considerations of policy cannot be allowed, judicially, to obstruct or defeat their exercise.

2. And if the general assembly is a court, its jurisdiction is clearly of a common-law description; in the nature of a writ of error, to revise and correct the decisions of inferior common-law courts.

*3. The act of congress provides, that the removal of a cause from a state court, in the specified cases, should only be "from a final judgment or decree in any suit, in the highest court of law or equity, of a state, in which a decision in the suit could be had." Now, Olney might, by petition, have obtained from the general assembly, a construction on the act of congress, which he pleaded in bar to the action brought against him. The name or title of the officer, who attests the process, cannot be material —whoever was the presiding magistrate, when the general assembly sat as a court,(a) might authenticate the citation, or it might be granted by a judge of the supreme court. Suppose, indeed, that the judgment were to be affirmed here, Olney might still petition the legislature, and obtain a reversal and new trial; unless it can be maintained, that the decision of this court will work a repeal of the law of Rhode Island. [*318

The cause was held under advisement, until the 8th of August, when the Chief Justice delivered the following decision on the point last argued:

By the Court.—We are clearly of opinion, that the superior court of Rhode Island, on whose judgment this writ of error is brought, is the highest court of law of that state, within the meaning of the 25th section of the judicial act. The general assembly might set aside, but they could not make, a decision.

The Chief Justice then delivered the opinion of the court on the first point: in consequence of which, the judgment of the superior court of Rhode Island was reversed, and the judgment of the inferior court affirmed.

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*The Phœbe Anne. [*319

Moodie *v.* The Ship Phœbe Anne.

Neutrality.

Under the treaty with France, a privateer has a right to make repairs in our ports. The mere replacement of her guns, is not an augmentation of her force.

Error from the Circuit Court for the district of South Carolina.

The Phœbe Anne, a British vessel, had been captured by a French privateer, and sent into Charleston. The British consul filed a libel, claiming restitution of the prize, upon a suggestion, that the privateer had been illegally outfitted, or had illegally augmented her force, within the United States. On the proofs, it appeared, that the privateer had originally entered the port of Charleston, armed and commissioned for war; that she had there

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(a) Iredell, Justice.—To show that, in the case of petitions, respecting the judicial proceedings of inferior courts, the general assembly does not act as a legislature, it may be observed, that both houses then sit in one room, as one body; but when engaged in making laws, the houses sit in separate rooms, as distinct bodies.

taken out her guns, masts and sails, which remained on shore, until the general repairs of the vessel were completed, when they were again put on board, with the same force, or thereabouts ; and that, on a subsequent cruise, the prize in question was taken. The decrees in the district and circuit courts were both in favor of the captors ; and on the return of the record into this court, *Reed*, having pointed out the additional repairs, argued, generally, on the impolicy and inconveniency of suffering privateers to equip in our ports.

Ellsworth, Chief Justice.—Suggestions of policy and convenience cannot be considered in the judicial determination of a question of right : the treaty with France, whatever that is, must have its effect. By the 19th article, it is declared, that French vessels, whether public and of war, or private and of merchants, may, on any urgent necessity, enter our ports, and be supplied with all things needful for repairs. In the present case, the privateer only underwent a repair ; and the mere replacement of her force cannot be a material augmentation ; even if an augmentation of force could be deemed (which we do not decide) a sufficient cause for restitution.

By the Court.—Let the decree of the circuit court be affirmed. (*a*)

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*320] *Grayson *v.* Virginia.

Process against a State.

Equity process against a state must be served sixty days before the return-day thereof ; after which, in default of appearance, the plaintiff may proceed *ex parte*.

Such process must be served on the chief executive magistrate, and the attorney-general of the state.

Bill in Equity. The service of the *subpœna* in this case, being proved, *Lewis* moved, at the last term, that a *distringas* might be awarded, in order to compel the state to enter an appearance ; arguing, from the analogy between a state and other bodies corporate, that this was the proper mode of proceeding. The Court, however, postponed a decision on the motion, in consequence of a doubt, whether the remedy to compel the appearance of a state, should be furnished by the court itself, or by the legislature ? And in the present term, *Lewis* argued, that the court was competent to furnish all the necessary means for effectuating its own jurisdiction.

On the 12th of August, the Chief Justice delivered the following opinion.

By the Court.—After a particular examination of the powers vested in this court, in causes of equity, as well as in causes of admiralty and maritime jurisdiction, we collect a general rule for the government of our proceedings ; with a discretionary authority, however, to deviate from that rule, where its application would be injurious or impracticable. The general rule prescribes to us an adoption of that practice, which is founded on the custom and usage of courts of admiralty and equity, constituted on similar principles ; but still, it is thought, that we are also authorized to make such

(*a*) See The Ship Den Onzekeren, *ante*, p. 285.