



no. 11

STATEMENT OF THE CASE
OF
DR. JAMES SIMONS,
Now before the Senate in Executive Session.

THE President having on the 20th day of September, 1858, appointed Dr. Simons a Surgeon in the Army, with rank next to Dr. De Leon, to fill a vacancy by the death of Dr. Harney, he announced the same to the Army, in General Order No. 15, and arranged his name accordingly on the Army Register. It is understood that he has, in conformity with his letter of appointment, now nominated him to the Senate for confirmation.

See Appendix, Nos. 1, 2, 3.

The friends of Dr. Simons (he being at his post on the frontier of Texas) have, with much anxiety, learned that objections will be urged against his confirmation, and they, therefore, beg leave to present to the consideration of the Senate a history of his case, and also the views of distinguished counsel upon the law applicable to it.

We are happy to find that no objections are presented against him, (as we are persuaded none can be,) upon grounds of either character or qualification for the office of Army Surgeon, but that a technical legal obstacle only is supposed to lie in his way.

The subject being of a confidential nature before the Senate, we do not know precisely either the character or extent of this legal obstacle, or the grounds of precedent, practice or argument, by which it may be supported. We labor under this great disadvantage, that we are called on, as it were, to make our "defence in the dark."

So far as we understand it, the objection is, that Dr. Simons ought not to be confirmed as a Surgeon "*next to Dr. De Leon.*"

We do not know whether it is objected that he ought not to be a Surgeon at all, but only whether he ought to be a Surgeon *of a certain date.*

Standing at the head of the list of Assistant Surgeons, as he did, by virtue of the rank expressly specified and fixed *on the face of his Commission*, Dr. Simons was, by the usual rule and practice of promotion, entitled to the appointment of Surgeon, upon the occurrence of the first vacancy, (see his Commission, Appendix, No. 4.) Army Register for 1858.

But more than this, the President was requested to nominate him *precisely* as he has done by a Resolution of the Senate, passed on the 3d day of March, 1857. Appendix, No. 5.

Although the question now before the Senate would seem to be limited by the nomination *as made*, yet as it may be objected that Dr. Simons ought not to be a Surgeon at all, both objections will be at once examined.

It will be best to present a short history of his case.

Dr. Simons was commissioned as an Assistant Surgeon, on the 20th February, 1840, "to rank from the 11th July, 1839."

Under this Commission he served with honor and fidelity for nearly seventeen years—he accompanied

the Army during the Florida War and in the invasion of Mexico, and, serving with both columns of the Army—was present in *all the battles* that were fought, excepting only that of Buena Vista, from the beginning to the end of that War.

The reports of his commanding officers, especially of Generals Wool and Garland, will attest his merits.

At the sanguinary battle of Molino-del-Rey, he was severely wounded, while exposing himself to the fires of the enemy, in his zeal to succor and dress the wounds of a gallant officer, Col. Walker, who had fallen, and was lying on the field.

During his long period of service, not a blemish rested upon Dr. Simons, and if any may now be charged, let it be openly made, and the rights of a defence allowed.

In the year 1855, at Fort Riley, in Kansas Territory, he was tried before a Court Martial and dismissed from the Army. The President disapproved of most of the findings of the Court, on grounds of very plain errors into which it had fallen, both upon the facts and the law. He was dismissed on the 16th January, 1856, by the President, upon the single charge of having left his post while disease (the cholera) was prevailing there.

Dr. Simons, in the language of the President's order of approval, "made no denial of the main fact, that he left his post during the pestilence." He alleges, in his defence, that he was sick, and so exhausted as no longer to be capable of attending to the sick at the post. But he did not establish this before the Court, but when the Judge Advocate offered to rebut and disprove it, he objected to the investigation, and the Court refused to make it." (See Appendix, No. 6.)

Dr. Simons admitted the fact with which he was

charged, to wit: leaving his post, &c. &c. (*and for which alone he was dismissed,*) and justified it on the ground of extreme sickness and inability to do duty any longer as a medical man—having first, however, procured the attendance of a competent Physician in his place, and transferred all the sick under his care.

It is perfectly clear that Dr. Simons offered this as his justification, and equally so that it was *not considered* by the Court.

The Record shows that Dr. Simons could not have found repose, though in his sick-bed, at the post, from the calls of the sick and dying. He felt it was his duty to try and restore his health, that he might be able again, as soon as possible, to combat the disease. In his then sick and prostrate condition, to remain would have been to impose additional duty on others, already too severely tasked. Besides, he had advised, at the first appearance of the cholera at the post, that all should leave the infected place, and only did in his own case, what he had (and every other physician would have advised) should be done, with respect to every other person at the post, to leave it for a healthier atmosphere. He but followed the universal medical treatment of this terrible malady; but with this difference, that *he remained faithful to duty until worn out and attacked by the disease*, he thought he then had the common right of humanity—the right to preserve life for himself, his wife and children—his country's service, and we respectfully think that the proposition will hardly be denied by any one, that such a justification as this, if proved, was a *sufficient one*, and ought to have entitled him to an honorable acquittal. And we wish to repeat, that we think it is a principle of universal law of nature and of necessity, that when an Army

Surgeon is himself attacked with the disease he is combatting at his post, and "is broken down and exhausted" by it, and no longer able to perform his duties, he provides a competent substitute and leaves his post for the sake of health, that he has *a perfect right to do so*. He cannot be said to DESERT his duty who being himself incapable by misfortune, provides for its performance.

Dr. Simons returned so soon as he was recovered, after the lapse of only five days. The Record of his Trial abundantly shows, that he proved and established these facts. This Record has been printed by Dr. Simons, and a copy is in the hands of the Committee on Military Affairs, to which honorable Senators are respectfully referred.

And yet, as the President states, this justification "was not investigated by the Court." It is well known that the Court determined that *such a justification was not sufficient in law* to acquit the accused. This plain error of the Court cost Dr. Simons his commission, and this alone. The Court refused to investigate a question which, if they had investigated or even considered the evidence upon that point already offered and admitted, and in the Record, would have unquestionably acquitted him. But the order of the President states that Dr. Simons "objected to this investigation" when the Judge Advocate offered "to rebut and disprove it."

