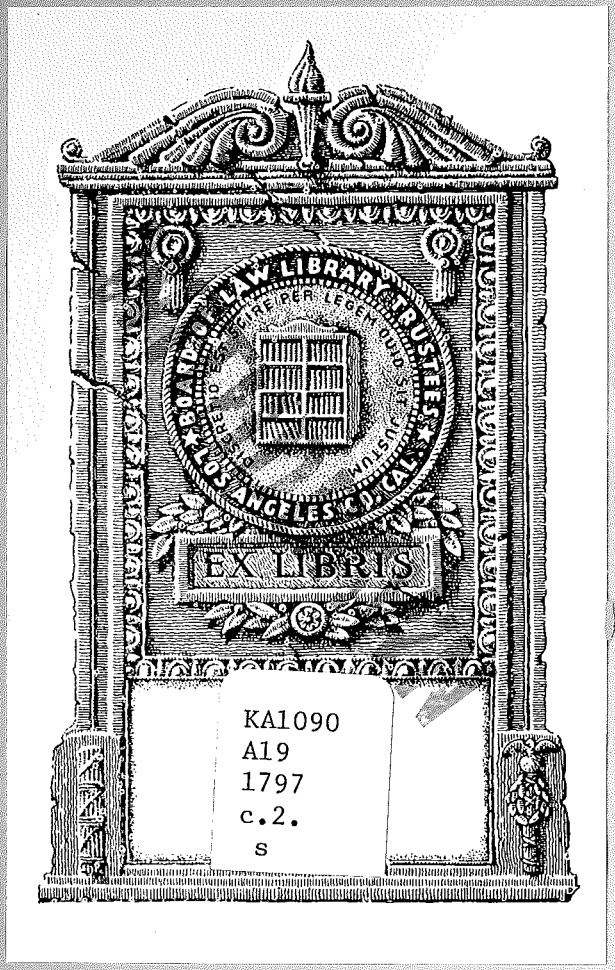

REPORTS

OF

CASES

ARGUED AND DECIDED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY DANIEL CALL.

VOLUME IV.

RICHMOND:
PUBLISHED BY ROBERT I. SMITH.
Samuel Shepherd & Co. Printers.
1833.

NOTE BY THE EDITOR.

There is no printed report of the decisions of the first court of appeals, and of those which have been omitted by reporters from that period to the death of Mr. *Pendleton*, although such a work is obviously wanted; and it is to supply that defect, that the present volume is published: which consists of two parts: the first includes all the important cases determined from the commencement of the first court, to its final dissolution in the year 1789; the second contains the unreported cases in the new court of appeals, from that period to the death of judge *Pendleton* in 1803, besides two cases in the general court, and court of admiralty.

THE REPORTER'S PREFACE

TO THE FOURTH VOLUME.

The history of a people is, often, best preserved by their laws and civil institutions; and nothing adds more to the true glory of a nation, than narratives of its wise and impartial administration of justice. The fame, of the Areopagus, survived the military glory of Athens: and when the battle of Marathon, the passage of the Hellespont, and the victory of Salamis, were treated as fables at Rome,(*a*) the memory of the Grecian laws still lived in the twelve tables of the capital of the Universe.(*b*)

Impressed with those ideas, the writer of this article commenced at an early, and continued to a later, period of his life, to collect the subjects of the present volume.

The first part of which contains all the important cases, upon the laws and constitution, decided in the first court of appeals, by the judges of the high court of chancery, general court, and court of admiralty; whose members were coeval with the revolution, and distinguished for their talents, and patriotism. This part embraces the period, between the commencement of the first court of appeals, and its final dissolution in March 1789.

The second part contains the unreported cases in the new court of appeals of five judges, from the dissolution of the first, to the death of judge *Pendleton* in October 1803, with one or two cases in other courts.

The work has been prepared with great labour and expense from the notes and memoranda of the judges and lawyers, who attended the courts, and a diligent examination of the records: and although it is probably defective in point of style and arrangement, it is submitted to the public, with great confidence in the fidelity of the reports.

May 1*st*, 1827.

(*a*) *Liv. lib.* 28, *cap.* 43. *Juv. Sat. x. l.* 174, *&c.*
(*b*) *Adams's Antiq.* 169. 5 *Gibb. Rom. Emp.* 308.

To the Honourable St. George Tucker.

Sir,

Having been enabled, by the assistance you kindly lent me, to complete the following work, I venture, without previous application, to inscribe it to you. For, when I review the past scenes of my life, few recollections are dearer to me than the constancy of your friendship: none that inspire warmer gratitude: and I have long wished to evince it by some public testimonial of my esteem for your virtue and talents. The opportunity has, at length, occurred; and I embrace it with pleasure, hoping that the acknowledgment will be acceptable to you, and that I shall continue to be honoured with your regard, until our days are numbered. That the remainder of your's may be easy, tranquil and happy, is the sincere wish of one who loves and respects you.

