

Florida Vs. Georgia

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Appeal No. : 58 U.S. 478

Appellant : Florida

Respondent : Georgia

Judgement :

Florida v. Georgia - 58 U.S. 478 (1854)

U.S. Supreme Court Florida v. Georgia, 58 U.S. 17 How. 478 478 (1854)

Florida v. Georgia

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ORIGINAL

SYLLABUS

In cases in which this Court has original jurisdiction, the form of proceeding is not regulated by act of Congress, but by the rules and orders of the court.

These rules and orders are framed in analogy to the practice in the English Court of Chancery. But the court does not follow this practice, where it would embarrass

the case by unnecessary technicality or defeat the purposes of justice.

There is no mode of proceeding by which the United States can bring into review the decision of this Court upon a question of boundary between two states. Justice therefore requires that the United States, which represent the rights and interests of the other twenty-nine states, should have an opportunity of being heard before the boundary is established.

The Attorney General having filed an information, stating that the interests of the United States are involved in the establishment of the boundary line between Florida and Georgia, he has a right to appear on behalf of the United States and adduce proofs in support of the boundary claimed by them to be the true one, and to be heard at the argument.

The United States will not, by this proceeding, become a party in the technical sense of the word, and no judgment will be entered for or against them. But the evidence and arguments offered, in their behalf, will be considered by the court in deciding the matter in controversy.

Each party is at liberty to cause surveys and maps to be made. But the court does not deem it advisable to appoint persons for this purpose.

In 11 How. 293 [memorandum opinion -- omitted], it is reported that the State of Florida filed a bill in this Court, in the exercise of its original jurisdiction, against the State of Georgia to establish a boundary between them. The State of Georgia answered, and other proceedings were had, but the case was not yet at issue, nor was all the testimony taken upon which the parties proposed to rely.

At the present term, the Attorney General appeared in Court and filed the following information, moving at the same time for leave to intervene on behalf of the United States for the reasons stated in the information.

"Now on this 15th day of December, 1854, Caleb Cushing Attorney General of the United States, in his proper person comes here into the Court, and for the said United States gives the Court to understand and be informed that a certain bill of

complaint

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is pending in said Court, by or in behalf of the State of Florida, complainant, against the State of Georgia, defendant, wherein is in controversy a certain portion of the boundary line between said states, and of the lands contiguous thereto."

"That by Mariano D. Papy, Attorney General of the State of Florida, formal notice in the name and behalf of said state has been given to the United States that the matter of said bill is of interest and concern to the said United States."

"That by inspection of said bill of complaint, it appears that the State of Florida alleges that the portion of boundary line in question should run, commencing at the junction of the Flint and Chattahoochee Rivers, and thence in a straight line to a point at or near a monument commonly called Ellicott's Mound, at the assumed head of the River St. Mary's, which line has been surveyed by the surveyors of the United States, and is known as McNeil's line, or howsoever otherwise the same may be described or designated."

"That in said bill of complaint the State of Florida further alleges that the State of Georgia pretends that, commencing at the junction of the Flint and Chattahoochee Rivers, as aforesaid, the said line should run to a point called Lake Spalding, or a point called Lake Randolph."

"It further appears that the said points of Lake Spalding and Lake Randolph are situated about thirty miles to the south of said Ellicott's Mound, and the effect will be, if the pretense of the State of Georgia be sustained, to transfer to said State of Georgia a tract of land in the shape of a triangle, having a base of some thirty miles, and equal sides each of the length of about one hundred and fifty miles, comprehending upwards of one million two hundred thousand acres of land, which have been considered and treated heretofore as public domain of the United States, and surveyed as such, and much of which has accordingly been sold and patented by the government as of the Territory of East Florida acquired from Spain."

"And for the information of the Court herein, the Attorney General files, annexed to this motion:"

"1. A certified copy of the cautionary traverse line so surveyed in 1825, by said McNeil."

"2. A certified copy of the filed-notes of said traverse line so surveyed."

"3. A certified copy of the map of the cautionary true line, plotted from traverse line, by said McNeil."

"4. An official copy of diagram of Surveyor General of the United States for Florida, of surveys of public lands of United States in said state, to September 30, 1853."

"Whereupon, and in consideration of the interest and concern

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of the United States manifestly apparent in said bill of complaint, the said Attorney General of the United States prays the consideration of the Court here, and moves the Court that he be permitted to appear in said case, and be heard in behalf of the United States in such time and form as the Court shall order. "

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MR. CHIEF JUSTICE TANEY delivered the opinion of the Court.

The Court proceed to dispose of the motion made by the Attorney General for leave to be heard on behalf of the United States, in the suit between the State of Florida and the State of Georgia.

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It appears that the boundary line between these two states is in controversy, and a bill has been filed in this Court by the State of Florida to ascertain and establish it.

The Attorney General has filed an information, stating that the United States are interested in the settlement of this line; that the territory in dispute contains upwards of one million two hundred thousand acres of land, and was ceded to the United States by Spain as a part of Florida; and that the United States have caused the whole of it to be surveyed as public land, and sold a large portion of it, and issued patents to the purchasers. And upon these grounds he asks leave to offer proofs to establish the boundary claimed by the United States, and to be heard, in their behalf, on the argument.

The motion is resisted on the part of the states, and the question has been fully argued by counsel for the respective parties. And as it is in some degree a new question, and concerns rights and interests of so much importance, we have taken time to consider it.

If the motion was merely to be heard at the argument, there would, we presume, have been no opposition to it on the part of the states. For it is the familiar practice of the Court to hear the Attorney General in suits between individuals when he suggests that the public interests are involved in the decision. And he is heard not as counsel for one of the parties on the record, but on behalf of the United States and as representing their interests. This was done in several instances at the last term, where the United States had sold lands as a part of the public domain, which were claimed by individuals under grants alleged to have been made by France or Spain previous to the cession to this country.

In these cases, however, they were argued by the Attorney General upon the evidence produced by the respective parties. No new evidence was offered on behalf of the United States. And the objection now made is that he cannot be permitted to adduce evidence in the case unless the United States are parties on the record, and that they cannot, under the provisions of the Constitution, become parties in this Court, in the legal sense of the term, to a suit between two states.

We proceed to consider this objection.

The Constitution confers on this Court original jurisdiction in all cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be a party. And it is settled, by repeated decisions, that a question of boundary between states is within the jurisdiction thus conferred.

But the Constitution prescribes no particular mode of proceeding, nor is there any act of Congress upon the subject.

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And at a very early period of the government, a doubt arose whether the Court could exercise its original jurisdiction without a previous act of Congress regulating the process and mode of proceeding. But the Court, upon much consideration, held that although Congress had undoubtedly the right to prescribe the process and mode of proceeding in such cases, as fully as in any other Court, yet the omission to legislate on the subject could not deprive the Court of the jurisdiction conferred; that it was a duty imposed upon the Court; and in the absence of any legislation by Congress, the Court itself was authorized to prescribe its mode and form of proceeding, so as to accomplish the ends for which the jurisdiction was given.