The Record shows, in the language of the President, "an offer by the Judge Advocate to rebut and disprove" the defence, thus admitting at least that a defence had been made, which, in the opinion of the Judge Advocate, it was his duty "to rebut and disprove." And it was to *the scope* and extent of this rebutting evidence that Dr. Simons objected. *He did not object to the*

investigation of his justification. We submit with all due respect that this was a grave error of the President. Dr. Simons had no counsel to aid him on his trial, and he thought, and such was the advice of his Army friends present, that the offered rebutting evidence should be limited by the nature of his justification, and the evidence he had produced to sustain it—he expressly waived all objection to any testimony in reply, or to “rebut and disprove” his defence. And upon this objection, distinctly stated at the time, (see printed Record, page 57, Court paper, No. 7,) to be simply for the purpose of *limiting* and *confining* the rebutting proof according to a familiar principle of the law of evidence—for making this just, and proper, and legal objection, we say—the Court refused to investigate his defence or to give him the benefit of a consideration of the evidence he had already introduced to sustain it, and which we say does in the judgment of all impartial persons fully sustain it. In the language of the Court “*the ends of justice* did not require” the investigation.

We repeat that Dr. Simons was condemned for *the error of the Court*. And with all due respect, we must think that even if his objection had occasioned it, yet as he was unskilled in law, and without counsel to advise him, and the error was of a nature, as it turned out, such as to cost him his Commission, a kind presumption in his favor ought to have shielded him from the imputation, at least, of an *intention* to raise an objection which would destroy his only defence and ruin him.

The Record and Order of the President, approving the sentence is referred to as authorizing these views, and Hon. Senators are most earnestly, as an act of jus-

tice, entreated to examine these proceedings for themselves.

We think it proper to make this reference to the merits of Dr. Simons' case to remove any impression that he was justly dismissed from the Army. It was after a very careful investigation *upon its merits*, that the Military Committee of the Senate, in 1856, and the Senate took such measures as were then passed to obtain for him a complete restoration, and which he and his friends now rely on with implicit confidence, as being firm enough to accomplish this object.

After the President's decision upon the Record was made known, application was *at once* made by his friends for a new trial, or a re-hearing of his case before another Court; and when Dr. Simons arrived in Washington, he requested that the President would order that a Medical Court might be called to investigate the question upon which the final decision rested, to wit: the condition of his health at the time of leaving his post and all the circumstances of his justification. Being a medical question it could well be referred to a Medical Board. The President refused his application though urged with all the earnestness of a deeply injured man and the influence of his friends.

See Appendix, No. 7.

At length he yielded so far as to consent that Dr. Simons might go before a Medical Board at Newport, Kentucky, as a candidate for admission as Assistant Surgeon in the army. And he accordingly repaired to Newport and carried with him a certified copy of the Record of his trial that it might be carefully investigated by the Board, to ascertain if it contained any thing affecting his character as a medical man.

That Medical Board no doubt did investigate the Re-

cord of his trial and did report in his favor, and recommended that he was qualified for admission into the Medical Staff, and he received a letter of appointment, as Assistant Surgeon, from the late Secretary of War. (Appendix, No. 8.)

We say then that in effect and substantially the report of this Medical Board, and the act of the President in re-appointing him for the same grade of office from which he had dismissed him, do reverse the conclusions of the Court Martial, as far as it is possible to do so, and also revoke the order approving the sentence of the Court.

Dr. Simons' nomination for Assistant Surgeon was referred to the Military Committee of the Session of 1856-7, and it is understood it was then *thoroughly investigated*—the record of his trial and all the papers and evidence in the Department of War or Surgeon General's office were called for and all possible information obtained that could assist the enquiries of the Committee.

The result was, as it is understood, that the Committee resolved that injustice had been inflicted by the dismissal of the Doctor, and that he ought not only to be confirmed but *restored* to his original rank and date, and this was reported to the Senate.

Congress having passed a law creating four additional Surgeons for the Army, after Simons' dismissal, the President nominated for two of these places, Assistant Surgeons T. C. Madison and J. K. Barnes. Simons ranked both of these officers while in the service, and it is understood that the Military Committee having resolved in favor of his restoration to his original rank, also reported that he was entitled to the nomination *for Surgeon* by virtue of his older rank when restored;

and that he and Madison ought to be promoted. But it is understood that the President refused to retract his nominations of Madison and Barnes, and so the question on confirming either, was delayed for several months.

At length the Senate confirmed all these gentlemen and passed the resolution signifying its opinion and wishes, touching his rank and date, and transmitted it to the President. See a copy in the (Appendix, No. 5.)

This occurred at the close of President Pierce's administration, and the confirmation and resolution accompanying it were communicated to his successor, the present Chief Magistrate.

Assenting to this "advice," and concurring in the resolution of the Senate, President Buchanan, as he had the constitutional power to do, signed and delivered to Dr. Simons his new Commission of Assistant Surgeon on the 28th day of May, 1857, and *on its face* gave the rank precisely indicated by the Senate, as far as by that Commission he could confer it.

This Commission expressly directs that he "shall rank as Assistant Surgeon from the 11th July, 1839, which was the day he first entered the Medical Staff. (See a copy in the Appendix, No. 4.)

Before he prepared this Commission the President referred the whole case and the question of his power to so to arrange rank to the present Attorney General, who advised that the Commission could confer rank *from the date fixed in it*, and in the language of his opinion, "this will entitle him to be appointed Surgeon, upon the first vacancy that may occur hereafter." See his opinion and especially the final sentence, (Appendix, No. 9.)

Now, if the recommendation of the Medical Board,

and President Pierce's nomination, did not effect substantially a reversal of the judgment of the Court, we respectfully insist that these proceedings by the Committee, this careful investigation of the very Record and all other questions affecting the case, this resolution of the Senate, and this Commission, by President Buchanan, do forever remove and reverse the judgment of the Court Martial. If such proceedings so authoritative and repeated are not to have such effect, then it will be impossible to do justice to a Military Officer who has suffered an unjust sentence, no matter how erroneous, unjust or cruel, it may be demonstrated to be.