I am, sir, your most ob't serv't,

DANIEL CALL.

May 1*st*, 1827.

ADDENDA.

At the end of the Biography of Judge PENDLETON, add:

He was honoured with a public funeral; and his eulogy was pronounced by Mr. *Edmund Randolph.*

ERRATA.

In the biography of Judge PENDLETON, in the last line, page ix. read *Unguem* for *Ungeum.*

In the note at the star, at the end of the biography of Judge WYTHE, page xv. in the second line, read *ipse*, for *isse*. In the same line, read *et* for *and.*

TABLE OF CASES REPORTED.

Letter "*v.*" follows the name of the plaintiff, "*ads.*" the name of defendant.

TABLE OF CASES CITED.

Letter "*v.*" follows the name of the plaintiff, "*and*" the name of the defendant.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

First Case of the Judges.

1779.
August.

The first court of appeals was a legislative court only; and it was not necessary, that the judges should produce any commissions, or the executive be present, when they qualified; for the act constituting the court, had not directed commissions to be issued, or the oaths to be taken in the presence of the executive; and the judges, by construction of law, knew each other to be judges of the courts to which they respectively belonged.

Mode of qualifying the judges of the first court of appeals.

By the 14th section of the constitution, the two houses of the general assembly were to appoint, by joint ballot, judges of the supreme court of appeals, and general court, judges in chancery, and judges of admiralty, who were to hold their offices during good behaviour. *Hen. Stat.* vol. 9, p. 117.

An act of October session 1776, established a court of admiralty; to consist of three judges, to be chosen by joint ballot of both houses; and to hold their offices during good behaviour. *Hen. Stat.* vol. 9, p. 202.

1779. *August.*

First case of the judges.

The high court of chancery was established by an act of October session 1777, to consist, likewise, of three judges, to be chosen by joint ballot of both houses; and to hold their offices during good behaviour. *Hen. Stat.* vol. 9, p. 389.

By an act of the same session of October 1777, the general court was established, to consist of five judges, to be chosen by joint ballot of both houses; and to hold their offices during good behaviour. *Hen. Stat.* vol. 9, p. 401.

In May 1779, an act, intituled, "an act constituting *the* court of admiralty," passed; by which the court was to consist of three judges; those then in office were confirmed; and every future judge was to be chosen by joint ballot of both houses; and the judges to hold their offices during good behaviour. *Hen. Stat.* vol. 10, p. 98.

This was considered as an amendatory act only.

By an act of the same session of May 1779, the court of appeals was established, to consist of the judges of the high court of chancery, general court, and court of admiralty; and five to be a sufficient number to constitute a court. *Hen. Stat.* vol. 10, p. 89.

This act did not direct that the judges should be chosen by joint ballot, and commissioned and sworn by the executive, as was prescribed with respect to the judges of all the other courts.

Under the last mentioned act, several of the judges met, at the capitol in the city of Williamsburg, in order to qualify as judges of the court of appeals; but produced no commissions; for none were directed by the act to be issued; and as they had qualified under the commissions in the courts to which they respectively belonged, it was not thought necessary to produce them now, as this was a legislative court only, and the judges, in construction of law, knew each other. They therefore qualified without the intervention or presence of the executive; and the following was the entry made in the order book.

1779. *August.*

First case of the judges

"*Williamsburg, to wit.*—At the capitol in the said city, on Monday the 30th of August, one thousand seven hundred and seventy-nine: In virtue of an act passed, at the last session of general assembly, intituled, *an act constituting the court of appeals*, then and there convened *Edmund Pendleton* and *George Wythe*, esquires, two of the judges of the high court of chancery; *John Blair*, esquire, one of the judges of the general court; and *Benjamin Waller*, *Richard Cary*, and *William Roscow Wilson Curle*, esquires, judges of the court of admiralty: And thereupon the oath of fidelity prescribed by an act, intituled, *an act prescribing the oath of fidelity, and the oaths of certain public officers;* together with the oath of office prescribed by the said act constituting the court of appeals, to be taken by every judge in the said court, being first administered, by the said *George Wythe* and *John Blair*, esquires, to the said *Edmund Pendleton*, esquire; and then, by the said *Edmund Pendleton*, esquire, to the rest of the judges, the court proceeded to the business before them."

Whereupon, *John Beckly* was appointed clerk; *Mathew Moody*, cryer; and *John Fenton*, tipstaff; who respectively qualified; and then the court adjourned to the 16th of December, following.

December 16th, 1779. Mr. *Wythe*, one of the chancellors, Mr. *Blair*, who had become chief justice of the general court, and Mr. *Waller*, chief judge of the admiralty, were the only judges present, who had already qualified as judges of the court of appeals: But judges *Carrington* and *Lyons* of the general court appearing, they without producing any commissions, were sworn into office by chancellor *Wythe* and chief justice *Blair;* and thereupon the court met, and proceeded to business.

