation, to extend to persons who may have participated in the existing rebellion in any State or part thereof, pardon and amnesty, with such exceptions, and at such times and on such conditions as he may deem expedient for the public welfare, *and whereas the Congressional declarations for limited and conditional pardon accords with well-established judicial exposition of the pardoning power*," etc.

President Johnson issued several limited pardon proclamations of this character, and then in January, 1867 (14 Stat., 377), Congress repealed the amnesty section of the act of 1862. Thereafter, on September 7, 1867 (15 Stat., 699), he issued another limited and conditional pardon proclamation. On July 4, 1868 (15 Stat., 702), he issued a full and absolute pardon by proclamation to all rebels, except those who were under an indictment for treason, and by a proclamation of December 25, 1868 (15 Stat., 711), he extended full, absolute, and unconditional pardon to all who had taken part in the rebellion. President Johnson on July 3, 1866, issued a proclamation extending pardon to all deserters who should return to their colors. A copy of this order is appended. Again, on October 10, 1873, President Grant

issued a proclamation pardoning all deserters who should return to the Army, which is also in the appendix.

We thus see that the contemporaneous exposition of the Constitution and the contemporaneous practice under it by the early Presidents, continued down to the period after the war, support the view that the power to grant pardons includes the power to grant pardons to a class by proclamations describing the class by the offense committed. The practice has been fully sustained by the Supreme Court of the United States.

In *ex parte* William Wells (18 How., 307) the question was whether the Constitution gave the President the power to commute a sentence of death to imprisonment for life. This is held to be a conditional pardon and within the power of the Executive. Referring to the significance of the word "pardon," Justice Wayne says, on page 310:

"In the law it has different meanings, which were as well understood when the Constitution was made as any other legal word in the Constitution now is. Such a thing as a pardon without a designation of its kind is not known in the law. Time out of mind, in the earliest books of the English law, every pardon has its particular denomination. They are *general*, special, or particular, conditional or absolute, not necessary in some cases, and in some grantable, of course."

And, again, referring to the power under the Constitution, the same justice says:

"The real language of the Constitution is general, that is, common to the class of pardons, or extending the power to pardon to all kinds of pardons known to the law as such, whatever may be their denomination."

The necessary effect of this language would seem to be that the power to pardon given the President includes the authority to issue general pardons.

In *ex parte* Garland (4 Wall., 333) the question was whether a statute which excluded from practice in the courts attorneys who had participated in the rebellion would operate to exclude one who had received full pardon for his offenses before trial. It was held that it could not. Mr. Justice Field delivered the opinion of the court and said, referring to the pardon clause of the Constitution:

"The power thus conferred is unlimited, with the exception

stated—i. e., in cases of impeachment. It extends to every offense known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken or during their pendency, or after conviction or judgment. This power of the President is not subject to legislative control; Congress can neither limit the effect of his pardon nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him can not be fettered by any legislative restrictions."

In *United States* v. *Padelford* (9 Wall., 531) the effect of President Lincoln's proclamation of December 8, 1863, was under consideration, with respect to which the court say:

"This proclamation, *if it needed legislative sanction*, was fully warranted by the act of July 17, 1862, which authorized the President at any time thereafter to extend pardon and amnesty to persons who had participated in the rebellion, with such exceptions as he might see fit to make. That the President had power, *if not otherwise, yet with the sanction of Congress*, to grant a general conditional pardon has not been seriously questioned. And this pardon, by its terms, included restoration of all rights of property, except as to slaves and as against the intervening rights of third persons."

Here is an intimation that in the mind of the court there was good ground for the contention that no legislative sanction was needed for the issuance by the Executive of a general conditional pardon.

In the case of the *United States* v. *Klein* (13 Wall., 128) the Chief Justice referred to the amnesty clause of the act of July 17, 1862, as follows:

"*The suggestion of pardon by Congress, for such it was, rather than authority*, remained unacted on for more than a year."

Again, after referring to the proclamation of general conditional pardon issued while the amnesty clause of the act of July 17, 1862, was in force, the Chief Justice described the three proclamations issued by President Johnson after its repeal, the last one of which, as we have seen, conferred full pardon, unconditionally, on all participating in the rebellion, and then said:

"It is true that the section of the act of Congress which purported to authorize the proclamation of pardon and

amnesty by the President was repealed on January 21, 1867; but this was after the close of the war, when the act had ceased to be important as an expression of the legislative disposition to carry into effect the clemency of the Executive, and after the decision of this court that the President's power of pardon 'is not subject to legislation;' that Congress can neither limit the effect of his pardon nor exclude from its exercise any class of offenders."