There was no difficulty in exercising this power where individuals were parties, for the established forms and usages in Courts of common law and equity would naturally be adopted. But these precedents could not govern a case where a sovereign state was a party defendant. Nor could the proceedings of the English Chancery Court, in a controversy about boundaries, between proprietary governments in this country, where the territory was subject to the authority of the English government, and the person of the proprietary subject to the authority of its courts, be adopted as a guide where sovereign states were litigation a question of boundary in a court of the United States. They furnished analogies, but nothing more. And it became, therefore, the duty of the court to mould its proceedings for itself, in a manner that would best attain the ends of justice, and enable it to exercise conveniently the power conferred. And in doing this, it was, without doubt, one of its first objects to disengage them from all unnecessary technicalities and

niceties, and to conduct the proceedings in the simplest form in which the ends of justice could be attained.

It is upon this principle that the Court appears to have acted in forming its proceedings where a state was a party defendant. The subject came before them in [Grayson v. Virginia](#), 3 Dall. 320. And the Court there said that they adopted, as a general rule, the custom and usage of courts of admiralty and equity, with a discretionary authority, however, to deviate from that rule where its application would be injurious or impracticable. And they at the same time passed an order directing process against a state to be served on the governor or chief magistrate, and the Attorney General of the state. This was in 1796. And the principle upon which its process was then framed, as well as the mode of service then prescribed, has been followed ever since, with this exception, that in subsequent cases the chancery practice, and not the admiralty, is regarded as furnishing the best analogy. But the power and

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propriety of deviating from the ordinary chancery practice, when the purposes of justice require it, have been constantly recognized; and were distinctly asserted in the case of [Rhode Island v. Massachusetts](#), 14 Pet. 210, 247 [argument of counsel -- omitted], and again in the same case in [40 U. S. 15](#) Pet. 273, and was recognized in the case of [New Jersey v. New York](#), 5 Pet. 289.

We proceed to apply these principles to the case before us. It is manifest, if the facts stated in the suggestion of the Attorney General are supported by testimony, that the United States have a deep interest in the decision of this controversy. And if this case is decided adversely to their rights, they are without remedy, and there is no form of proceeding in which they could have that decision revised in this court or anywhere else. Justice, therefore, requires that they should be heard before their rights are concluded. And if this were a suit between individuals, in a court of equity, the ordinary practice of the court would require a person standing in the present position of the United States, to be made a party, and would not proceed to a final decree until he had an opportunity of being heard.

But it is said that they cannot, by the terms of the Constitution, be made parties in an original proceeding in this court between states; that if they could, the Attorney General has no right to make them defendants without an act of Congress to authorize it.

We do not, however, deem it necessary to examine or decide these questions. They presuppose that we are bound to follow the English chancery practice, and that the United States must be brought in as a party on the record, in the technical sense of the word, so that a judgment for or against them may be passed by the Court. But, as we have already said, the Court is not bound, in a case of this kind, to follow the rules and modes of proceeding in the English chancery, but will deviate from them where the purposes of justice require it, or the ends of justice can be more conveniently attained.

It is evident that this object can be more conveniently accomplished in the mode adopted by the Attorney General than by following the English practice in cases where the government have an interest in the issue of the suit. In a case like the one now before us, there is no necessity for a judgment against the United States. For when the boundary in question shall be ascertained and determined by the judgment of the Court in the present suit, there is no possible mode by which that decision can be reviewed or reexamined at the instance of the United States. They would therefore be as effectually concluded by the judgment as if they were parties

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on the record, and a judgment entered against them. The case, then, is this: here is a suit between two states in relation to the true position of the boundary line which divides them. But there are twenty-nine other states, who are also interested in the adjustment of this boundary, whose interests are represented by the United States. Justice certainly requires that they should be heard before their rights are concluded by the judgment of the Court. For their interests may be different from those of either of the litigating states. And it would hardly become this tribunal, entrusted with jurisdiction where sovereignties are concerned, and with the power

to prescribe its own mode of proceeding, to do injustice rather than depart from English precedents. A suit in a court of justice between such parties, and upon such a question, is without example in the jurisprudence of any other country. It is a new case, and requires new modes of proceeding. And if, as has been urged in argument, the United States cannot, under the Constitution, become a party to this suit, in the legal sense of that term, and the English mode of proceeding in analogous cases is therefore impracticable, it furnishes a conclusive argument for adopting the mode proposed. For otherwise there must be a failure of justice.

Indeed, unless the United States can be heard in some form or other in this suit, one of the great safeguards of the Union, provided in the Constitution, would in effect be annulled.

By the 10th section of the 1st Article of the Constitution, no state can enter into any agreement or compact with another state, without the consent of Congress. Now a question of boundary between states is, in its nature, a political question, to be settled by compact made by the political departments of the government. And if Florida and Georgia had, by negotiation and agreement, proceeded to adjust this boundary, any compact between them would have been null and void, without the assent of Congress. This provision is obviously intended to guard the rights and interests of the other states, and to prevent any compact or agreement between any two states, which might affect injuriously the interest of the others. And the right and the duty to protect these interests is vested in the general government.

But, under our government, a boundary between two states may become a judicial question, to be decided in this Court. And, when it assumes that form, the assent or dissent of the United States cannot influence the decision. The question is to be decided upon the evidence adduced to the Court, and that decision, when pronounced, is conclusive upon the United States, as well as upon the states that are parties to the suit.

Now as in a case of compact, it is, by the Constitution, made the duty of the United States to examine into the subject, and to determine whether or not the boundary proposed to be fixed by the agreement is consistent with the interests of the other states of the Union; it would seem to be equally their duty to watch over these interests when they are in litigation in this Court, and about to be finally decided. And, if such be their duty, it would seem to follow that there must be a corresponding right to adduce evidence and be heard, before the judgment is given. For this is the only mode in which they can guard the interests of the rest of the Union, when the boundary is to be adjusted by a suit in this Court. For, if it be otherwise, the parties to the suit may, by admissions of facts and by agreements admitting or rejecting testimony, place a case before the Court which would necessarily be decided according to their wishes, and the interest and rights of the rest of the Union excluded from the consideration of the Court. The states might thus, in the form of an action, accomplish what the Constitution prohibits them from doing directly by compact. Nor is this intervention of the United States derogatory to the dignity of the litigating states, or any impeachment of their good faith. It merely carries into effect a provision of the Constitution, which was adopted by the states for their general safety; and, moreover, maintains that universal principle of justice and equity, which gives to every party whose interest will be affected by the judgment the right to be heard.