On the next day *Robert Carter Nicholas*, one of the judges of the court of chancery, qualified (without producing any commission) in open court; but the oaths were administered to him by judges *Lyons* and *Cary*.

1779. *August.* First case of the judges.

In March 1780, *Bartholomew Dandridge* one of the judges of the general court qualified (without producing any commission) in open court; but it is not said, in the order book, by whom the oaths were administered.

1780. *August.*

COMMONWEALTH *v.* BECKLEY.

If the clerk of this court neglects to attend his duty in court; or the clerk of an inferior court to furnish the copy of the record of the inferior court to enable the applicant to prosecute his appeal to this court, this court will, after a rule to shew cause, animadvert upon his conduct.

The following rule was this day made, by the court, in the case of *John Beckley*, the clerk of this court, and of the high court of chancery.

"*Rule.* Mr. *John Beckley*, the clerk of this court, having neglected to attend his duty yesterday and this day; and it appearing that the said Mr. *Beckley*, as clerk of the high court of chancery, hath failed to furnish, when required, a transcript of the record in the appeal of *Hite* and others against lord *Fairfax*, which was depending and undetermined, before the king in council, in order for the prosecution of the said appeal in this court, It is ordered, that unless the said Mr. *Beckley* shall, at the next session of this court, make a reasonable excuse for such his conduct, the same shall then be animadverted upon, 'till which time, the consideration of a proper allowance to be made him, as clerk of this court, is suspended."

And, in March 1781, the following rule of discharge was entered.

"*Rule.* Mr. *John Beckley*, clerk of this court, agreeable to an order of the last court, offered the reasons for his non-attendance at that time, which being deemed satisfactory by the court, It is ordered that the rule against him be discharged."

COMMONWEALTH *v.* CATON *& al.*

1782. *November.*

The court of appeals had jurisdiction in criminal cases adjourned thither from the general court.

The treason law of 1776 was constitutional; and the house of delegates could not, without the concurrence of the senate, pardon three persons condemned under it by the general court.

This case came before the court* by adjournment from the general court; and was as follows:

John Caton, *Joshua Hopkins* and *John Lamb* were condemned for treason, by the general court, under the act of assembly concerning that offence, passed in 1776, which takes from the executive, the power of granting pardon in such cases.† The house of delegates by resolution of the 18th of June, 1782, granted them a pardon, and sent it to the senate for concurrence; which they refused. The men, however, were not executed, but continued in jail under the sentence; and, in October 1782, the *attorney general*, moved in the general court, that execution of the judgment might be awarded. The prisoners pleaded the pardon granted by the house of delegates: The *attorney general* denied the validity of the pardon, as the senate had not concurred in it: and the general court adjourned the case, for novelty and difficulty, to the court of appeals.

---

* Which at that time consisted of the judges of the high court of chancery; those of the general court; and those of the admiralty assembled together. *Ch. Rev.* 102. And the sitting members, upon the present occasion, were *Edmund Pendleton*, *George Wythe* and *John Blair*, judges of the high court of chancery: *Paul Carrington*, *Bartholomew Dandridge*, *Peter Lyons* and *James Mercer*, judges of the general court: and *Richard Cary*, one of the judges of the court of admiralty.

† The words of the act are, "The governor, or in case of his death, inability, or necessary absence, the councillor who acts as president, shall in no wise have or exercise a right of granting pardon to any person or persons convicted in manner aforesaid, but may suspend the execution until the meeting of the general assembly, who shall determine whether such person or persons are proper objects of mercy or not, and order accordingly." *Ch. Rev.* 40.

1782. *November.* Commonwealth v. Caton & al.

The resolution of the house of delegates was in the following words:

"IN THE HOUSE OF DELEGATES,

"*Tuesday the 18th of June*, 1782.

"Resolved that *James Lamb*, *Joshua Hopkins* and *John Caton*, who stand convicted and attainted of treason by judgment of the general court, at their last session, and appear to be proper objects of mercy, be and are hereby declared to be pardoned for the said treason, and exempted from all pains and penalties for the same; provided they and each of them repair to the county of *Augusta* within —— days from this time, and continue within the said county during their natural lives respectively. Ordered that Mr. *Patrick Henry* do carry the said resolution to the senate and desire their concurrence."

The cause was argued in the court of appeals by Mr. *Randolph*, the attorney general, for the commonwealth, and by Mr. *Hardy* and several other distinguished gentlemen for the prisoners.

For the commonwealth it was contended, that the pardon was void, as the senate had not concurred. That the clause in the constitution might be read two ways, either of which would destroy the pardon. One was, to throw the words, "*or the law shall otherwise particularly direct*," into a parenthesis;" which would confine the separate power of the lower house to cases of impeachment only; and would leave those where the assembly had taken it from the executive to the direction of the laws made for the purpose. The other was, to take the whole sentence as it stands, and then the construction will, according to the obvious meaning of the constitution, be that, although the house of delegates must originate the resolution, the senate must in all cases concur, or it will have no effect. For it would be absurd to suppose, that the same instrument which required the whole legislature to make a law, should authorize one branch to repeal it.