Again, on page 147:

"It is the intention of the Constitution that each of the great coordinate departments of the Government—the legislative, executive and the judicial—shall be, in its sphere, independent of the others. To the Executive alone is intrusted the power of pardon, and it is granted without limit. Pardon includes amnesty. It blots out the offense pardoned, and removes all its penal consequences."

It is perfectly clear from these extracts that in the opinion of the court the proclamation of absolute pardon, December 25, 1868, was entirely within the constitutional power of the President, though it may be admitted that it was not necessary to the conclusion in the Klein case, that it should be so decided.

In the case of *Armstrong* v. *The United States* (13 Wall., 154), however, the rights of the claimant against the United States rested solely on the proclamation of December 25, 1868, and the absolute and unconditional pardon thereby conferred and those rights were sustained.

Said the Chief Justice:

"The proclamation of the 25th of December granted pardon unconditionally and without reservation. This was a public act of which all courts of the United States are bound to take notice and to which all courts are bound to give effect. The claim of the petitioner was preferred within two years. The Court of Claims, therefore, erred in not giving the petitioner the benefit of the proclamation."

This is an express holding that the proclamation of absolute and general pardon and amnesty is within the power of the President without legislative authority or sanction. This ruling has been followed in *Pargoud* v. *The United States* (13 Wall., 156); *Carlisle* v. *The United States* (16 Wall., 147); *Knote* v. *The United States* (95 U. S., 149).

The only authority which can be cited against this view is the report of the Judiciary Committee of the Senate on the right of the President to issue the proclamation of December 25, 1868. This will be found in the bound volume of Senate Reports of the Fortieth Congress, third session, No. 239. They reported for adoption by the Senate the following resolution:

"*Resolved*, That in the opinion of the Senate the proclamation of the President of the United States of the 25th of December, 1868, purporting to grant general pardon and amnesty to all persons guilty of treason and acts of hostility to the United States during the late rebellion, with restoration of rights, etc., was not authorized by the Constitution or laws."

And accompanied their recommendation with an argument in support thereof. Arguments on the subject by Senator Ferry and Senator Conkling will be found in Congressional Globe, third session Fortieth Congress, Part I., pp. 168, 438. I can not find that the resolution which was reported February 17, 1869 (Cong. Globe, 3d session 40th Cong., 1381), was ever adopted by the Senate. As the validity of the proclamation here condemned has been since four times sustained by the Supreme Court, the committee report can not now be considered an authority of weight.

A very full discussion of the power of the President to grant a general pardon or amnesty to a class of offenders will be found in the American Cyclopædia, 1873, under the head of "Amnesty." There will be found a reference to the prerogative of the English Crown in granting pardons and an explanation of the statutes of amnesty passed by Parliament which clearly shows that the power existing in the Crown included power to issue general pardons. I have already taken too much space, and I forbear to discuss this aspect of the subject.

The same view has been taken in some of the State courts where acts of general amnesty passed by the State legislatures have been held invalid on the ground that such acts are an invasion of the pardoning power, which is exclusively vested in the Executive, by language in the State constitution similar to that of the Federal Constitution. See *State* v. *Sloss* (25 Mo., 291); *The State* v. *Fleming* (7 Humphreys,

Tenn., 152); *Haley* v. *Clark* (26 Ala., 439); see also *People* v. *Moore*, (62 Mich., 496).

It is submitted that reason, practice, and authority established the constitutional power of the Executive, without legislative sanction, to issue proclamations extending pardon or amnesty to classes of offenders.

There are appended copies of the proclamations of general pardon and amnesty to which reference has been made in the foregoing opinion, for the reason that they are not found in the regular publications of the Statutes at Large, and some of them are not recorded in the State Department.

Very respectfully,

WM. H. TAFT,
Solicitor-General.

The PRESIDENT.

I concur in this opinion.

W. H. H. MILLER.

PROCLAMATION GRANTING PARDON TO THE WESTERN INSURGENTS.

[Sparks' Life of Washington, vol. 12, p. 134, 135.]