Happily, it has never yet been admitted that Military Courts are more exempt from error than our Civil Judicial Tribunals, and we daily see that the wisest of these are continually reversed, and it is to be hoped that the Senate will never consent to establish a principle that Military Tribunals are infallible, or their sentences to be forever irreversible.

Intending fully to carry out the resolution of the Senate, the Executive acting through the Secretary of War, at the time of delivering to Drs. Madison and Barnes their commissions, as Surgeons, distinctly notified them both that upon the happening of the next vacancy among the Surgeons, Simons would be promoted so as to take rank above them both, and on the Army Rolls "next after Dr. De Leon." See copy of the Secretary's letter, Appendix No. 10.

Simons was also informed by the Secretary that his full restoration should finally be accomplished—and it is with unqualified pleasure that his friends refer to this letter of Secretary Floyd, which contains a generous and just tribute to the Doctor's worth, as an

officer and man, and which speaking both for the War Department and upon the conclusions of the Senate, in terms of a complete and healing vindication—conveys to him the entire confidence of the War Department.

Under these circumstances, Dr. Simons accepted his new Commission, and rejoined the Army, at a distant frontier post in Texas, where in the faithful discharge of his duties, and surrounded by his wife and children, he has for the last eighteen months rested in a spirit of perfect confidence in the certainty of his restoration.

By Surgeon Harney's death the vacancy has now occurred, by which *without injustice* to any one, his most cherished hopes can be gratified, and his wounded reputation healed. It is submitted that nothing short of a restoration to his *old rank* will remove the injury he has suffered.

Dr. Simons' friends say most emphatically that upon the history and all the facts and circumstances of his case, a *solemn pledge* exists between the Senate and the Executive on the one hand, and Dr. Simons on the other, that he shall be *restored to his original rank and date* on the Army Rolls, next after Dr. De Leon. And they further say with great deference, that this present Senate ought *not to repeal* the deliberate pledge of their predecessors, which has been *acted upon* by both the President and Dr. Simons, and "valuable legal rights become vested." (See the case of *Marbury vs. Madison*, 1 Cranch Rep. 57, 58.)

We hope a kind consideration of the fact that Dr. Simons *has received* his letter of appointment as Surgeon "next to Dr. De Leon,"—that his name has been so arranged and *published* in the Army Register for 1859, and in general orders—by circulars and newspapers placed before the Army and the public—will

restrain any proceedings on the part of the Senate which may appear like recalling his restoration, and reviving the injustice of a sentence under which he has already so severely suffered.

If it be deemed upon principle that no more restorations ought to be made, let this determination be applied to *future cases*. The *past* transactions of this case have VESTED RIGHTS, which no *retroactive proceedings* can now justly reach or rightfully disturb.

If Dr. Simons' rights *under his commission*, thus, "signed, sealed and delivered," can be denied, so can those vested in *every case* of a restoration, be equally resumed, and a long list of restored officers is placed in jeopardy. (See the Appendix No. 11, for the names of these officers and circumstances of each case.)

It cannot, as a matter of law, make a difference whether the officer was dismissed by the simple order of the President, or his order upon a sentence of a Military Court. In either case the Executive will "directs that he be dismissed from the public service," and the general order proclaims that he "ceases to be an officer of the Army." See opinion of Attorney General Johnson, of April 8, 1850.

It will however be seen by the list of cases (eighteen or twenty) hereto annexed, that several of these are restorations *after sentence* of a Court Martial duly approved. (See case No. 15, of Capt. Dobbin, and No. 17, of Capt. Deas, and cases Nos. 3 and 8.)

The examples of such restorations are to be found in the act of almost every administration of the Government, and with the sanction of the Senate.

Upon the merits then of his case—requiring the justice of a full restoration, with a large number of precedents to justify it, and most especially upon the

action of the Senate, and the President, we think it is a matter of clear moral right that Dr. Simons' restoration should *be completed*. To place him above Drs. Madison and Barnes will do them no injustice, as that is rightfully his place, and every Assistant Surgeon over whom Dr. Simons has been already placed may complain against it with as much reason as they can object.

Such are the moral aspects of his claim, and we think they are irresistible.

But his case is equally clear in its legal relations, and we propose very briefly to examine its merits in this respect, and to enquire :

I. Whether under the law Dr. Simons may not be confirmed as Surgeon "next to Dr. De Leon" and above Drs. Madison and Barnes, according to the nomination now before the Senate, and

II. Whether under the law he may not be confirmed simply as a Surgeon.

Upon the first point we refer to the Act of Congress approved 30th June, 1834, 4th vol. of Stat. at Large, 714, to ascertain what are the qualifications for the place of Surgeon in the Army, and find that it is only required.—1st. That the candidate shall have served for five years as Assistant Surgeon; and 2d. Shall have been examined by an Army Medical Board.

There is no other qualification required.

Now Dr. Simons has served as Assistant Surgeon nearly twenty years, and has been at least twice examined by such Army Medical Board.

Independently of the power of the Executive to *restore* him as an act of justice, we assert that he possesses the right to nominate Dr. Simons as he has done as *an original appointment*, he possessing the necessary

legal qualifications, and there being no law prohibiting the President from presenting to the Senate for the office of Surgeon, the name of *any Citizen Physician* who may be duly qualified. If it be alleged that the Act of 3d March, 1851, vol. 9, p. 618, requires "that all promotions in the Staff Department or Corps, shall be made as in other Corps of the Army," we reply that a just construction of this provision merely directs that *when promotion is resorted to* to fill a Staff Office, then the rule established by the Act of 3d March, 1853, vol. 10, page 189, "that no Officer shall be promoted before those who rank him in his Corps"—must be followed, or in other words, that promotion which means advancing an Officer to a higher grade, shall be carried on *among* Officers of each grade, according to seniority of date, (see also Army Regulations of 1857, Art. IV, Sec. 19.)