1782. *November.* Commonwealth v. Caton & al.

For the prisoners, it was contended, that the language of the constitution embraced both sets of cases, as well those of impeachment, as those where the assembly should take the power of pardoning from the executive: and, in both, that the direction was express that the power of pardoning belonged to the house of delegates. That the words of the constitution, and not conjectures drawn from the supposed meaning of the framers of it, should give the rule. That the act of assembly was contrary to the plain declaration of the constitution; and therefore void. That the prisoners were misguided and unfortunate men; and that the construction ought, in favour of life, to incline to the side of mercy.

The *attorney general*, in reply, insisted, that compassion for the prisoners could not enter into the case; and that the act of assembly pursued the spirit of the constitution. But that, whether it did or not, the court were not authorized to declare it void.

Cur. adv. vult.

WYTHE, Judge. Among all the advantages, which have arisen to mankind, from the study of letters, and the universal diffusion of knowledge, there is none of more importance, than the tendency they have had to produce discussions upon the respective rights of the sovereign and the subject; and, upon the powers which the different branches of government may exercise. For, by this means, tyranny has been sapped, the departments kept within their own spheres, the citizens protected, and general liberty promoted. But this beneficial result attains to higher perfection, when those, who hold the purse and the sword, differing as to the powers which each may exercise, the tribunals, who hold neither, are called upon to declare the law impartially between them. For thus the pretensions of each party are fairly examined, their respective powers ascertained, and the boundaries of authority peaceably established. Under

1782. *November.*

Common-wealth *v.* Caton & al.

these impressions, I approach the question which has been submitted to us: and, although, it was said the other day, by one of the judges, that, imitating that great and good man lord *Hale*, he would sooner quit the bench than determine it, I feel no alarm; but will meet the crisis as I ought; and, in the language of my oath of office, will decide it, according to the best of my skill and judgment.

I have heard of an english chancellor who said, and it was nobly said, that it was his duty to protect the rights of the subject, against the encroachments of the crown; and that he would do it, at every hazard. But if it was his duty to protect a solitary individual against the rapacity of the sovereign, surely, it is equally mine, to protect one branch of the legislature, and, consequently, the whole community, against the usurpations of the other: and, whenever the proper occasion occurs, I shall feel the duty; and, fearlessly, perform it. Whenever traitors shall be fairly convicted, by the verdict of their peers, before the competent tribunal, if one branch of the legislature, without the concurrence of the other, shall attempt to rescue the offenders from the sentence of the law, I shall not hesitate, sitting in this place, to say, to the general court, *Fiat justitia, ruat cœlum;* and, to the usurping branch of the legislature, you attempt worse than a vain thing; for, although, you cannot succeed, you set an example, which may convulse society to its centre. Nay more, if the whole legislature, an event to be deprecated, should attempt to overleap the bounds, prescribed to them by the people, I, in administering the public justice of the country, will meet the united powers, at my seat in this tribunal; and, pointing to the constitution, will say, to them, here is the limit of your authority; and, hither, shall you go, but no further.

Waving, however, longer discussion upon those subjects, and proceeding to the question, immediately, before us, the case presented is, that three men, convicted of treason against the state, and condemned by the general court, have pleaded a pardon, by the house of delegates, upon which

1782. *November.*

Common-wealth *v.* Caton & al.

that house insists, although the senate refuses to concur; and the opinion of the court is asked, whether the general court should award execution of the judgment, contrary to the allegation of the prisoners, that the house of delegates, alone, have the power to pardon them, under that article of the constitution, which says, "But he (the governour) shall, with the advice of the council of state, have the power of granting reprieves or pardons, except where the prosecution shall have been carried on by the house of delegates, or the law shall otherwise particularly direct; in which *cases*, no reprieve, or pardon, shall be granted, but by resolve of the house of delegates."

Two questions are made,

1. Whether, this court has jurisdiction in the case?
2. Whether the pardon is valid?

The first appears, to me, to admit of no doubt; for the act constituting this court is express, that the court shall have jurisdiction "In such cases as shall be removed, before them, by adjournment from the other courts before mentioned, when questions, in their opinion, new and difficult, occur." *Chan. Rev.* 102: which emphatically embraces the case under consideration.

The sole enquiry therefore is, whether the pardon be valid?