Upon the whole, we think the Attorney General may intervene in the manner he has adopted, and may file in the case the testimony referred to in the information without making the United States a party, in the technical sense of the term; but he will have no right to interfere in the pleading, or evidence, or admissions of the states, or of either of them. And when the case is ready for argument, the Court will hear the Attorney General as well as the counsel for the respective states and, in deciding upon the true boundary line, will take into consideration all the evidence which may be offered by the United States or either of the states. But the Court does not regard the United States, in this mode of proceeding, as either plaintiff or defendant, and it is therefore not liable to a judgment against it, nor entitled to a judgment in its favor. We consider the Attorney General as the proper officer to represent the United States in this Court, and that the general

government, in bringing before us for consideration the rights and interest of the Union in the question to be decided, does nothing more than perform a duty imposed upon it by the Constitution. And as the mode in which that duty is to be performed

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here is not regulated by law, but must depend upon the rules and regulations prescribed by the Court, we shall not embarrass the proceedings by endeavoring to conform them strictly to English precedents and pleadings, and regard the mode in which the information on behalf of the United States has been presented to be the simplest and best manner of bringing their interest before the Court and of enabling it to do justice to all parties whose rights are involved in the decision.

MR. JUSTICE Mc LEAN, MR. JUSTICE DANIEL, MR. JUSTICE CURTIS, and MR. JUSTICE CAMPBELL, dissented.

MR. JUSTICE CURTIS, dissenting.

It is in accordance with natural justice, and with a principle of jurisprudence that no one should be affected by a judgment or decree without an opportunity to present to the Court, either by himself or his lawful representative, in some regular and legal course, his allegations and proofs and to be heard thereon, and therefore I should have assented to the application of the Attorney General in this case, and would willingly concur with a majority of the Court in the order it directs to be entered if I did not find it to be subject to objections too grave for me to disregard, and which careful reflection, even under the influence of the great respect I feel for the opinions of my brethren, has not enabled me to overcome.

I will state as briefly as I can what these objections are. In doing so, I shall first examine the nature and effect of the application of the Attorney General to see whether it is in the power of the Court to grant it as made, and I will then consider whether the order directed by the Court is subject to the same difficulties in part or in whole.

That application is, in substance, an *ex officio* information in which the Attorney General of the United States informs this Court of the pendency of a suit here by the State of Florida against the State of Georgia wherein there is in controversy a portion of the boundary line between those states; that it appears from an inspection of the bill of the State of Florida and of the answer of the State of Georgia that, if the pretensions of the State of Georgia shall be sustained by this Court, the boundary line in controversy will be so run as to include within the territorial limits of that state a tract of land of about one million two hundred thousand acres, which have been considered and treated heretofore as public domain of the United States, and surveyed as such, and much of which has been sold and granted by the United States as being part of the Territory of East Florida acquired from Spain.

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In support of this information, the Attorney General has filed certain documents and a map, and he prays that, in consideration of the interest and concern of the United States, he may be permitted to appear in the case and be heard in behalf of the United States in such time and form as the Court shall order.

The case to which this information relates now stands on the original docket of this Court upon a bill filed by the State of Florida and an answer by the State of Georgia. No replication had been put in, and of course no proofs taken.

It is quite apparent, therefore, since the case is not now in a condition to be brought to a hearing and since much time must necessarily elapse, considering the course of the Court and the nature of the controversy and the character of the parties, before it can be put into a state to be heard, that this application of the Attorney General is not designed merely to obtain the privilege of taking part in the hearing of the cause by making an argument at the bar upon the pleading and proofs as they may exist when the cause may be set for a hearing, if that time shall ever arrive. It seems to me not consistent with that respect which is due to the Attorney General to suppose that he has caused the States of Florida and

Georgia, by their counsel, to appear here, and has called on the Court to listen to and consider elaborate and learned arguments upon questions of constitutional law and general jurisprudence, merely to present the question whether -- in the contingency that this case should at some future day be brought to a hearing, and in the event that at that time the interest of the United States should remain as it is now alleged to be -- the Court would hear the law officer of the United States in support of its interests.

Courts of justice make orders and decrees upon actually existing states of fact, not upon what may possible occur at some period in the future. And this obvious dictate of ordinary prudence is rigidly obeyed by courts of equity when acting on subjects like that now before the Court.

In England, the sovereign has a great number and variety of interests and rights, which may be affected by decrees of courts of equity. As will be more fully stated hereafter, the Attorney General represents the Crown in respect of those rights, and no decree affecting them is made until he has had opportunity to become a party to the suit. But the question whether he is a necessary party is raised in the same way and at the same time as the question whether a private person is a necessary party. And I believe we should search in vain for an instance in which any Court had made an order in a cause before it was at issue,

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that, if it should come to a hearing, the Attorney General should be heard at the bar.

I have made these observations concerning the nature and objects of this application because the information does not specify or in any way indicate what particular order it is desired the Court should pass. If I felt at liberty to understand it simply as an application to be heard at the bar, by way of argument on the pleadings and proofs of the complainant and the defendant, I should think the proper answer would be that the Court would advise thereon when it was made reasonably certain that the cause would be heard. But I am not at liberty so to view

this information, not only for the reasons I have suggested, but because the Attorney General, with becoming frankness, has declared, both orally at the bar and in his printed brief, that what he desires passes far beyond this. He has thus made known to the Court that he seeks to intervene in the cause in behalf of the United States, and he has explained his understanding of the term "intervention" and of the effect of an order of the Court allowing it to be that he is to come into the cause

"not in subordination to the mode of conduction the complaint or defense adopted by one state or by the other, nor subject to the consequences of their acts, or of any possible misleading, insufficient pleading, omission to plead, or admission or omission of fact, by either or both, but free to cooperate with or oppose either or both and to bring forth all the points of the case according to his own judgment, whether as to the law or the facts, for *ex facto oritur jus*. "

Can this, or anything like this, be allowed consistently with the Constitution and laws of the United States?

In answering this inquiry, it is necessary to determine what would be the relation of the United States to this controversy if the Attorney General were thus admitted. In my opinion, they would thus become substantially and really, a party to the controversy. I say substantially and really a party for I quite agree with the majority of the Court in thinking that this question is not to be decided according to any strict technical rules, or even viewed solely by the light which they impart. As I consider it, the question is one of constitutional law, and though the Constitution was framed and intended to operate in connection with those systems of law and equity existing in our country at the time of its adoption, and many terms in it can be correctly understood only by resorting to the interpretation of those terms in those bodies of law, yet I concede that in examining this question we are to look to the substance and nature of the relation to the suit, and not merely to forms and names, and therefore I have inquired whether, if the Attorney General

be admitted on the record in accordance with the prayer of his information, the United States will be substantially and really a party to this suit? And in the first place I think there can be no substantial distinction in this matter between the United States and the Attorney General. If what is done is sufficient to make him a party, the United States is, in substance and in legal effect, a party. The rights and interests which he brings before the Court are the rights and interests of the United States. He presents those rights and interests not as a trustee in whom they are vested; not as specially empowered by law to sue in his own name for the recovery of something belonging to the government; but he acts simply as an attorney and counselor at law.