If the constitutional power of the President be "to appoint, with the advice and consent of the Senate, all Officers," &c. and there be no law except those already indicated, restraining him, it must follow that he has rightfully, at least, nominated Dr. Simons as he has done "with rank next to Dr. De Leon," and the question whether the Senate will confirm such nomination is merely one of *discretion*, under all the circumstances of the case. We say no law is violated, and therefore there is no legal duty to reject the nomination, and it must stand or fall on its moral considerations, and which we have in this case already presented.

But if we are wrong in this view of Executive power, and our construction of these laws and rules of promotion is wrong, yet we say according to the contrary construction of these provisions, and holding that the President is required to follow the rule of promo-

tion, and advance an Assistant Surgeon, in the terms of the Law according to "rank," or of the regulations "by seniority," then also the President's nomination is strictly legal, because by Dr. Simons' present Commission as Assistant Surgeon, *his rank was and is before either Madison or Barnes, and senior to both of them* as Assistant Surgeon; and the effect of the confirmation will be to arrange these Officers, according to their date, as they have from the beginning, and now do stand upon the Army Rolls.

Dr. Simons being restored by the joint action of the President and Senate to *his old rank*, before their new Commissions as *Surgeons* were issued to Drs. Madison and Barnes, a technical difficulty merely prevented the legal rights of his rank, being then fully acknowledged, but they were respected, and the notice given to these gentlemen must prevent any allegation of injustice to them by now confirming Dr. Simons above them.

The acts of the Secretary in this matter are the acts of the President. See

13 Pet. 498.

16 Pet. 302.

An examination of the second legal enquiry will be brief, and conclude our case.

The laws which we have already cited, confer the right of promotion upon the Officer of the lower grade, having the "oldest rank," or as expressed by the regulations having "seniority."

Now what is to determine this rank and seniority, relatively to others of the same grade?

Is not *the Commission* the exclusive evidence to determine this enquiry?

How otherwise will it be ascertained? By the Army General Orders, or by the Army Rolls or Register? But all these sources of information coincide, and show that Dr. Simons was, at the time of his present nomination, the *oldest Assistant Surgeon in the line of promotion*.

It is true that the names of Assistant Surgeons Eaton, King and Bailey, appear on the Register above Simons, but *they have long since ceased to be in the line of promotion*, or otherwise would have been Surgeons before De Leon, Madison, Barnes or Simons, and all others whose date of appointment is subsequent to theirs.

In the great case of *Marbury vs. Madison*, before cited, the Supreme Court decided that the Commission of an Officer being once delivered to him, "*it becomes the evidence of his title, and vested private rights which could not be resumed,*" and in *United States vs. Vinton*, 2 Sumner's Rep. 299, Judge Story decided that the *Commission itself* was the legal evidence of the *rank it specified*, "and that it would be a liberty the Judiciary dare not take, to strike out any part of it." In that case the question was, whether the Officer took rank according to the *date* of his Commission, or from an *anterior date* specified in the Commission; and it was held that the Executive had the power so to arrange the rank of an Officer. The question concerned the pay, &c. of Brevet Rank.

But it may be said, admitting that the President has so arranged Dr. Simons' rank, he had no power to do it, and this is the only remaining enquiry. We will not consider this question as an exercise of Executive *power in the way of a restoration* only, which, as we have seen, has been continually done from the administration of the elder Adams down to the last Session of the Senate, over and over again, in both Army

and Navy. But we will briefly consider it as an inherent constitutional power of the President.

The Constitution makes him "Commander in Chief of the Army and Navy," and directs that "he shall Commission all the Officers of the United States."

Now we cannot find any law or even Regulation directing how rank, relatively to others in the same grade shall be specified in a Military Commission, and the President has *the discretion* of a Commander in Chief over the subject.

If there be any regulation of the Army prescribing such rank inasmuch as the regulation emanated from the Executive power, it can also recall it, and in any particular instance repeal it or deny its application. This was decided by the Supreme Court in the United States *vs.* Eliason, 16 Peters Rep. 301, 302.

And the President, by the rank he has specified in Dr. Simons' Commission, has made the rule for the particular case.

In United States *vs.* Vinton, it was decided that the President has this power of arranging rank, and every Attorney General who has been called to consider the question has affirmed it, and its exercise has never yet been questioned, so far as we can ascertain.

It has been made a question whether the President has this exclusive power in cases where he has chosen to nominate an officer with rank from a previous date, and has *submitted such nomination to the Senate* "whether, the date and rank may not be separated from the office itself by the Senate." See Mr. Butler's opinion in Cox's case. But it has never yet been denied that where both President and Senate, (as in this, Dr. Simons' case,) *have concurred* about rank, whether by the Senate first "advising" it, or the President nomina-

ting it, is wholly immaterial, that such rank was lawfully conferred, and when *fixed in a commission* which has been delivered to the officer, "it has conferred legal rights which cannot be resumed," as was said by Ch. Justice Marshall in the case in 1st Cranch, Rep. 27, 28.

See Mr. Legare's opinion in Du Barry's case, of Nov. 29, 1842.

Mr. Crittenden, 19 Sept. 1850. Judge Black's opinion of 1857, in the Appendix, No. 9.

All these learned opinions distinctly assert the legality of antedating Military Rank, and in cases of restoration the necessity of doing it, and there is not an opinion to be found to the contrary.

Upon the whole case then we submit that whether Dr. Simons' present nomination "to be a Surgeon next to Dr. De Leon," be considered as the exercise of a constitutional power by the executive to appoint originally, and give rank to an officer of the Medical Staff, or simply as *a case of restoration*, (which this is,) while the Senate may undoubtedly withhold its consent, with great deference it is said, that it cannot do so upon either legal or moral grounds. And that upon the other enquiry as to Dr. Simons' right at all events to be a Surgeon below Drs. Madison and Barnes, we respectfully think not a particle of objection can be justly raised, founded even upon the narrowest and most technical grounds.

His present commission gives him a clear legal right to this promotion, and it cannot be divested without doing violence TO A SACRED PRINCIPLE OF LAW.

APPENDIX.

No. 1.