If we consider the genius of our institutions, it is clear, that the pretensions of the house of delegates cannot be sustained. For, throughout the whole structure of the government, concurrence of the several branches of each department is required to give effect to its operations. Thus the governour, with the advice of the council of state, may grant pardons, commission officers, and embody the militia; but he can do neither without the assent of the council: the two branches of the legislature may pass laws, but a bill passed by one of them has no force: and the two houses of assembly may elect a judge; but an appointment, by one of them only, would be useless. This general requisition of union seems, of itself, to indicate, that nothing was intended to be done, in any department, without it; and, ac-

1782. *November.*

Common-wealth *v.* Caton & al.

cordingly, the fourth section of the constitution declares, that "The legislature shall be formed of two distinct branches, who, *together*, shall be a complete legislature;" and the eighth, "that all laws shall originate in the house of delegates, to be approved or rejected by the senate." Thus requiring, in conformity to the regulations throughout the whole fabric of government, an union of the two branches, to constitute a legislature; and an union of sentiment in the united body, to give effect to their acts. And it is not to be believed, that, when, this union was so steadfastly demanded, even in the smallest cases, it was meant to be dispensed with, in one of the first magnitude, and which might involve the vital interests of the community.

But if we advert to the motive for the regulation, the necessity for concurrence will be more apparent. For it is obvious, that the contests in England between the house of commons, and the crown, relative to impeachments, gave rise to it, as the king generally pardoned the offender, and frustrated the prosecution. With this in view, the power of pardoning cases of that kind was taken from the executive here, and committed to other hands, in order that the evil complained of, there, might be removed. But the interpretation contended for by the house of delegates, in effect, reverses the object. Thus the object was to put a check to prerogative in one department; the effect is to remove all check, and establish prerogative in another department. The object was to prevent disappointment, by one department, of the national will; the effect is to enable, less than a department, to defeat it. The object was to enable the whole legislature to provide for the public safety, by insuring the punishment of dangerous offenders; the effect is to enable one branch of the legislature to turn him loose upon society, without the consent of the other. Such monstrous consequences could not have been intended by the framers of the constitution. For what motive could the convention, when providing for the public safety, have had for an arrangement, which might impair, but could not increase, it?

1782. *November.*

Common-wealth *v.* Caton & al.

If, in a common case, the house of delegates was not permitted to pardon without the concurrence of the senate, although no public danger would attend it, what reason can be assigned for a different rule, where it was anxiously provided that the legislature might, for the sake of the public security, prohibit a pardon; and where the safety of the state might depend upon it?

This view of the subject confines the object of the provision of the constitution, now under consideration, to cases where the prosecution is carried on by the house of delegates; and justifies the first interpretation contended for by the attorney general, of reading the words "*Or the law shall otherwise particularly direct*," in parenthesis: so as to limit the power of pardoning, by the house of delegates, to cases of impeachment prosecuted, by them, under the sixteenth and seventeenth sections of the constitution. Which is, manifestly, the intention of the clause. For I have shewn that the whole article was bottomed upon the contests in England, between the house of commons and the crown, relative to impeachments; and as the remedy applied there, by the statute of William the third, was confined to that species of crimes, leaving all others, to the usual course of pardon by the crown, or by act of parliament; so here in pursuance of the system, and in imitation of that statute, the power of pardoning, by the house of delegates, was confined to cases, where they prosecuted themselves; leaving all others to the ordinary course of remission, by the executive when they have the power; and, when they have not, to the legislature. For, although it was reasonable to allow them to relinquish their own suit, it was not so, where the prosecution was carried on by government, for the benefit of the community, under laws made, by both branches of the legislature, to secure the public safety. The word *cases*, in the plural number, makes no difference, 1. Because it was probable there would be more than one case of a prosecution by the house of delegates; and therefore the plural number was properly used, with a view to that

1782. *November.* Commonwealth *v.* Caton & al.

possibility. 2. Because the letter *s* may be rejected, as accidentally added against the intent.

But suppose the reading, by parenthesis, not to be adopted, the pretensions of the house of delegates would, nevertheless, not be authorized.

1. Because, the construction, as the *attorney general* observed, must still be according to the meaning of the constitution; and, although the house of delegates must originate the resolution, the senate must concur, or it will have no effect; as it would be absurd to suppose, that the instrument which required the whole legislature to make a general provision, should authorize one branch to repeal it: and that, too, in the most vital cases, where the prohibition of pardon was concurred in, by both houses, in order to secure the public safety.

2. Because the word *resolve* has two senses: The first, where it applies to the affairs of the house only, without affecting the general interests of the country; and, then, the resolution is complete, without the assent of the senate. The second, where it extends to the whole community; and, then, the resolution being legislative in its nature, requires the concurrence of the whole legislature, as every thing does, which affects the public at large.

The latter is the sense in which the word ought to be taken in the present case, 1. Because it goes to repeal a law; which can only be done by another law: and that makes the concurrence of the senate indispensable: for the constitution says, that all laws shall originate in the house of delegates, and shall be approved, or rejected by the senate; but a resolution, affecting the whole community, is, in fact, a law, although it bears a different name: which brings it, precisely, within the course of legislation prescribed by the constitution. 2. Because a word of equivocal signification, ought to be understood according to that sense, which is conformable to the general scope of the instrument; for the general scope manifests the particular intent of those, who used it.