Whereas the commissioners, appointed by the President of the United States to confer with the citizens in the western counties of Pennsylvania, during the late insurrection which prevailed therein, by their act and agreement, bearing date the 2d day of September last, in pursuance of the powers in them vested, did promise and engage, that, if assurances of submission to the laws of the United States should be bona fide given by the citizens resident in the fourth survey of Pennsylvania, in the manner and within the time in the said act and agreement specified, a general pardon should be granted, on the 10th day of July then next ensuing, of all treasons and other indictable offences against the United States, committed within the said survey before the 22d day of August last, excluding therefrom, nevertheless, every person who should refuse or neglect to subscribe such assurance and engagement in manner aforesaid, or who should after such subscription violate the same, or wilfully obstruct, or attempt to obstruct, the execution of the acts for raising a revenue on distilled spirits and stills, or be aiding or abetting therein;

And whereas, I have since thought proper to extend the said pardon to all persons guilty of the said treasons, misprisions of treason, or otherwise concerned in the late insurrection within the survey aforesaid, who have not since been indicted or convicted thereof, or of any other offense against the United States;

served; and the court, unaware of these facts, granted leave to amend the declaration in the original suit by extending the term more than twenty years, so as to enable the plaintiffs to sue out a writ of possession. This writ of error was sued out to enable the court below to correct that error; they have ordered that it [*149] shall be corrected; and from that order to set aside their former order and quash the writ of possession, is the appeal now made to the reversing power of this court.

We think the case comes precisely within the rule laid down by this court in the case of Waldon v. Craig, 9 Wheat. 576; with this difference that the latter was a case in which the court thought so favorably of the claim of the plaintiff in error, that they would have sustained the suit if it had been possible. The court there express themselves thus: "There is peculiar reason in this case, where the cause has been protracted, and the plaintiff kept out of possession beyond the term laid in the declaration, by the excessive delays practised by the opposite party. But the course of this court has not been in favor of the idea that a writ of error will lie to the opinion of a circuit court granting or refusing a motion like this. No judgment in the cause is brought up by the writ, but merely a decision on a collateral motion, which may be renewed."

In that case, as in this, the motion was to extend a term in ejectment, after judgment; but where the plaintiff's delay in proceeding with his writ of possession was not attributable to his own laches. He had been arrested in his course by successive injunctions sued out by the defendants. This court did there recognize the case of delay by injunction as one in which, in that action, the court might exercise the power to enlarge the term even after judgment, and the particular case as one which merited that exercise of discretion; but dismissed the writ of error, because it was a case proper for the exercise of that discretion, and not coming within the description of an error in the principal judgment.

16 P. 614; 6 H. 81.

The United States v. George Wilson.

7 P. 150.

A pardon is a private though official act of the executive, must be delivered to and accepted by the criminal, and cannot be noticed by the court unless it is brought before it judicially by plea, motion, or otherwise.

Certificate of division of opinion of the judges of the circuit court of the United States for the eastern district of Pennsylvania. The case is stated in the opinion of the court.

Taney, (attorney-general,) for the United States.

No counsel *contrà*.

[*158] *MARSHALL, C. J., delivered the opinion of the court.

In this case, the grand-jury had found an indictment against the prisoner for robbing the mail, to which he had pleaded not guilty. Afterwards he withdrew this plea, and pleaded guilty. On a motion by the district attorney, at a subsequent day, for judgment, the court suggested the propriety of inquiring as to the effect of a certain pardon, understood to have been granted by the President of the United States to the defendant, since the conviction on this indictment, alleged to relate to a conviction on another indictment, and that the motion was adjourned till the next day. On the succeeding day, the counsel for the prisoner appeared in court, and, on his behalf, waived and declined any advantage or protection which might be supposed to arise from the pardon referred to; and thereupon the following points were made by the district attorney:—

1. That the pardon referred to is expressly restricted to the sentence of death passed upon the defendant under another conviction, and as expressly reserves from its operation the conviction now before the court.

2. That the prisoner can, under this conviction, derive no advantage from the pardon without bringing the same judicially before the court.

The prisoner, being asked by the court whether he had any thing to say why sentence should not be pronounced for the crime whereof he stood convicted in this particular case, and whether he [*159] wished in any manner to avail himself of the pardon *referred to, answered that he had nothing to say, and that he did not wish in any manner to avail himself, in order to avoid the sentence in this particular case, of the pardon referred to.

The judges were thereupon divided in opinion on both points made by the district attorney, and ordered them to be certified to this court.

A *certiorari* was afterwards awarded to bring up the record of the case in which judgment of death had been pronounced against the prisoner. The indictment charges a robbery of the mail, and putting the life of the driver in jeopardy. The robbery charged in each indictment is on the same day, at the same place, and on the same carrier.