The Postmaster General is empowered by law to bring suits in his own name in the Courts of the United States upon contracts made with him as the head of a department, and the United States, though exclusively interested, is not deemed a party to the controversy. [*Osborn v. Bank of the United States*](#), 9 Wheat. 855. So an executor or administrator, though he may have no beneficial interest in the cause of action, is deemed the party to the suit for the purpose of jurisdiction. [8 U. S. 4](#) Cranch 308; [21 U. S. 8](#) Wheat. 668; [25 U. S. 12](#) Pet. 171. But in these and similar cases, the officer or executor has, by law, the legal right of action vested in him.

On the other hand, it has been repeatedly decided that where a law required a bond to be taken in the name of a public officer, but for the benefit of individuals, as in case of sheriffs' bonds, the person for whose use the suit was brought, and not the obligee in whose name it was brought, was the party to the suit within the meaning of the Constitution. *Brown v. Strode*, 5 Cranch 303; [*McNutt v. Bland*](#), 2 How. 9; [*Huff v. Hutchinson*](#), 14 How. 586.

These decisions go much beyond what I maintain in this case. The rights and interests which the Attorney General desires to assert in this case are in no manner and for no purpose vested in him, any more than the rights and interests of the private parties litigating in Court are vested in the attorneys and counsel whose names are on the docket or who argue the causes at the bar.

He is not what was termed in the cases of *Browne v. Strode* and the other cases just referred to a conduit through whom the remedy is afforded on a contract made in his name. He is simply a law officer of the government, empowered to act for the United States in this Court. In such a case it does not seem to me to admit of a doubt that whatever is done by him, though in his name, will be done by the United States.

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The case of [*Georgia v. Brailsford*](#), 2 Dall. 402, was a bill by "His Excellency, Edward Telfair, Esquire, Governor and Commander-in-Chief in and over the State of Georgia, in behalf of the said state." The jurisdiction was sustained as of a suit by the state, and an injunction granted and a trial had at the bar of this Court. 4 Dall. 1. Yet to give the Court jurisdiction, a state must be a party on the record. [*Osborne v. Bank*](#), 9 Wheat. 738. In this case, the Court must have considered the state was made a party on the record by a proceeding in its behalf in the name of its chief executive magistrate. So it was declared by the Court in the case of [*Governor of Georgia v. Madrazo*](#), 1 Pet. 122, and in this last-mentioned case it was decided, on great consideration and after examining all the previous decisions, that a claim filed by the Governor of Georgia, in his own name as governor but in behalf of that state, made the state itself a party to the record within the meaning of the Constitution and laws of the United States.

In [*Benton v. Woolsey*](#), 12 Pet. 27, the District Attorney of the United States for the Northern District of New York had filed an information in his own name to foreclose a mortgage belonging to the United States. The case came to this Court by appeal. In delivering the opinion of the Court, MR. CHIEF JUSTICE TANEY said:

"Some doubts were at first entertained by the Court whether this proceeding could be sustained in the form adopted by the district attorney. It is a bill of information and complaint in the name of the district attorney in behalf of the United States. But upon carefully examining the bill, it appears to be, in substance, a proceeding by the United States, although in form it is in the name of the officer. And we find

that this form of proceeding in such cases has been for a long time used without objection in the Courts of the United States held in the State of New York, and was doubtless borrowed from the form used in analogous cases in the Courts of the state where the state itself was the plaintiff in the suit. No objection has been made to it either in the Court below or in this Court on the part of the defendants, and we think the United States may be considered as the real party, although in form it is the information and complaint of the district attorney. But although we have come to the conclusion that the proceeding is valid and ought to be sustained by the Court, it is certainly desirable that the practice should be uniform in the Courts of the United States and that in all suits where the United States are the real plaintiffs, the proceedings should be in their name unless it is otherwise ordered by act of Congress. "

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Now it is plain that the only ground upon which this proceeding could be sustained as within the jurisdiction of a Court of the United States was that an information by a law officer of the government in his own name as such officer, but asserting rights of the United States, is a controversy to which the United States is a party within the meaning of those words in the Constitution, for it was only because the United States was a party to the controversy that the jurisdiction attached. It would have been in conformity with what this decision declares to be the correct practice if this information and all proceedings which may ensue thereon were to be in the name of the United States; but it is also in conformity with it to say that though in the name of the Attorney General, for the United States, the United States will thereby be made a party to this controversy, provided what is done is sufficient to constitute anyone a party to it. It remains to inquire whether the rights and privileges claimed by the Attorney General in behalf of the United States, if conceded, will make them a party to this controversy.

It seems to me somewhat difficult to reason about so plain a proposition. The Attorney General has already filed an information alleging the interest of the United States and showing what it is and how it arises. If an order is made thereon allowing him to appear and support those allegations, the United States will

appear on the record asserting their interest in this controversy. It will so appear that it may enjoy the rights of a party to be heard by proper allegations and proofs, and by arguments at the bar. The process of the Court must be accorded to it to obtain its proofs in those modes and under those sanctions appropriated exclusively to the taking of evidence to be used in judicial controversies. It is to be at liberty to oppose the pretensions of the other parties and to assert and maintain its own in a regular course of judicature, and it, in common with the others, is to be bound by the decree, which is to be the product of its allegations, proofs, and arguments as well as of those of the two States of Florida and Georgia.

If all this does not make the United States a party to this controversy, it would be difficult for me to show that it has any parties.

Under our system of jurisprudence, what constitutes a person a party to the record? Is it not sufficient if it appears by the record that he had a direct interest in the subject matter of the suit; that he placed before the Court in his own name, and not in the name of another, by some appropriate allegations, his claim or defense; that he introduced legal evidence in support of that claim or defense, which was heard by the Court; that he

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was heard by his counsel; that his rights and what he presented to the Court in support of them were taken into consideration by the Court in making a decision, and that these rights were intended to be bound, and in point of law are bound, by the decree? All this must appear from this record if the United States be allowed to do what has been prayed for.

The Attorney General, in his very learned and able argument, has referred the Court not only to the practice of some of the Courts of England, but to the Roman law and to the modern civil law of the continent of Europe concerning intervention. This practice differs in details in the different countries. But so far as I have been able to examine, a third person who comes in after the institution of a suit to assert a right of his own involved in the controversy is considered and expressly

denominated a party. The definition given in the Code of Practice of Louisiana, which is substantially borrowed from the French Code of Procedure, is:

"An intervention, or interpleader, is a demand by which a third person requires to be permitted to become a party in a suit between other persons, either by joining the plaintiff in claiming the same thing or something connected with it or by uniting with the defendant in resisting the claims of the plaintiff, or it may be lawful for him, where his interest requires it, to oppose both."

See *also* Merlin, vol. 16, and Recueil, voc. Intervention, Dalloy Dic. s. vocc.

The English law is equally clear. When the Attorney General is brought into a suit between third persons as the representative of the Crown and to protect its rights, though possessed of some privileges which do not belong to private persons, he is not only called a party, but he is treated as one. He is attended with a copy of the bill, and if he does not appear it is considered as a *nihil dicit*, and if he does appear and fails to answer, the bill is taken *pro confesso* as against the Crown. 1 Dan.Ch.Pr. 169, 170, 531, 548.