1782. *November.* Commonwealth *v.* Caton & al.

These arguments receive some illustration from the twentieth section of the constitution, recognizing the power of the whole legislature, and not one branch, to abolish penalties and forfeitures: which is contravened by the other construction; for, if the house of delegates can remit part of the penalty, they may the whole, as well the forfeiture of the goods, as the corporal suffering. An idea utterly inconsistent, with the recognition of a power, in the whole legislature, to do it.

Every view of the subject, therefore, repels the construction of the house of delegates: and, accordingly, the practice is said to have been against it, ever since the formation of the government: which seems to have been the understanding upon the present occasion; for the resolution provides, that it shall be sent, to the senate, for concurrence.

This mode of considering the subject, obviates the objection made by the prisoners' counsel, relative to the constitutionality of the law concerning treason; for, according to the interpretation just discussed, there is nothing unconstitutional in it.

I am, therefore, of opinion, that the pardon pleaded by the prisoners is not valid; and that it ought to be so certified, to the general court.

PENDLETON, President. Upon the preliminary question, respecting the power of the general court to adjourn criminal cases into this court for difficulty, and of this court to hear and decide upon them when so adjourned; it is objected that the law for establishing the general court, gives that court a power to hear and determine all treasons, murders, felonies, or other crimes and misdemeanours, and makes no provision for an appeal, or writ of error to this court, or adjournment hither, on account of difficulty. But this, to decide the present question, concludes nothing; since the same law gives that court power to take cognizance of, and to hear and determine all civil suits at common law, and some other controversies; and is equally silent as to an ap-

1782. *November.*

Common-wealth *v.* Caton & al.

peal, writ of error, or power of adjournment, in those cases; and yet there is no doubt but, in such cases, the writ of error will lie, or the decision may be adjourned hither by that court. 'Tis not, therefore, to this law, but to that for constituting this court, we must recur for the rule by which to determine the question. The jurisdiction given to the court has three branches:

1. An original jurisdiction over such suits as may be commenced, or adjourned there, by direction of any particular law, without which, no original suit can be commenced in this court; of this nature are the land claims now depending; and impeachments, which the constitution of government allows against the judges of the general court.

2. Of such as shall be brought before them by appeal from, or writ of error to, decrees of the high court of chancery, judgments of the general court, or sentences of the court of admiralty, when they are final, and the matter in controversy be equal, in value, to £ 50, or be a freehold, or franchise.

3. Also, in such cases as shall be removed before them, by adjournment from the other courts, when questions, in their opinion new and difficult, occur.

A fourth branch of business is mentioned, but that was of a special nature, and will cease, as soon as two suits now depending, are determined.

In the two first branches, the terms suits and controversies are used, in terms proper to describe disputes between litigant parties, and would seem to exclude criminal cases; especially when the idea of value is annexed to them; which cannot be applied to that inestimable blessing, life. But, in the third branch, those terms are dropt, and the more general *one* of cases adopted; which appears to have been the result of wisdom, and contemplated leaving the other courts at full liberty to adjourn every case before them, whether civil or criminal, if upon a view of its difficulty or its importance, either in itself, or the consequences

attending it, they shall choose to refer it to the decision of the whole judges, in their collective capacity, in this court. The words are general enough to comprehend criminal as well as civil cases; for the former are, equally with the latter, cases on which the judges are to decide; and, of course, in which they are authorized to refer the decision to this court; for that power, in them, is implied, in giving this court jurisdiction over cases so adjourned. It has been supposed, however, that the general term cases, is explained to mean the same as suits and controversies in the two first branches, by a subsequent clause of the act, which directs that a clear and concise state of the case of each party in such appeal, writ of error, or controversy adjourned, shall be prepared and signed by his counsel, printed at his expence, and that expence taxed in the bill of costs, and one delivered to each judge. Words which undoubtedly refer to controversy, where there are contending parties, expences, and costs, to be taxed upon the event of the determination. Yet, I should think this latter clause insufficient to controul so important a power as appears to be given in the first clause; even if it did not admit of an application to a different purpose, than that of explaining the term cases, used in the clause giving the jurisdiction. But, I conceive this diversification of the terms not to have been used by the legislature lightly, or intended to convey the same idea by different expressions, but was wisely made to answer a just and proper purpose; as thus, criminal cases, as well as civil controversies, might be adjourned under the terms of the first clause. In such there were no parties to prepare a state of the case, or pay the expence of printing them, nor costs to be awarded in which they were to be included; and therefore, in those instances, this state of the case was not required to be made; for that was to be done only in civil controversies adjourned. I interpret this latter clause therefore, not as explanatory of the whole jurisdiction given by the former clause, but as restraining the necessity of printed cases to a particular sort of those cases which might

1782. *November.*

Common-wealth *v.* Caton & al.