WAR DEPARTMENT, *September 20th, 1858.*

SIR,—You are hereby informed that the President of the United States has promoted you to the rank of Surgeon in the Medical Department of the Army, in the service of the United States, to take effect from the 29th day of August, 1856, vice Harney, deceased, and to take place on the Army Register next after Surgeon De Leon. Should the Senate, at their next session, advise and consent thereto, you will be commissioned accordingly.

[Signed,] JOHN B. FLÓYD, *Secretary of War.*

Surgeon JAMES SIMONDS, *U. S. Army,*
Camp Verde, Texas.

Acknowledge the receipt of this letter to the Adjutant General.

(A true Copy.)

S. COOPER, *Adjutant General.*

A. G. OFFICE, *January 18, 1859.*

No. 2.

GENERAL ORDERS, NO. 15.

WAR DEPARTMENT, ADJUTANT GENERAL'S OFFICE, }
Washington, December 10, 1858. }

Promotions and appointments in the Army of the United States, made by the President since the publication of "General Orders," No. 8, of July 3, 1858:

PROMOTIONS.—*Medical Department.*—Assistant Surgeon James Simons, to be Surgeon, vice Harney, deceased—to date from August 29, 1856, and to take place on the Army Register next below Surgeon David C. De Leon.

No. 3.

Extract from Army Register for 1859, page 5.

MEDICAL DEPARTMENT—SURGEONS, &c.

Name, rank and date of commission.	Original entry into service.
David C. De Leon, 29 Aug. 1856.	21 Aug. 1838.
James Simons, 29 Aug. 1856.	11 July, 1839.
Thomas C. Madison, 29 Aug. 1856.	27 Feb. 1840.
Joseph K. Barnes, 29 Aug. 1856.	15 June, "

Extract from Army Register for 1858, page 5.

MEDICAL DEPARTMENT—SURGEONS WITH RANK OF MAJOR.

Name, rank and date of commission.	Original entry into service.
David C. De Leon, 29 Aug. 1856.	21 Aug. 1838.
Thomas C. Madison, 29 Aug. 1856.	27 Feb. 1840.
Joseph K. Barnes, 29 Aug. 1856.	15 June, 1840.

ASSISTANT SURGEONS WITH RANK OF CAPTAIN.

Joseph Eaton, 1 June, 1821.	14 April, 1812.
Benjamin King, 1 June, 1821.	14 Oct. 1818.
Joseph H. Bailey, 28 Nov. 1834.	28 Nov. 1834.
James Simons, 11 July, 1839.	11 July, 1839.

 No. 4.

KNOW YE, That reposing special trust and confidence in the patriotism, valor, fidelity and abilities of JAMES SIMONS, I have nominated, and by and with the advice and consent of the Senate, do appoint him Assistant Surgeon in the service of the United States: to rank as such from the 11th day of July, 1839.

Signed, JAMES BUCHANAN.

Dated 28th May, 1858.

 No. 5.

IN EXECUTIVE SESSION—SENATE OF THE UNITED STATES, }
 March 3d, 1857. }

Resolved, That the Senate advise and consent to the appointment of James Simons, to be Assistant Surgeon in the Army, and recommend that the President direct that he take rank from the 11th day of July, 1839, and next after Surgeon De Leon.

[Attest,] ASBURY DICKINS, *Secretary*.

 No. 6.
Charges upon which Simons was tried.—Decisions of Court and President.

FIRST CHARGE.—Neglect of duty, to the prejudice of good order and Military Discipline, with six specifications:—first, for leaving his post during the existence of cholera, for six days; second, third, fourth fifth and sixth specifications, for neglecting the sick.

SECOND CHARGE.—Conduct unbecoming an officer and a gentleman, with one specification, that he shamefully quitted his post and duty. *Finding of the Court*—guilty of all the charges and specifications, save the second and sixth specification in the first charge.

SENTENCE OF THE COURT.—Dismissal.

Review, Decision and Sentence of President Pierce.—"The proceedings of the Court Martial having been laid before me, and having been maturely examined, the following is my decision thereon.

The evidence sustains the finding upon the first specification to the first charge and upon the first charge, but does not show that Assistant Surgeon Simons, while he remained at the post, refused or wilfully failed to give Medical attendance to Major Ogden or Mrs. Wood or her son. Nor does it appear that the regulations of the Army require a Medical Officer to attend to the families of officers—the specification upon this point, therefore, is not legally tenable. The finding of guilty on the third, fourth and fifth specifications to the first charge is not confirmed. The acquittal on the second and sixth specifications is confirmed. The facts in the specification to the second charge are the same as the first specification to the first charge, and there is no denial of the main facts, that Dr. Simons left his post during the pestilence. He alleges in his defence, that he was sick and so exhausted as no longer to be capable of attending to the sick at the post. But he did not establish this before the Court, but when the Judge Advocate offered to rebut and disprove it, he objected to the investigation and the Court refused to make it. Still, not being fully satisfied that the act of Dr. Simons was, under the circumstances, of the immoral and dishonorable or disreputable character necessary to sustain the charge, under the 83d Article of War, the finding on the second charge and specification is not confirmed. I cannot, however, doubt that the facts proved sustain the first charge, and not only justify the sentence of the Court, but require that it shall be executed. Assistant Surgeon James Simons, therefore, ceases to be an officer in the Army."

[Signed,]

FRANKLIN PIERCE.

16th January, 1856.

No. 7.

WAR DEPARTMENT, *Washington, February 5, 1856.*

SIR,—In reply to your communication of the 4th instant, asking for a new trial in the case of Assistant Surgeon Simons, or that the proceedings already had be remanded to the Court for re-consideration, I regret to say that the practice of the service does not allow new trials in such cases; and to inform you that the President has not seen sufficient reason for remanding the case to the same Court.

Very respectfully, your obedient servant,

JEFFERSON DAVIS, *Secretary of War.*

LAMBERT GITTINGS, Esq., *Baltimore, Md.*

No. 8.

WAR DEPARTMENT, *October 24, 1856.*

SIR,—You are hereby informed that the President of the United States has appointed you an Assistant Surgeon, in the service of the United States, to rank as such from the third day of October, one thou-

sand eight hundred and fifty-six. Should the Senate at their next session, advise and consent thereto, you will be commissioned accordingly.