Indeed, I am not aware of any case, either in equity or admiralty or at law under particular statutes, in which a third person who intervenes is not considered and called a party. The ground upon which a decree *in rem* is held to bind all persons is that everyone having an interest has a right to make himself a party to the cause, and that the seizure or arrest of the thing gives notice to all concerned of the pendency of the proceedings, and thus enables them to become parties. In [Rose v. Himely](#), 4 Cranch 277, Chief Justice Marshall states this familiar rule:

"Those on board a vessel are supposed to represent all who are interested in it, and if placed in a situation which enables them to take notice of any proceedings against a vessel and cargo

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and enables them to assert the rights of the interested, the cause is considered as properly heard, and all concerned are parties to it."

And so in equity. Those who come in, even before the master, are, as Lord Redesdale says, Mit.Pl. 178, 179, considered parties to the cause in the subsequent proceedings.

With great respect for my brethren, I cannot agree that the reasons advanced by them why the United States will not be a party to the record are sufficient. Those reasons I understand to be that no decree will be made against the United States and that the Attorney General will not be allowed to interfere in any way with the pleadings or proofs of either the State of Florida or Georgia. As to the first of these reasons, it is certainly true that no decree will be made against the United States in form or by name, but if I understand the opinion of the majority of my brethren, they consider as I do, that substance, and not form, is to be looked to in this case, and that the only inducement for allowing the United States to be heard is that, from the nature of the controversy, all the world must necessarily be precluded by the decree from disputing the correctness of the line of boundary fixed by it. Whether the United States shall or shall not be named in the decree would seem, therefore, to be formal, rather than substantial, since their rights and duties will be the same whether named or not. In either case, the decree will conclusively operate thereon.

And as to the other reason, that the Attorney General is not to be allowed to interfere with the pleadings or evidence of the States of Florida or Georgia, I must say, with deference for the better opinion of my brethren, that it seems to me to be a restriction which, while it still leaves the United States a party to the suit, deprives them of some of the rights of a party, and to that extent fails to carry out the very principle which requires them to be heard at all.

The right to have this case stated by Florida in the bill so as to present it in its entire substance is a substantial and important right of the United States. If the case is defectively or untruly stated there, the decree must be affected thereby, for Georgia has the right to insist that the decree shall conform to the bill. An explicit and full answer to the bill is also material to the United States, that they may know what is to be relied on, and what proofs and arguments are necessary to be adduced. The power to cross-examine witnesses and to except to proofs when

offered has been deemed essential to the administration of justice. I would respectfully ask upon what principle known to our jurisprudence is the United States to be deprived of these rights if it is admitted at all to contest the claims of Georgia?

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If both Florida and Georgia may cross-examine the witnesses of the United States and except to their proofs, what intrinsic propriety or judicial reason can there be why the latter may not cross-examine the witnesses and except to the proofs of the former?

With submission to a majority of my brethren, I confess it seems to me that to deprive party of some rights which, under all systems of law known to us, are deemed essential, while other rights are allowed to him which can be conceded only to a party to the controversy, proves the embarrassment which was felt in carrying out the idea of making him a party, but does not overcome the difficulty or even avoid it. It appears to me to declare, in effect, justice requires that you should be admitted as a party on this record, but in order to make some distinction between yourself and other parties, you shall not enjoy all the rights of a party, and the particular rights which you are not to enjoy are the power of excepting to the pleadings and proofs of the other parties.

This is not satisfactory to my mind. Whether I consider only the substantial relations of the United States to the controversy or the analogous provisions of positive or customary law in our own and other countries, I cannot avoid the conclusion that if they are admitted upon this record to assert their rights -- to show what they are, and how they are involved in this controversy; to maintain them, in the regular course of judicature, by allegation, proof, and argument, against the State of Georgia; to have the process of the Court to enable them to do so; to profit by the decree if favorable, to lose by it if adverse -- they are a party to this controversy within the meaning of the Constitution of the United States. And this raises the question, which in my opinion is a very grave one, whether the Constitution permits the United States to become a party to a controversy between

two states in this Court?

The judicial power of the United States extends, among other things, to controversies to which the United States shall be a party -- to controversies between two or more states -- between a state and citizens of other states or of foreign states, where the state commences the suit, and between a state and foreign states.

In distributing this jurisdiction, the Constitution has provided that in all cases in which a state shall be a party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction. One of the other cases before mentioned is a controversy to which the United States is a party.

I am not aware that any doubt has ever been entertained by

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anyone, that controversies to which the United States is a party come under the appellate jurisdiction of this Court in this distribution of jurisdiction by the Constitution. Such is the clear meaning of the words of the Constitution. So it was construed by the Congress in the Judiciary Act of 1789, which, by the 11th section, conferred on the circuit courts jurisdiction of cases in which the United States are plaintiffs, and so it has been administered to this day.

There was a case of the *United States v. Todd*, commenced in this Court in 1794, which is not reported, but it is stated from the record by MR. CHIEF JUSTICE TANEY in a note to the case of the [*United States v. Ferreira*](#), 13 How. 52. Of this case the note says:

"The *Case of Yale Todd* was docketed by consent in the Supreme Court, and the Court appears to have been of opinion that the act of Congress of 1793, directing the Secretary of War and the Attorney General to take their opinion upon the question, gave them original jurisdiction. In the early days of the government, the right of Congress to give original jurisdiction to the Supreme Court in cases not

enumerated in the Constitution was maintained by many jurists, and seems to have been entertained by the learned judges who decided *Todd's Case*. But discussion and more mature examination have settled the question otherwise, and it has long been the established doctrine, and we believe now assented to by all who have examined the subject, that the original jurisdiction of this Court is confined to the cases specified in the Constitution, and that Congress cannot enlarge it. In all other cases, its power must be appellate."

The decision of this Court in [*Marbury v. Madison*](#), 1 Cranch 137, settled this construction of the Constitution, and, as stated in this note, no one who has examined the subject now questions it.

We have, then, two rules given by the Constitution. The one, that if a state be a party, this Court shall have original jurisdiction; the other, that if the United States be a party, this Court shall have only appellate jurisdiction. And we are as clearly prohibited from taking original jurisdiction of a controversy to which the United States is a party as we are commanded to take it if a state be a party. Yet when the United States shall have been admitted on this record to become a party to this controversy, both a state and the United States will be parties to the same controversy. And if each of these clauses of the Constitution is to have its literal effect, the one would require and the other prohibit us from taking jurisdiction.

It is not to be admitted that there is any real conflict between these clauses of the Constitution, and our plain duty is so to construe them that each may have its just and full effect. This is

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attended with no real difficulty. When, after enumerating the several distinct classes of cases and controversies to which the judicial power of the United States shall extend, the Constitution proceeds to distribute that power between the supreme and inferior Courts, it must be understood as referring throughout to the classes of cases before enumerated as distinct from each other.