1782. *November.*

Common-wealth *v.* Caton & al.

be adjourned, and then there remains with me no difficulty in the question. The argument of inconvenience is mentioned; which is always properly considered as of great weight in determining a new case; especially in this court, whose decisions are to fix the law. If I was to consider this question in a political light, I should wonder indeed, that disputes about property to the value of £50, which dwindles into nothing when compared with the subject which gives rise to the present discussion, might be removed for difficulty, and that in a case where the judges are to decide between the safety of the state on the one hand, and the life of a citizen on theoth er, however overwhelmned with doubts and difficulties, they must go through them and determine without that assistance which they might wish to have on the occasion; the reason for such assistance, must increase in proportion to the magnitude of the subject; and therefore, although the legislature seems to think some things too low, they do not declare any thing too high, for the jurisdiction of this court, that is within the judiciary powers. The objection of some of the judges, not being present, would be unanswerable, if matters of fact were to be discussed, on the final judgment pronounced here; but as it is a matter of law and not fact to be determined on, I do not see the inconveniences or impropriety of their absence; or, if their presence should be desired, why a mode may not be adopted to bring them hither. As to the delay, I can only say, it is left with the judges of the general court to determine, upon considering the difficulty and importance of the case on the one hand, and the delay and other inconveniences on the other, to determine whether they will decide themselves, or require the assistance of the other judges. This power the legislature have given them, and I have neither inclination nor authority to take it from them.

The question, upon the merits, is whether by the paper stated in the record as the resolution of the house of delegates, these three unhappy men stand pardoned of the treason of which they are attainted in the general court, or still

1782. *November.*

Common-wealth *v.* Caton & al.

remain subject to the execution of the judgment which passed against them upon their conviction? If the exclusive power of the house of delegates on this occasion was to be admitted, it would be difficult to maintain that this resolution should operate as a pardon, since those who made it, by sending it to the senate for their concurrence, appear to have suspended its operation until the concurrence of the senate should be obtained; which not having happened, the force of it stands as yet suspended; or rather the senate by rejecting this, and the house of delegates not passing another, their power remains unexercised, and the attainder retains its full force. But, as I do not make this the ground of my judgment, I shall pass to the two great points into which the question has been divided, whether, if the constitution of government and the act declaring what shall be treason are at variance on this subject, which shall prevail and be the rule of judgment? And then, whether they do contravene each other? The constitution of other governments in Europe or elsewhere, seem to throw little light upon this question, since we have a written record of that which the citizens of this state have adopted as their social compact; and beyond which we need not extend our researches. It has been very properly said, on all sides, that this act, declaring the rights of the citizens, and forming their government, divided it into three great branches, the legislative, executive, and judiciary, assigning to each its proper powers, and directing that each shall be kept separate and distinct, must be considered as a rule obligatory upon every department, not to be departed from on any occasion. But how far this court, in whom the judiciary powers may in some sort be said to be concentrated, shall have power to declare the nullity of a law passed in its forms by the legislative power, without exercising the power of that branch, contrary to the plain terms of that constitution, is indeed a deep, important, and I will add, a tremendous question, the decision of which might involve consequences to which gentlemen may not have extended their ideas. I am happy in being

1782. *November.* Commonwealth *v.* Caton & al.

of opinion there is no occasion to consider it upon this occasion; and still more happy in the hope that the wisdom and prudence of the legislature will prevent the disagreeable necessity of ever deciding it, by suggesting the propriety of making the principles of the constitution the great rule to direct the spirit of their laws.

It was argued by the counsel for the prisoners, that the interpretation, now to be made, ought, in favour of life, to incline to the side of mercy, and that compassion for the misguided and unfortunate ought to have some influence on our decision.

Mercy—divine attribute! Often necessary to the best: sometimes due to the worst: and, from the infirmities of our nature, always to be regarded, when circumstances will admit of it. But how, in public concerns, this is to be accomplished with just attention to the general welfare, has, in every age, been a *desideratum* with statesmen and legislators. For, in human associations, other considerations, as well as the dictates of mercy, must be attended to. Compassion for the individual must frequently yield to the safety of the community. Society proceeds upon that principle. Men surrender part of their natural rights to ensure protection for the residue against domestic violence, and hostilities from abroad; which can only be effected by the due execution of wholesome laws calculated to maintain the rights of private citizens, and the integrity of the state. But how would this be promoted by letting loose notorious offenders to burn, to rob, and to murder, or to aid a foreign foe in his unjust attempts upon the liberties of the country? Mercy, in such cases, to one, would be cruelty to the rest.