You will immediately on receipt hereof, please to communicate to this Department, through the Adjutant General's Office, your acceptance or non-acceptance of said appointment; and in case of accepting you will report, by letter, to the Surgeon General for further instructions.

(Signed,) JEFFERSON DAVIS, *Secretary of War.*

Assistant Surgeon JAMES SIMONS,
U. S. Army, Baltimore, Md.

No. 9.

ATTORNEY GENERAL'S OFFICE, *April 22, 1857.*

SIR,—It appears from a statement sent me by you, and the papers accompanying it, that Dr. Simons was an Assistant Surgeon in the Army, under a commission which gave him rank from July, 1839. In February, 1856, he was dismissed from the service. In October, 1856, he was again appointed Assistant Surgeon, to rank as such from the 3d day of that month. On the 25th of October, he accepted the appointment. On the 16th of August, 1856, while Dr. Simons was out of the service, an Act of Congress was passed, providing for the increase of the Medical Department of the Army, by the appointment of four additional Surgeons and eight Assistant Surgeons. The four new places of Surgeon, created by this Act, were filled by appointments of four persons who had previously been Assistant Surgeons. Of these four, two had been the seniors, and two, Messrs. Madison and Barnes, the juniors of Dr. Simons, before his dismissal.

Their nominations were all confirmed by the Senate. When Dr. Simons' nomination came to be acted upon, the Senate, deeming his sentence unjust, not only advised and consented to his appointment as Assistant Surgeon, but added a recommendation that the President should give him the rank which he had lost by being dismissed.

Their intention manifestly was that he should have the same place in the corps that he would have occupied if he had remained in the service.

This desire of the Senate can be carried out only by giving him a commission as full Surgeon, for in the regular course of promotion he would have been a Surgeon now.

But that place cannot be given him, because he was nominated and confirmed as Assistant Surgeon, which does not authorize him to be commissioned as Surgeon. There is another objection to this. All the places of full Surgeon in the Army are filled, or at least persons have been nominated to all of them, and the Senate has advised and consented to these nominations. If you do what the Senate requested, you must withhold from Dr. Barnes the office to which he was nominated and confirmed, and give it to Dr. Simons, who was not nominated or confirmed for that office, but for a different office, lower in grade.

I cannot think that the place of Surgeon, created by the act of 1856, were illegally filled by the appointment of Drs. Madison and Barnes, though their commissions do bear date subsequent to the first commis-

sion of Dr. Simons. If the last named gentleman had remained in the service, he would have been, by the usual rule, entitled to promotion, in preference to the others. But he was out, driven out, it may be, most unjustly. Being out, he was neither senior nor junior to any one who was in. His name had no place at all on the roll. The President could as well pass him by in making promotion as if he had been in the corps.

I do not doubt that the President when he thinks an officer has been dismissed from the service by an unjust sentence, may right the wrong by a new commission dating back to the time of the first appointment, so that he will lose no chances of subsequent promotion. The law was so held by Mr. Legare, in Surgeon Dubary's case, and there are numerous precedents to the same effect on the records of your Department. If the President before the appointment of Messrs. Madison and Barnes as Surgeons, had thus restored Dr. Simons to his old rank, he would have been entitled to that office, one of them would have been excluded. Upon the same principle the President might have given Dr. Simons a commission, as Surgeon, excluding those who had been his juniors, under the commission of 1839, without affording them any cause of complaint. But neither of these things was done. Dr. Simons was simply nominated for Assistant Surgeon from 3d October, 1856. That was the only rank he had in the service then, or at any time since, and there is nothing in that to make the promotion of Messrs. Madison and Barnes illegal.

It seems to be doubted by some of the officers whether the appointment of Dr. Simons ought to be considered a promotion, or a case of original appointment. I cannot see how that makes any difference.— Either way it can be nothing more than an appointment as Assistant Surgeon, with rank from October 3d, 1856.

In brief, my opinion is that Dr. Simons cannot, under present circumstances, be legally commissioned as Surgeon, and that both Dr. Madison and Dr. Barnes may legally be commissioned to the places for which they have been nominated and confirmed.

But if the President should think it right to review the decision of the Court Martial whose sentence dismissed Dr. Simons, and if upon such review he should be of opinion that a wrong was done, which it is his duty to correct, he may do so without interfering with the promotion given to Messrs. Madison and Barnes. He can commission them as Surgeon, and he can also commission Mr. Simons as Assistant Surgeon, and in the commission he can give him rank from 11 July, 1839, agreeably to the wish of the Senate.

This will entitle him to be appointed Surgeon upon the first vacancy that may occur hereafter.

I am, most respectfully, yours, &c. Signed, J. S. BLACK.

HON. JOHN B. FLOYD, *Secretary of War, Washington, D. C.*

No. 10.

ADJUTANT GENERAL'S OFFICE, }
 Washington, June 2, 1857. }

SIR,—I am directed by the Secretary of War to apprise you, that in accordance with a recommendation of the Senate, embraced in its Resolution of March 3, 1857, confirming the nomination of Asst. Surgeon Simons, (copy herewith,) this officer will be nominated to fill the first vacancy of Surgeon which may occur, and to take place as such next below Surgeon David C. De Leon.

I am, sir, very respectfully, your obedient servant,

[Signed,]

S. COOPER, *Adjutant General.*

To

Asst. Surgeon THOMAS C. MADISON, *U. S. Army,*

Fort Randall, N. T.

Asst. Surgeon JOSEPH K. BARNES, *U. S. Army,*

West Point, N. Y.

No. 11.

Statement showing what Officers of the Army have been dismissed or dropped, and have been subsequently restored to the Army since the year 1821, with the cause of dismissal, and ground of restoration.

1. Captain DANIEL CURTIS of the 2d Infantry, was dismissed by order of the President, October 16, 1821, for conduct derogatory to the character of the officer and gentlemen; was re-instated by order of the President, in his original rank, position and regiment, April 8, 1822, for trial by General Court Martial, and having been tried accordingly, was dismissed by the Court, January 8, 1823.