And when it says "in all cases in which a state shall be a party, the Supreme Court shall have original jurisdiction," it means in all the cases before enumerated in which a state shall be a party. Indeed, it says so, in express terms, when it speaks of the other cases where appellate jurisdiction is given.

So that this original jurisdiction, which depends solely on the character of the parties, is confined to the cases in which are those enumerated parties, and those only.

It is true this course of reasoning leads necessarily to the conclusion that the United States cannot be a party to a judicial controversy with a state in any Court.

But this practical result is far from weakening my confidence in the correctness of the reasoning by which it has been arrived at. The Constitution of the United States substituted a government acting on individuals in place of a confederation which legislated for the states in their collective and sovereign capacities. The continued existence of the states under a republican form of government is made essential to the existence of the national government. And the fourth section of the Fourth Article of the Constitution pledges the power of the nation to guarantee to every state a republican form of government, to protect each against invasion, and, on application of its legislature or executive, against domestic violence. This conservative duty of the whole towards each of its parts forms no exception to the general proposition that the Constitution confers on the United States powers to govern the people, and not the states.

There is therefore nothing in the general plan of the Constitution, or in the nature and objects of the powers it confers, or in the relations between the general and state governments to lead us to expect to find there a grant of power over judicial controversies between the government of the Union and the several states. On the contrary, the agency of courts to compel the states to obey laws of the Union or to concede to the United States its rights or claims would naturally be deemed both superfluous and impolitic -- superfluous because the states can act only through individuals, who are directly responsible, both civilly and criminally, to the laws of the United States, which are supreme, and in the Courts of the United States,

which have jurisdiction to enforce all laws of the United States, and

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impolitic because calculated to provoke irritation and resistance and to excite jealousy and alarm.

It must be remembered also that a state can be sued only by its own consent. This consent has been given in the Constitution, but only in cases having such parties as are there described. The particular character of the parties to the controversy, into which a state has consented to enter, constitutes not only an essential element in that consent, but it is the sole description of what is agreed to. The State of Georgia has consented to be sued by one or more states or by foreign states, and by no other person or body politic. The State of Georgia has consented to stand joined as a defendant with one or more states, or with a foreign state, and with citizens or subjects of a state other than the one bringing the suit, but with no other person or body politic. Certainly, there is no power existing in this government to enlarge that consent so as to embrace in it anything to which it does not, by its terms, extend.

I cannot agree that because the State of Georgia consented to be sued by the State of Florida, Georgia thereby consented to the introduction into the controversy of any party whose rights were so involved in the controversy that the Court is bound, upon principles of natural justice, to have that party before the Court in order to make a decree.

In the first place, if it be conceded that a third party, not capable of suing a state or being sued by one, is a necessary party to a controversy between two states, and that the Court cannot make a decree without the presence of that party, it would seem to me to be the legitimate inference, that in such a case the states had not consented to be sued. Having consented to be sued, in controversies having certain described parties, it would seem that a controversy which could not be carried on by them was not one to which the consent applies.

So far as I am aware, the other grants of judicial power by the Constitution, which depend on the character of the parties, have been so construed. Has it ever been supposed that into a suit between citizens of different states a third party not competent to sue or be sued could come or be brought because he was a necessary party without whose presence a decree could not be made? Has the doctrine ever been advanced that when the Constitution gave jurisdiction over suits between citizens of different states, it thereby by implication authorized that jurisdiction to be extended so as to embrace every person whose rights were so involved in the controversy that the principles of natural justice required him to be heard?

Take the case of a suit between a citizen of Florida and a citizen of Georgia, in the course of which it appears that an

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inhabitant of this district who is not competent to sue or capable of being sued has such an interest in the controversy that the Court can make no decree between the parties before them without affecting that interest; has it ever been supposed that there was any implied power granted by the Constitution and the 11th section of the Judiciary Act of 1789 to make him a party, or has the conclusion been that in all such cases the Court cannot act at all? The latter, I apprehend, is the settled conclusion. The forty-seventh rule for the equity practice of the circuit courts provides that if persons who might otherwise be deemed necessary or proper parties to the suit cannot be made so because their joinder would oust the jurisdiction of the Court as to the parties before the court, the court may, in its discretion, proceed in the cause without making such persons parties, and in such cases the decree shall be without prejudice to the rights of the absent parties. This certainly assumes that there is no implied power, arising out of the necessity of the case, to make them parties or to bring them into the cause so as to hear and bind them without making them parties. The Court is to distribute all the justice it can between the parties over whom it has jurisdiction; but if it can do nothing without the presence of a necessary party, the remedy is not to bring him in, or allow him to come in, but to refuse to act, and leave the parties to terminate their dispute by

other means. This is declared by this Court in [Hagan v. Walker](#), 14 How. 36, and the earlier cases lead to the same conclusion. [Russell v. Clarke's Ex'rs](#), 7 Cranch 98; [Cameron v. Roberts](#), 3 Wheat. 591; [Wormley v. Wormley](#), 8 Wheat. 451; [Carneal v. Banks](#), 10 Wheat. 188; [West v. Randall](#), 2 Mason 195, 196; [Shields v. Barrow](#), ante, [58 U. S. 130](#) , of the present term.

It is true there is a class of cases in which this Court has decided that when the jurisdiction of the circuit court, by reason of the character of the parties, has once attached, it is not divested by one of the parties' losing the character which entitled him to sue or subjected him to be sued in the circuit court, or by his death and administration's being granted to a citizen who would not have been competent to sue, and further that when the judgment operated *in rem*, as in a suit in ejectment, no change of the property *pendente lite* could prevent the circuit court from exercising its jurisdiction over its own execution. The cases of [Morgan's Heirs v. Morgan](#), 2 Wheat. 297; [Mollan v. Torrance](#), 9 Wheat. 537, are of the first class. It was there held that a change of domicile did not defeat the jurisdiction which had once attached. In the case of [Clarke v. Mathewson](#), 12 Pet. 164, it was held that a bill of revivor was but a continuation of the original suit and that the jurisdiction having once attached was complete, and continued to enable the court to

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adjudicate on that subject matter. In [Dun v. Clarke](#), 8 Pet. 1, it was held that the circuit court had jurisdiction of a bill to enjoin the levy of an execution on a judgment in ejectment, though the land had been devised so that all parties were citizens of the same state.

This was upon the ground that the devisee of the land was to be deemed the mere representative of the plaintiff in the judgment, and that as to him, the bill was not an original suit, but a proceeding on the equity side of the court to enable the court to control its own execution, and according to the case of [Harris v. Hardeman](#), 14 How. 334, the same thing might have been done upon motion on the law side of the court. But the court refused to take jurisdiction over the other parties to the bill

who had an interest in the land, or to decide the merits of the controversy, and confined itself to staying the execution of the judgment until the merits could be investigated in a suit in a state court.