We do not think that this record is admissible, since no direct reference is made to it in the points adjourned by the circuit court; and

without its aid we cannot readily comprehend the questions submitted to us.

If this difficulty be removed, another is presented by the terms in which the first point is stated on the record. The attorney argued, first, that the pardon referred to is expressly restricted to the sentence of death passed upon the defendant under another conviction, and as expressly reserves from its operation the conviction now before the court. Upon this point, the judges were opposed in opinion. Whether they were opposed on the fact, or on the inference drawn from it by the attorney; and what that inference was, the record does not explicitly inform us. If the question on which the judges doubted was, whether such a pardon ought to restrain the court from pronouncing judgment in the case before them, which was expressly excluded from it, the first inquiry is, whether the robbery charged in the one indictment, is the same with that charged in the other. This is neither expressly affirmed nor denied. If the convictions be for different robberies, no question of law can arise on the effect which the pardon of the one may have on the proceedings for the others.

If the statement on the record be sufficient to inform this court judicially that the robberies are the same, we are not told on what point of law the judges were divided. The only inference we can draw from the statement is, that it was *doubted [*160] whether the terms of the pardon could restrain the court from pronouncing the judgment of law on the conviction before them. The prisoner was convicted of robbing the mail, and putting the life of the carrier in jeopardy, for which the punishment is death. He had also been convicted on an indictment for the same robbery, as we now suppose, without putting life in jeopardy, for which the punishment is fine and imprisonment; and the question supposed to be submitted is, whether a pardon of the greater offence, excluding the less, necessarily comprehends the less, against its own express terms.

We should feel not much difficulty on this statement of the question, but it is unnecessary to discuss or decide it.

Whether the pardon reached the less offence or not, the first indictment comprehended both the robbery and the putting life in jeopardy, and the conviction and judgment pronounced upon it extended to both. After the judgment, no subsequent prosecution could be maintained for the same offence, or for any part of it, provided the former conviction was pleaded. Whether it could avail without being pleaded, or in any manner relied on by the prisoner, is substantially the same question with that presented in the second point, which is, "that the prisoner can, under this conviction, derive no advantage

from the pardon, without bringing the same judicially before the court by plea, motion, or otherwise."

The constitution gives to the President, in general terms, "the power to grant reprieves and pardons for offences against the United States."

As this power had been exercised from time immemorial by the executive of that nation, whose language is our language, and to whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it.

A pardon is an act of grace, proceeding from the power intrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed. It is the private, though official act of [* 161] the executive magistrate, delivered to the * individual for whose benefit it is intended, and not communicated officially to the court. It is a constituent part of the judicial system that the judge sees only with judicial eyes, and knows nothing respecting any particular case of which he is not informed judicially. A private deed, not communicated to him, whatever may be its character, whether a pardon or release, is totally unknown and cannot be acted on. The looseness which would be introduced into judicial proceedings, would prove fatal to the great principles of justice, if the judge might notice and act upon facts not brought regularly into the cause. Such a proceeding, in ordinary cases, would subvert the best established principles, and overturn those rules which have been settled by the wisdom of ages.

Is there any thing peculiar in a pardon which ought to distinguish it in this respect from other facts?

We know of no legal principle which will sustain such a distinction.

A pardon is a deed, to the validity of which delivery is essential, and delivery is not complete without acceptance. It may then be rejected by the person to whom it is tendered; and if it be rejected, we have discovered no power in a court to force it on him.

It may be supposed that no being condemned to death would reject a pardon; but the rule must be the same in capital cases and in misdemeanors. A pardon may be conditional; and the condition may be more objectionable than the punishment inflicted by the judgment.

The pardon may possibly apply to a different person or a different crime. It may be absolute or conditional. It may be controverted

by the prosecutor, and must be expounded by the court. These circumstances combine to show that this, like any other deed, ought to be brought "judicially before the court by plea, motion, or otherwise."

The decisions on this point conform to these principles. Hawkins, b. 2, c. 37, § 59, says: "But it is certain that a man may waive the benefit of a pardon under the great seal, as where one who hath such a pardon doth not plead it, but takes the general issue, after which he shall not resort to the *pardon." In section 67, he [*162] says, "an exception is made of a pardon after plea."