2. Assistant Surgeon JOHN W. BAYLOR, was dismissed by order of the President, May 28, 1825, for having failed to repair to Cantonment Gibson, agreeably to an order transmitted to him under date of the 8th July, 1824;—he was re-instated by order of the President, to his original rank and position July 11, 1825, upon the recommendation of General Scott.

3. 2d Lieut. E. K. SMITH of the 5th Infantry, was dismissed by sentence of General Court Martial October 6, 1830, (see General Order No. 47, of that date,) for illegal, arbitrary and unmilitary conduct;—and was re-instated in his original rank, position and regiment by the President by and with the advice and consent of the Senate, April 26, 1832; it having been decided that the Court Martial which tried him was illegally constituted.

4. Captain BENJAMIN L. E. BONNEVILLE, of the 7th Infantry, was dropped from the Army by order of the President, May 31, 1834, (see General Orders, No. 42, of that date,) for having been absent from his regiment without leave since October, 1833;—and was re-instated in

his original rank, position and regiment by the President, with the advice and consent of the Senate, April 19, 1836, (see Order No. 25, April 22, 1836.)

5. Brevet 2d Lieut. MONTGOMERY BLAIR, 2d Artillery, who resigned October 10, 1835; was re-instated by the President, with the advice and consent of the Senate, in his original rank, position and regiment, May 20, 1836. His restoration impaired the rights of no officer, however, as Lieutenant Blair was the junior brevet 2d Lieutenant in his regiment, and this came in at the foot of the list.

6. 1st Lieut. ANTHONY DRANE, 5th Infantry, considered to have resigned November 25, 1835, was, March 14, 1842, re-appointed by the President, with the advice and consent of the Senate as a Captain in the same regiment, with rank from October 31, 1836; the same to which he would have been entitled, had he never been out of service. His restoration was founded on the report of a Board of Officers, that Captain Drane had not tendered his resignation, but was put out of service contrary to his wishes.

7. 1st Lieut. WILLIAM MARTIN, 4th Infantry, having resigned (under charges of drunkenness,) December 31, 1835, was re-inserted by the President with the advice and consent of the Senate, May 20, 1836, in his original rank, position and regiment.

8. Major WILLIAM GATES of the 1st Artillery, was dismissed by order of the President, June 11, 1836, (see general Order No. 37, of that date,) upon the finding of a Court of Inquiry that he had failed to make a sortie when besieged by an inferior Indian force; was re-instated in the 2d Artillery with his original rank by the President, with the advice and consent of the Senate, January 6, 1837, with a view to his trial by a General Court Martial; was tried subsequently, and honorably acquitted.

9. 2d Lieut. JOHN L. HOOPER of the 4th Infantry, was dismissed by the President, May 2, 1836, (see General Orders, No. 37, of that date,) for having failed to render his returns and accounts as Assistant Commissary of subsistence since the 1st quarter of 1835, agreeably to the provisions of the 3d section of the Act, approved January 31, 1823; was re-instated by the President, with the advice and consent of the Senate, January 25, 1837, as a 1st Lieutenant in the same regiment to rank from November 2, 1836, (see General Orders, No. 82, December 31, 1836,) and to stand at the foot of the list of 1st Lieutenants, that is to say, next below 1st Lieutenant John W. McCrabb, who had formerly stood next below him on the regimental and Army Rolls.

10. 2d Lieutenant THOMAS McCRATE, of the 1st Dragoons, was dropped by order of the President, May 6, 1837. (See General Orders No. 29, of that date,) for having been absent without leave since September 30, 1836;—was re-appointed by the President as 2d Lieutenant in the same regiment, to date from August 1, 1837; and was so confirmed by the Senate, October 13, 1837; subsequently, on his promotion to a 1st Lieutenancy, Lieut. McCrate was, by and with the advice and consent of the Senate, re-instated in the rank which he would have held had he never been out of service; it having been satisfactorily es-

tablished that the circumstances which occasioned his absence were of a nature to palliate, if not excuse, the offence.

11. 1st Lieut. WILLIAM H. T. WALKER, 6th Infantry, resigned October 31, 1838; was re-appointed by the President, November 18, 1840, (see General Order No. 51 of that date,) to his original rank and position, and was confirmed by the Senate accordingly, January 5, 1841. Eight, (that is to say, with one exception, all,) of Lieut. Walker's juniors, in this case, generously waived rank in his favor. [Lieut. Walker had resigned, in consequence of bad health, the effect of severe wounds received in battle, and from an unwillingness to remain a burthen upon the service.]

12. Captain G. C. HUTTER, 6th Infantry, was dropped from the rolls by order of the President, for disobedience of Orders and absence without leave, June 22, 1841, (see General Orders No. 34, of that date.) The Order was rescinded August 6, 1841, (see General Orders No. 44, of that date,) and the re-appointment was submitted to the Senate for confirmation December 23, 1841, but rejected, February 10, 1842; again re-appointed by the President with his original rank and date, April 1, 1847, he was nominated accordingly to the Senate, December 17, 1847, and rejected February 12, 1848.

13. 1st Lieut. W. E. AISQUITH, 1st Artillery, cashiered by sentence of General Court Martial, February 24, 1845, was re-appointed by the President, November 20, 1847, a Captain in his Regiment with rank from same date; was nominated accordingly to the Senate December 17, 1847, and was rejected January 12, 1848.

14. 2d Lieut. G. D. HANSON, 8th Infantry, having resigned June 1, 1845, was nominated February 26, 1847, for re-appointment as 1st Lieutenant in the same Regiment, to rank from December 31, 1845, and was confirmed accordingly, March 2, 1847. Lieutenant H. did not take the position he would have held, had he continued in service, but was arranged below two officers to whom he had formerly been senior. The ground of re-instatement was that he had recalled the tender of his resignation before its acceptance.

15. Captain S. D. DOBBIN, 3d Infantry, was dismissed by sentence of a General Court Martial, approved, in virtue of the 65th Article of War, by Major General Scott, commanding the Army in Mexico, March 21, 1847, (see General Orders No. 62, of that date;) was re-appointed by the President to his original rank and position, May 24, 1847; was nominated to the Senate December 17, 1847, and confirmed accordingly, January 6, 1848.)