It will be seen, I think, that none of these cases rests at all on the ground that there is jurisdiction by implication over a third party whose rights are such as to make his presence in the cause necessary. But if they did, they would fall far short of proving that such an implication can be made in this case. The Constitution is merely silent concerning the introduction of a third person, not competent to sue or be sued in the courts of the Union, into a suit in the circuit courts; but it is not silent concerning controversies to which the United States is a party. It declares in effect that over such controversies this Court shall not have original jurisdiction, for it makes its jurisdiction over such controversies appellate, and this, as has been long settled, excludes all original jurisdiction over such controversies, and even prevents Congress from conferring it. [Marbury v. Madison](#), 1 Cranch 137. To say that there is an implication that when the United States is a necessary party to an original suit in this Court, they can become a party here would be, in my opinion, not only an extension of the original jurisdiction of this Court to a case not described by the Constitution as within it, but to a party as to whom we are expressly forbidden to take such jurisdiction.

Nor do I find in the nature and circumstances of this case any such necessity for making the United States a party as would lay a foundation for the presumption that it must be competent for the Court and consistent with the Constitution and laws to allow it to be done. This is not a broad question whether, in the exercise of the original jurisdiction of this Court, we are obliged to exclude all third parties though they may have the most important rights and interests necessarily involved in the suit. I apprehend no such question arises here.

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I do not doubt that in an original suit in equity here, between two states, or between a state and a foreign state, or between a state as complainant and individuals, or in a suit affecting ambassadors other public ministers or consuls,

any necessary party may be brought in who is competent to be sued by the plaintiff or to sue the defendant in that suit in this Court. Thus a state may sue here other states, foreign states, all citizens of other states and of foreign states, and this I believe includes every possible party, except its own citizens and inhabitants of this district and of the territories and the United States. Setting aside residents of this district and of the territories who cannot be deemed of great moment in this particular matter, and citizens of the state bringing the suit, whose rights the Constitution evidently considers need no protection from this government, the practical effect of the doctrine I maintain will be found to be confined to the United States. It cannot be made a party to such a suit, and, in my judgment, it is in accordance with the whole plan of the government, as well as with the particular provisions of the Constitution concerning the judicial power, that it should not be able to interpose and assume an adverse position to a state in a judicial controversy in this Court. Besides, I do not find in this case any real necessity to make the United States a party, according to the principles of equity law. A Court of equity generally requires all persons who have an interest in a suit to be made parties. But it is a familiar rule that when it is impracticable to bring before the Court all interested, it is enough to make such parties as have a common interest with those who are absent. In such a case, the parties who are present represent the rights of those who are absent, and the court proceeds to make its decree, binding the rights of the absent parties, with the same confidence that justice is done as if they were before the court. Story's Eq.Pl. 97, 112.

Now what is this case? The interest of Florida and that of the United States are identical. That interest is to have the boundary line fixed as far to the northward as the proofs will allow. It is true that what Florida seeks is the protection of its rightful jurisdiction as a sovereign state, and what the United States desires is the protection of its title as a landholder, and as the grantor of lands now held by its grantees. But both the political jurisdiction of Florida, and the title of the United States to land acquired from Spain, being coextensive with the Territory of Florida, these two parties have a common interest in the subject matter of this suit, and Florida is, in the contemplation of a Court of equity, competent to represent the interest of the United States as an owner of land.

This would certainly be true in the case of individual parties, and in my opinion the same rule applies with still greater force to these parties. Florida is a sovereign state, whose suit must be conducted according to the will of its legislature. There is no room for any suspicion of any unworthy motives or conduct in its management. It is a high duty of that state, which it owes to itself and which will doubtless be discharged to vindicate its jurisdictional rights and make good its claims to all the territory which comes within its true limits. Though the question is merely where a line should be run, that line carries with it the sovereignty and territorial jurisdiction of states.

On the other hand, the United States is a landholder, whose title may be affected by running the line in one place rather than another. And so will the titles of hundreds of other landholders in this territory, whose interest is precisely the same as that of the United States in kind, though not in amount. To say that it is necessary for the purposes of justice that the United States, as the proprietor of lands, should be admitted into this suit to take care lest the State of Florida should omit something by way of pleading or evidence seems to me to be yielding to an imaginary necessity only.

It is not alleged that the United States has any interest in this controversy except as an owner or grantor of land. Unquestionably there are political considerations affecting the federal relations of the states and connected with the extent of their territory in reference to which the United States has a direct and important interest. This is not only obvious in itself, but is recognized by the Constitution in various ways, and, amongst others, by the prohibition of the states to make any compact without the consent of the United States. But the object of this suit is not to change the limits or territory of states, but to ascertain their true and actual boundary, and in this question the United States has no interest except that justice should be done -- an interest which is not of a character to warrant the government in interposing in this case to assist in securing it, any more than in any other case pending in this Court. It is suggested that the counsel for the two states may make

agreements as to evidence and other matters respecting the suit, and that the United States ought to be a party in order to supervise such; but it seems to me that if this were a sufficient reason for making the United States a party in this case, it would apply to all cases between two states, for in all cases such arrangements are as likely to be made as in this one. But if such agreements of counsel respecting the mode of conducting a suit between two states could be deemed compacts between those states within the restraining clause of the 10th

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section of the First Article of the Constitution, Congress, and not the Attorney General or this Court, must sanction them, and there does not seem to be any satisfactory reason why that officer should be connected with the subject. Any agreement fixing the line of boundary made by the two states and not sanctioned by Congress would certainly not be executed by this Court, which is to decree on the existing rights of the parties and not upon new rights created by a compact which is not valid without the assent of Congress.

But if the objection to the jurisdiction could be overcome, I should still be of opinion that the Attorney General has no authority to make the United States a party to a suit in this Court. That officer possesses no powers derived from usage or implied from the name of his office. His powers are only coextensive with his duty, and that is defined by law to be "to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned." 1 Stat. 93. It belongs to Congress alone to decide in what cases the United States may be made a party in the courts and to designate the officers by whom they may be made a party. This power Congress has exercised. It has conferred upon the district attorneys power to prosecute all delinquents for crimes and offenses cognizable under the authority of the United States and all civil actions in which the United States shall be concerned. 1 Stat. 92. By the Act of May 29, 1830, 5, 4 Stat. 415, the Solicitor of the Treasury is empowered to instruct the district attorneys in all matters and proceedings appertaining to suits in which the United States is a party, or interested, and by the 10th section of the same act, the Attorney General is to advise with and direct the Solicitor. But no authority is conferred by any law upon

any officer to make the United States a party to any suit except as a plaintiff or prosecutor. If the United States be interested in a suit against an individual, and he thinks fit to allow the law officer of the United States to prosecute or defend in his name, I know of no objection to it, and it is very often done. It may be suggested that as the line of boundary will be fixed by the final decree in this case, and as the rights of the United States will thereby be concluded, it can do them no injury, but may be beneficial to them, to be a party to this cause. If this be so and the Court has jurisdiction, it may afford sufficient reason why Congress, in its discretion, should authorize an appearance by the Attorney General in behalf of the United States; but it does not enlarge the power of that officer or enable him to do what, in my opinion, no law has conferred on him power to do -- to make the United States a party to an original suit in this Court.