Notwithstanding this general assertion, a court would undoubtedly at this day permit a pardon to be used after the general issue. Still, where the benefit is to be obtained through the agency of the court, it must be brought regularly to the notice of that tribunal.

Hawkins says, section 64, "it will be error to allow a man the benefit of such a pardon unless it be pleaded." In section 65, he says, "he who pleads such a pardon must produce it *sub fide sigilli*, though it be a plea in bar, because it is presumed to be in his custody, and the property of it belongs to him.

Comyn, in his Digest, tit. Pardon, letter H, says: "If a man has a charter of pardon from the king, he ought to plead it in bar of the indictment; and if he pleads not guilty he waives his pardon." The same law is laid down in Bacon's Abridgment, title Pardon, and is confirmed by the cases these authors quote.

We have met with only one case which might seem to question it. Jenkins, page 129, case 62, says: "If the king pardons a felon, and it is shown to the court, and yet the felon pleads guilty, and waives the pardon, he shall not be hanged; for it is the king's will that he shall not, and the king has an interest in the life of his subject. The books to the contrary are to be understood where the charter of pardon is not shown to the court."

This vague *dictum* supposes the pardon to be shown to the court. The waiver spoken of is probably that implied waiver which arises from pleading the general issue; and the case may be considered as determining nothing more than that the prisoner may avail himself of the pardon by showing it to the court, even after waiving it by pleading the general issue. If this be, and it most probably is the fair and sound construction of this case, it is reconciled with all the other decisions, so far as respects the present inquiry.

Blackstone, in his 4th vol. p. 337, says, "a pardon may be pleaded in bar." In p. 376, he says, "it may also be pleaded in arrest of judgment." In p. 401, he says, "a pardon by act *of [*163] parliament is more beneficial than by the king's charter; for

a man is not bound to plead it, but the court must, *ex officio*, take notice of it; neither can he lose the benefit of it by his own laches or negligence, as he may of the king's charter of pardon. The king's charter of pardon must be specially pleaded, and that at a proper time; for if a man is indicted and has a pardon in his pocket, and afterwards puts himself upon his trial by pleading the general issue, he has waived the benefit of such pardon. But if a man avails himself thereof, as by course of law he may, a pardon may either be pleaded on arraignment, or in arrest of judgment, or, in the present stage of proceedings, in bar of execution."

The reason why a court must *ex officio* take notice of a pardon by act of parliament, is, that it is considered as a public law; having the same effect on the case as if the general law punishing the offence had been repealed or annulled.

This court is of opinion that the pardon in the proceedings mentioned, not having been brought judicially before the court by plea, motion, or otherwise, cannot be noticed by the judges.

10 P. 286.

The United States *v.* Samuel Brewster.

7 P. 164.

A draft drawn by the president of a branch of the Bank of the United States on the principal bank, is not a bill, within the clauses of its charter which provide for the offences concerning forged bills.

Certificate of division of opinion of the judges of the circuit court of the United States for the eastern district of Pennsylvania.

The defendant was indicted for uttering the following instrument, and upon the trial the judges were opposed in opinion upon the question.

(5) F 745 F 745 (5)
Cashier of the

Bank of the United States,
Pay to C. W. Earnest, or order, five dollars
Office of Discount and Deposit in Pittsburgh, the 10th day of December, 1829.
A. BRACKENRIDGE, Pres.
J. Correy, Cash.
Fairman, Draper, Underwood & Co.
(Indorsed) Pay the bearer,
C. W. EARNEST.

[* 165] * "Whether the genuine instrument of which the said false, forged, and counterfeited instrument is in imitation, is a bill issued by order of the president and directors of the said bank, according to the true intent and meaning of the 18th section

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through which the oil is extracted. When is discovery of the mineral made? The regulation says, when there is a natural exposure of the oil and gas, or by "a drilling that discloses the actual and physical presence" of it. Nothing in that regulation provides that a well must be drilled on the particular property leased. Drilling on adjacent lands might disclose oil. An existing well on the leased lands here in question is not a condition to the depletion. Herring v. Commissioner, supra, 293 U.S. 322, at page 325, 55 S.Ct. 179, 79 L.Ed. 389.

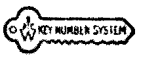
It is illogical and unreasonable to hold that there is no discovery of oil on lands until the presence of such oil becomes known by the drilling of a well on such lands. Suppose a small lot is surrounded by wells all near the boundary of the small lot; that the geological formation of the small lot is the same as that of the land surrounding it; and that all experts agree that there is oil on the small lot. It is absurd to say that there has been no discovery of oil on the small lot.