16. 1st Lieut. L. B. NORTHROP, 1st Dragoons, dropped by order of the President, January 8, 1848, was re-appointed by the President with the advice and consent of the Senate, as 1st Lieutenant, to fill a vacancy occasioned by the resignation of Captain Turner, to date from July 4, 1836, and to stand at the head of the list of the 1st Lieutenants; the same being his date and position at the time he was dropped from the rolls, January 8, 1848, (see General Orders No. 50, War Department, (Adjutant General's Office,) September 1, 1848.

17. Captain EDWARD DEAS, 4th Artillery, was dismissed by sentence of a General Court Martial, approved, in virtue of the 65th Article of

War, by Major General Wool, commanding Army of Occupation, April 11, 1848, (see Orders No. 108, Army of Occupation, of that date;) was nominated for re-appointment to his original rank and position, June 12, 1848, and confirmed by the Senate accordingly, June 15, 1848.

18. Major GEORGE B. CRITTENDEN, Regiment of Mounted Riflemen, was cashiered by sentence of General Court Martial, August 19, 1848, (see General Orders No. 45, of that date.) The Senate of the United States having, March 2, 1849, pronounced his trial and conviction to be irregular and contrary to the directions of law, and that no vacancy arose therefrom; and the subject having thereupon been referred by the then Executive (His Excellency, James K. Polk,) to the Secretary of War, without any decision having been made thereon, the next President re-instated him, March 15, 1849, in his former rank and position in the Army.

19. Assistant Surgeon JAMES SIMONS, was dismissed by sentence of a General Court Martial, January 16, 1856, (see General Orders No. 3, February 6, 1856) After having been examined with other candidates for appointment, agreeably to section 1, Act of June 30, 1834, he was again appointed by the President, an Assistant Surgeon in the Army, October 3, 1856, with rank from that date; was nominated accordingly, December 17, 1856, and was confirmed March 3, 1857, in the following words, to wit: "*Resolved*, that the Senate advise and consent to the appointment of James Simons to be Assistant Surgeon in the Army; and recommend that the President direct that he take rank from the 11th day of July, 1839, and next after Surgeon David C. De Leon." Agreeably to which recommendation, he was announced in General Orders No. 7, of June 1, 1857, as re-appointed, to date from July 11, 1839.

Respectfully furnished to Senator Iverson, agreeably to his request of the 25th inst.

[Signed,] S. COOPER, *Adjutant General.*
Adjutant General's Office, January 26, 1858.

Also the two additional cases of Capt. Reynolds and 1st Lieutenant Stevenson, as follows :

GENERAL ORDERS, No. 15.

WAR DEPARTMENT, ADJUTANT GENERAL'S OFFICE, }
Washington, October 9, 1855. }

Captain *Alexander W. Reynolds*, Assistant Quartermaster, having, on several occasions, failed to render his accounts within the period prescribed by law, or satisfactorily to account for such default; and having also failed to account satisfactorily, to a large amount, for public moneys placed in his hands, the President of the United States directs that he be "dismissed from the public service." Captain Reynolds accordingly ceases to be an officer of the Army from October 8, 1855.

By order of the Secretary of War,

S. COOPER, *Adjutant General.*

GENERAL ORDERS, No. 8.

Extract.

RE-APPOINTMENTS.

QUARTERMASTER'S DEPARTMENT.

Alexander W. Reynolds, lately Assistant Quartermaster in the Army of the United States, to be Assistant Quartermaster, with the rank of Captain, to date from August 5, 1847, *vice* Brent, deceased, and to resume his former place on the Army Register, next below Captain Van Vliet.

GENERAL ORDERS, NO. 12.

WAR DEPARTMENT, ADJUTANT GENERAL'S OFFICE, }
WASHINGTON, *September 22, 1856.* }

First Lieutenant *Matthew R. Stevenson*, of the seventh regiment of Infantry, having failed to render his accounts as required by the Act "concerning the disbursement of public money," approved January 31, 1823, the PRESIDENT of the United States directs that he be "dismissed from the public service."

Lieutenant Stevenson accordingly ceases to be an officer of the Army from September 20, 1856.

BY ORDER OF THE SECRETARY OF WAR:

S. COOPER,
Adjutant General.

GENERAL ORDER, No. 8.

Extract.

RE-APPOINTMENTS.

SEVENTH REGIMENT OF INFANTRY.

Matthew R. Stevenson, lately First Lieutenant in the Seventh Infantry, to be a Captain in the same regiment, to date from January 2, 1858, *vice* Humber, deceased, and to resume his former place on the Army Regiment, next below Captain Joseph H. Potter.

BALTIMORE, 25 *January*, 1859.

To the HON. HENRY MAY.

Dear Sir,—As I have reason to believe that Surgeon Gen. Lawson is opposing the confirmation of Dr. Simons, and as it may argue demerit or reflect upon him, will you do me the favor to state what opinion he has heretofore expressed to you, both as to the decision of the Court and of Simons.

Yours, most respectfully and truly,

LAMBERT GITTINGS.

BALTIMORE, 26 *January*, 1859.

LAMBERT GITTINGS, Esq.

Dear Sir,—In reply to your note stating you "had reason to believe that Dr. Lawson, the Surgeon General of the Army, is opposing the confirmation of Dr. Simons, and that you fear this may argue his demerit or reflect upon his character," I very cheerfully state that when I first called upon Dr. Lawson, and spoke with him upon Dr. Simons' case, he expressed, in very warm terms, his respect for and confidence in the Doctor. He stated that he was one of the most honorable and efficient of the Medical Staff—and with much feeling spoke of the injustice he had suffered by the sentence of the Court Martial. He expressed the hope that he might be restored and offered his friendly services to advance that object. I am thus fully persuaded that your information is incorrect, and feel convinced that the Surgeon General is not opposing the confirmation and is incapable of saying or doing anything which may reflect upon the Doctor's character or injure his prospects.

I am, very truly, your friend,

H. MAY.