Aware of this, the makers of the constitution, considering that, although, in representative governments, the laws should be mild, they ought to be rigidly executed; and that, although a power to pardon, which had often been abused in England, should exist some where, it ought never to be exercised without proper cause, framed the clause now under consideration; which provides that the governour, or

1782. *November.* Commonwealth *v.* Caton & al.

chief magistrate, "shall not, under any pretence, exercise any power or prerogative by virtue of any law, statute, or custom of England; but he shall, with the advice of the council of state, have the power of granting reprieves and pardons:" not in all cases indiscriminately, but in such only as were least liable to abuse; the rest were confided to agents less exposed to temptation.

Thus the power was, in general, committed to the executive: But, as to cases concerning the conduct of public officers, and those which policy might suggest to the legislature as proper to be taken from the chief magistrate and his council, it was thought a safer depository, beyond the reach of the various passions and motives which might influence a few individuals, would be found in the general assembly: and therefore the clause excepts cases of impeachment; and those which the law might otherwise provide for. In these, the power of pardoning is reserved to the representatives of the people: But whether to one or both houses is the important question. A question which should be decided according to the spirit, and not by the words of the constitution.

The language of the clause is inaccurate, and admits of both the constructions mentioned by the *attorney general*, that is to say, 1. By throwing the words, "or the law shall otherwise particularly direct," into a parenthesis, to confine the power of pardoning, by resolution of the house of delegates alone, to cases of impeachment only: and to leave those which the general assembly might take from the executive, to the direction of the laws made for the purpose. 2. By taking the clause altogether, to make the representatives of the people the source of mercy, provided the consent of the senate was obtained. Either view of the subject satisfies the present enquiry; but I prefer the first, as most congenial to the spirit, and not inconsistent with the letter, of the constitution.

The treason law appears to have been framed upon this idea; and, in passing it, the legislature have, in my opinion,

1782. *November.*

Common-wealth *v.* Caton & al.

pursued, and not violated, the constitution. Indeed the house of delegates appear to have understood it so themselves, as they sent the resolution to the senate for their concurrence, which not having been obtained, the resolution is of no force, and the pardon falls to the ground.

Chancellor BLAIR and the rest of the judges, were of opinion, that the court had power to declare any resolution or act of the legislature, or of either branch of it, to be unconstitutional and void; and, that the resolution of the house of delegates, in this case, was inoperative, as the senate had not concurred in it. That this would be the consequence clearly, if the words, "or the law shall otherwise particularly direct," were read in a parenthesis; for then the power of pardoning by the house of delegates, would be expressly confined to cases of impeachment by that house; and, if read without the parenthesis, then the only difference would be, that the assent of the two houses would be necessary; for it would be absurd to suppose that it was intended, by the constitution, that the act of the whole legislature should be repealed by the resolution of one branch of it, against the consent of the other.

The certificate to the general court was as follows:

"The court proceeded, pursuant to an order of the court of Thursday last, to render their judgment on the adjourned question, from the general court, in the case of *John Caton, Joshua Hopkins* and *James Lamb;* whereupon it is ordered to be certified, to the said general court, as the opinion of this court, that the pardon, by resolution of the house of delegates, severally pleaded and produced in the said court, by the said *John Caton, Joshua Hopkins* and *James Lamb*, as by the record of their case appears, is invalid."

N. B. It is said, that this was the first case in the United States, where the question relative to the *nullity* of an unconstitutional law was ever discussed before a judicial tribunal: and the firmness of the judges (particularly of Mr. *Wythe*,) was highly honourable to them; and will always be applauded, as having, incidentally, fixed a precedent, whereon, a general practice, which the people of this country think essential to their rights and liberty, has been established.

1782. *November.*

Common-wealth *v.* Caton & al.

CASE OF THE LOYAL AND GREENBRIER COMPANIES.

1783 *May.*

The indian war in 1754, and the subsequent acts of the kingly government preventing the settlement of the lands lying within the boundaries claimed by the Loyal and Greenbrier companies were sufficient excuses for those companies, for not completing their surveys, and obtaining patents for the lands within the periods prescribed by the orders of council, under which they were claimed.

Waste lands before the revolution, were taken up, by order of council, in general cases: and by warrant from the governour for military services.

Form of the orders of council under which lands were taken up.

An entry in the council books, if followed by an order of council, gave priority of grant.

By the first section of the act of assembly, for adjusting and settling the titles of claimers to unpatented lands, passed at the May session 1779, it is provided, That surveys of waste lands upon the *western* waters before the first of January 1778, and upon the *eastern* waters before the end of that assembly, "upon any order of council,* or entry in the

*There were two modes of taking up waste and unappropriated lands at that time. One was by obtaining an order of council simply; the form of which, in the year 1721, was sometimes as follows, to wit, "On the petition of ———, leave is granted him to take up ——— acres of land lying in the county of ———." But this form seems to have afterwards changed to the following, "On the petition of ———, leave is granted him to take up ——— acres of vacant land lying in the county of ———; and four years allowed to survey, and pay rights, on return of the plan to the secretary's office." A copy of this order was carried to the auditor's office, who made an entry of it, and certified it on the copy of the order, which