I therefore believe that "the date of discovery" as used in section 204 (c) means the date when the presence of oil became known, either by natural exposure, or by such drilling on or near the lands in question, as discloses the actual and physical presence of oil or gas on the lands in question.

In the instant case, it was stipulated that the leased land "was proven oil bearing property" on the date the lease was made. Therefore the date of discovery was on or prior to that date.

Finally, article 222 (3) of the regulations defines "property," as used in section 204 (c) of the act, to be the "well." It also defines the "well" to be the drill hole, a portion of the surface of the land, and the oil and gas content within certain limits. If this regulation means that there is "property" as used in the statute, only when there is a drilled well, then it is obvious that appellant had no property. I do not believe such a meaning can be given to the regulation, but, if it does condition ownership of such property on the existence of a well, it is contrary to Herring v. Commissioner, supra. I believe such regulation means that "property" includes, as used in section 204 (c) of the act, all the things mentioned therein, or it may mean the oil and gas content alone.

I conclude that appellant is entitled to a depletion deduction.



LUPO v. ZERBST, Warden, et al.*
No. 8471.

Circuit Court of Appeals, Fifth Circuit.
Oct. 19, 1937.

1. Pardon ⇐1, 13

The character of a document granted by President commuting a sentence so that prisoner could return to Italy for a brief period, on condition that prisoner be law-abiding during period of sentence and that if he were not commutation should be void and prisoner might by President's direction be apprehended and returned to penitentiary to complete sentence, was required to be determined by its legal effect, and whether it was denominated as a pardon or commutation was immaterial.

The term "pardon" is used to describe a complete and total cancellation of punishment, whereas the term "commutation" is used to describe a substitution of a lesser or partial punishment (Parole Act, 18 U.S.C.A. §§ 714–723).

[Ed. Note.—For other definitions of "Commute; Commutation" and "Pardon," see Words & Phrases.]

2. Pardon ⇐14

A document granted by President commuting a sentence so that prisoner could return to Italy for a brief period, on condition that prisoner be law-abiding during period of sentence and that if he were not commutation should be void and prisoner might by President's direction be apprehended and returned to penitentiary to complete sentence, was not illegal or against public policy because of conditions contained therein (Parole Act, 18 U.S.C.A. §§ 714–723).

3. Pardon ⇐14

A prisoner may not accept the benefits of clemency without accepting conditions attached thereto.

*Rehearing denied Dec. 8, 1937.

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Habeas corpus proce
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4. Pardon ⇐14

Conditions in a commutation of sentence granted by President so that prisoner could return to Italy for a brief period requiring prisoner to be law-abiding during period of sentence, and providing that if he were not commutation should be void and prisoner might by President's direction be apprehended and returned to penitentiary to complete sentence, were accepted by prisoner, where prisoner could read and write, signed receipt for commutation when he received it, and produced and relied upon it at Ellis Island when he returned from Italy (Parole Act, 18 U.S.C.A. §§ 714–723).

5. Prisons ⇐15

A prisoner has no vested right in good-time credit until date arrives when its allowance will end imprisonment.

6. Pardon ⇐10
Prisons ⇐15

A conditional commutation granted to prisoner so that he could return to Italy, which he could not do under Parole Law, terminated his sentence at once and thereby automatically terminated his parole and his status as a parolee, and hence prisoner was not entitled to good-time credit after grant of commutation and before return to prison upon revocation thereof, as against contention that at time of revocation prisoner had served his term because good-time credits were vested for period preceding granting of commutation (Parole Act, 18 U.S.C.A. §§ 714–723).

7. Pardon ⇐4

The constitutional power of the President to grant reprieves and pardons includes power to grant commutations on lawful conditions.

8. Pardon ⇐10

In revoking a conditional commutation and directing that prisoner be returned to prison because of breach of condition, the President was acting within his powers, and prisoner was lawfully returned to prison subject to such action, if any, as might be taken by the Parole Board.

Appeal from the District Court of the United States for the Northern District of Georgia; E. Marvin Underwood, Judge.

Habeas corpus proceeding by Ignatio Lupo against Fred G. Zerbst, Warden, United States Penitentiary, Atlanta, Ga. From a judgment ordering that the writ be discharged and directing that the petitioner be remanded to custody, the petitioner appeals.

Affirmed.

Clint W. Hager and Eugene L. Tiller, both of Atlanta, Ga., for appellant.

Bates Booth, Sp. Asst. to Atty. Gen., Gordon Dean, Sp. Executive Asst. to Atty. Gen., and Lawrence S. Camp, U. S. Atty., and Harvey H. Tisinger and Hiram T. Nichols, Asst. U. S. Attys., all of Atlanta, Ga., for appellee.

Before FOSTER, SIBLEY, and HOLMES, Circuit Judges.

HOLMES, Circuit Judge.

Appellant was convicted of the crime of counterfeiting, in the United States District Court for the Southern District of New York, on February 19, 1910, and sentenced to serve a term of 30 years in the federal penitentiary at Atlanta. On February 21, 1910, he entered upon his sentence and served time uninterruptedly until June 30, 1920, on which date he was released on parole.

On October 29, 1921, the President granted him what is styled in the document itself a conditional commutation of sentence. This instrument recites that whereas it was made to appear that it was highly important for business reasons that appellant return to Italy for a brief period, which he could not do under the Parole Act (18 U.S.C.A. §§ 714–723), and for other reasons appearing, the sentence of appellant was commuted to expire at once on condition that he be law-abiding and not connected with any unlawful undertaking during the period of his present sentence; and, on the further condition, that if he did violate the conditions of the commutation, of which fact the President himself should be the sole judge, the commutation should be null and void and of no effect, and appellant might, by direction of the President, be apprehended and returned to the penitentiary and required to complete service of his sentence. The following month appellant went to Italy, returning in May, 1922. In order to get back into the United States, he produced his conditional commutation to the Board of Special Inquiry at Ellis Island. Nevertheless, he was ordered deported, but, upon appeal to the Secretary of Labor, the Board's action was reversed on the ground that the con-

tinuance of his commutation contemplated that he remain in this country in order that, in the event of a breach of its condition, he could be remanded to custody.

On July 10, 1936, the President revoked said commutation because of appellant's association with persons of evil character, of his having been arrested and indicted on various charges, and of his having been engaged in racketeering and other unlawful enterprises. The order of revocation further provides as follows:

"Whereas the said Ignatio Lupo has violated the terms and conditions of his conditional commutation, and pursuant to its terms and conditions, the commutation has become void and of no force and effect and the said Ignatio Lupo has become liable to apprehension and return to the United States Penitentiary at Atlanta, Georgia, to complete the service of the term of his original sentence:

"Now, therefore, by the authority vested in me as President of the United States, you, the said United States Marshal for the Southern District of New York, are hereby commanded forthwith to apprehend the said Ignatio Lupo, if found within the jurisdiction of the United States, and deliver him, together with this warrant, to the Warden of the United States Penitentiary at Atlanta, Georgia, there to serve the remainder of his said term of imprisonment, to-wit, such time as, added to the time already served by the said Ignatio Lupo under his sentence, will equal the term of his original sentence.

"And you, the said Warden, are hereby directed to receive the said Ignatio Lupo and him safely keep confined in said penitentiary during the remainder of his said term of imprisonment as aforesaid."

Pursuant to the aforesaid revocation, appellant was arrested by the United States Marshal for the Southern District of New York and transported to the Atlanta federal prison, where he was received by the warden and has since been confined. Immediately thereafter he sought to challenge the validity of his imprisonment, and applied for a writ of habeas corpus, which was granted. Upon the hearing no attack was made upon the indictment, trial, or sentence, but all the issues raised concerned the validity and regularity of the procedure in connection with the conditional commutation of sentence and the revocation of the same. The District Judge resolved the issues in favor of the appellee, ordered the writ of habeas corpus discharged, and directed that the appellant be remanded to custody for execution of the remainder of his sentence. From this judgment appellant has brought the case to this court for review by appeal. He insists that the President was authorized to grant the commutation of sentence, but was without power or legal authority to engraft conditions thereon. Therefore, he says, the conditions being void and the commutation itself valid, the petitioner was unconditionally released on October 20, 1921, the date of said commutation. In the event the court should find that the alleged conditional commutation was lawful, the petitioner insists that he continued to serve his sentence under the restraint of said parole and said conditional commutation, and that he had fully completed the service of his minimum sentence on April 13, 1930, which was prior to the time that his parole and conditional commutation were sought to be revoked.

We are unable to concur in the contentions of appellant. In Re Wells, 18 How.(59 U.S.) 307, 15 L.Ed. 421, the Supreme Court said: "The power as given is not to reprieve and pardon, but that the President shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment. The difference between the real language and that used in the argument is material. The first conveys only the idea of an absolute power as to the purpose or object for which it is given. The real language of the constitution is general, that is, common to the class of pardons, or extending the power to pardon to all kinds of pardons known in the law as such, whatever may be their denomination. We have shown that a conditional pardon is one of them."

[1, 2] We think it is immaterial in this case whether the President's act of grace is denominated a pardon or a commutation; the former term being used to describe a complete and total cancellation of punishment, the latter a substitution of a lesser or partial punishment. The character of the document here under consideration must be determined by its legal effect. There is nothing illegal or against public policy in any of the conditions therein contained.

[3, 4] It is contended that the appellant did not accept these conditions; but the District Judge found as a fact that the

commutation, with the conditions therein contained, was accepted by him, and we fully concur in this finding. The record reveals that appellant could read and write; that he signed a receipt for the document when he received it; and that he produced and relied upon it before the Board of Special Inquiry at Ellis Island when he returned from his trip to Italy. It is held in a number of cases that a prisoner may not accept the benefits of clemency without accepting the conditions attached thereto. We therefore conclude that the appellant accepted the conditions contained in his commutation when he accepted the document granting it. United States v. Wilson, 7 Pet. 150, 8 L.Ed. 640; Burdick v. United States, 236 U.S. 79, 35 S.Ct. 267, 59 L.Ed. 476.

[5, 6] We cannot agree with the contention of appellant that, at the time of revocation, he had already served his term of imprisonment; his contention being that if good-time credits for the whole period from 1910 to 1940 are counted, his term expired in 1930, and that if good-time credits were vested for the period preceding the President's conditional pardon, his term expired in April, 1936. There is no vested right in good-time credit until the date arrives when its allowance will end imprisonment. Aderhold v. Perry (C.C.A.) 59 F.(2d) 379. See, also, Carroll v. Zerbst (C.C.A.) 76 F.(2d) 961; Ebeling v. Biddle (C.C.A.) 291 F. 567; Morgan v. Aderhold (C.C.A.) 73 F.(2d) 171; Platek v. Aderhold (C.C.A.) 73 F.(2d) 173. Cf. U.S. ex rel. Anderson v. Anderson (C.C.A.) 76 F.(2d) 375.

The contention that appellant is entitled to good-time credit after the grant of his conditional commutation and before his return to prison is contrary to the nature of such credits. We must be careful not to confuse the effect of executive action with the status of a prisoner on parole. The conditional commutation granted appellant terminated his sentence at once and thereby automatically terminated his parole with all the conditions attached to his status as a parolee. It removed all restrictions upon him except the conditions of the commutation, and thereby ousted the jurisdiction over him of the Parole Board. Obviously, the purpose of appellant in asking executive clemency was to be released from the requirements of his parole status. It cannot be claimed that at one and the same time he was released from the requirements of parole and still remained on parole.

[7, 8] In revoking the commutation and directing the appellant to be returned to prison, the President was acting within his powers. The constitutional power to grant reprieves and pardons includes the power to grant commutations on lawful conditions. The appellant was lawfully returned to prison where he is now held under sentence of the United States Court for the Southern District of New York, subject to such action, if any, as may be taken by the Parole Board.

The judgment discharging the writ of habeas corpus and remanding appellant to the custody of appellee is affirmed.

PACIFIC GAS & ELECTRIC CO. v. SACRAMENTO MUNICIPAL UTILITY DIST. et al.

No. 8500.

Circuit Court of Appeals, Ninth Circuit.

Sept. 10, 1937.

1. Municipal corporations ⇐962

General tax imposed on property within municipal utility district, formed to furnish all utilities permitted by general statute under which district was organized, was none the less valid because the three functions of providing the public with heat, light, and power were first, in committed purpose of furnishing all the utilities (Gen.Laws Cal.1931, and Supps. 1933, 1935, Act 6393).

2. Municipal corporations ⇐956(1)

Sacramento Municipal Utility District, comprising 650 square miles including city and unincorporated territory in two counties, formed under statute authorizing district, is an "agency of government" to extent that it might exercise power of general taxation of all property in area to support the furnishing of such authorized utilities to serve public at large with light, water power, heat, transportation, telephone service, and other means of communication, and means of disposition of sewage (Gen. Laws Cal.1931 and Supps. 1933, 1935, Act 6393).