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I am authorized to say that MR. JUSTICE McLean concurs in this opinion.

MR. JUSTICE CAMPBELL dissenting.

I dissent from the opinion of the Court. The Attorney General suggests to the Court that the State of Florida has filed here an original bill against the State of Georgia for a settlement of the boundary between the states. He represents that the line claimed by Florida is that which the United States has recognized in the surveys, sales, and other operations of the Land Office, and that the line of Georgia diminishes the domain of the United States in Florida twelve hundred thousand acres. "Whereupon, and in consideration of the interest and concern of the United States," he moves for leave "to appear in said cause, and be heard in behalf of the United States, in such time and form as the Court will order." The condition of the cause in relation to which the motion is made is that a bill and answer have been filed, but no issue exists, and none of the ulterior stages in the course of the cause attained, nor has there been any motion to the Court requiring an examination of the record, and so the motion, as understood from its terms, is certainly premature. But the words, "to appear in said cause and be heard in behalf of the

United States" very indifferently explain the significance of the motion. The application is that the Attorney General may "intervene,"

"not as a technical party; not as joining with the one or other party; not in subordination to the mode of conducting the complaint or defense adopted by the one state or the other, nor subject to the consequences of their acts, or of any possible misleading, insufficient pleading, omission to plead, or admission or omission of fact, by either party, or both, but to cooperate with or to oppose both or either and to bring forth all the points of the case according to his own judgment, whether as to the law or fact."

Though the pleadings show that the interests of the State of Florida and of the United States unite to maintain the same line, the Attorney General declines to adopt her suit lest the condition of the United States might become "precarious," "depending on the discretion of Florida." Nor will the Attorney General file a bill for the United States, nor agree that Florida may make them defendants to hers, for "that the Court is not empowered by the Constitution to entertain an original suit" of the kind.

Nor is the motive for this intervention merely that the United States have a fiscal interest, for the Attorney General suggests that the Constitution may be violated by agreements and compacts of states, "entered of record," thereby altering the limits

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of the states and the structure of the Union, "to the direct prejudice of the rights, interests, and laws of the United States." These suggestions of possible injustice arising from collusive compacts "entered of record" may be used in any judicial controversy between states, and in this case no evidence of such appears of record, and if such suggestions are heeded, the Attorney General must be constantly an applicant for leave to appear, "not as a technical party," but to employ some oversight, superintendence, or censorship in suits between states of the Union in this Court, and surely such a claim requires new modes of proceeding, and that now proposed is as peculiar as the claim. The United States

appears, with the assertion of its exemption from suit in this Court, that the original jurisdiction of the Court does not embrace them as a party. Thus declaring independence of process, pleading, and decree in an original suit in the Court, it asks to assist or to assail, at its pleasure, suitors legally before it, and to mould the decree in their case by allegations, evidence, and arguments, introduced without, and perhaps against, its will.

The principle of common law and chancery procedure is that suits are commenced, prosecuted, and defended by parties to the record in their own names and the intervention of third persons, not parties, is unknown to the system, and we may affirm confidently in a case like this, where the party is above and beyond the jurisdiction of the Court, such a case is without a precedent. 2 Chitty's Pr. 343. The case of *Pentland v. Quorrington*, 3 My. & C. 249, was that of a trustee with a full assignment suing in the name of the assignor under his power of attorney and obtaining a decree with notice to the defendant. The nominal plaintiff agreed to an order for delay, and the trustee petitioned for a discharge of the order, and that he might conduct the suit. Lord Cottenham said:

"It is a perfectly new equity. The only suit in Court is a suit between the defendant and the party assignor with whom the contract was made. The plaintiff assignor is a party to the arrangement for effectuating which the present order has been made. Your case is against him, that whereas he has authorized you to carry on this suit in his name, he has entered into the arrangement in question without your concurrence. If I were to make such an order, I should be giving you the right of carrying on this suit against the defendant; I should be displacing the plaintiff on the record."

He asked: "Is there any instance of such an interference on the part of the Court as you now ask?" The eminent solicitor answered: "I admit that I have never seen a case like the present." So in *Drever v. Manderley*, 4 M. & C. 94, an order allowing a third person to control a suit where the subject

belonged to him by assignment, but to which he was not a party by any proceeding, was pronounced by the same chancellor "perfectly irregular." The Court did not object to the right to the subject of the suit, but to the mode of enforcing the right by the attempt to control the suit. It required the assignee to exhibit his right by bill, according to the practice of the Court, in his own name.

Chief Justice Marshall, in describing the controversies to which the judicial power of the United States extends, says:

"The words are of well understood and limited signification. It is a controversy between parties which had taken a shape for judicial decision. . . . To come within the description of a case in law and equity, a question must assume a legal form for forensic litigation and judicial decision. There must be parties come into Court who can be reached by its process and bound by its power, whose rights admit of ultimate decision by a tribunal to which they are bound to submit."

5 Wheat.App. 16, 17. The supposed cases of exception cited by the Attorney General only display the pervading extent of this principle. The instances quoted are rules under the interpleading act of Wm. IV; landlords defending for tenants in ejection, vouchees in warranty in real actions, bills of interpleader, and suits by representative parties, for or against themselves and others. The cases referred to in courts of common law arise where a person having the primary right or obligation is called as a party to the suit to defend that right or to fulfill the obligation, and Lord Coke speaks of the common law instance of a vouchee as "seeming strange" and depending upon "ancient, continual, and constant allowance," 2 Ins. 241; and so, in interpleading suits, parties having an adverse interest are called in by process, as parties, to disengage a neutral who may have the subject of controversy and desires to relinquish it to the owner when he shall be ascertained, and in representative cases the Court acts upon the parties to the record and determines the case made by them. In this case, the United States admits no representation on its behalf; nor will it undertake the suit of either, nor admit the jurisdiction of the Court to treat it as a suitor or party, but contests the authority of the Court, is ready to contest or strengthen the positions of either party, and thus it seeks, by an anomalous Austrian intervention, to overlook and

control the proceedings of the litigants to their own aggrandizement. I find no precedent in the direct and straightforward course of the common law, nor in the statutes altering it, for such a conduct. I will briefly examine the precedents to which we have been cited, in the codes of procedure of those tribunals which apply the jurisprudence of imperial or

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papal Rome. The French code permits the interposition of third persons in existing suits. An intervenor may guard a present or future interest, or one certain, contingent, conditional, or collateral, whether pecuniary or personal or held as a representative. But the inquiry is how and under what circumstances? And the answer is by propounding his pretensions to the court as a suitor, inviting contest, alleging proofs, recognizing the jurisdiction of the court, and submitting to its decree. 4 Bioche Dic. de Pro. 590; La.Code, Prac. 324.

La Canada, describing the Spanish system, says there are necessarily two parties to every suit (*actor* and *reo*); and when a third litigant comes, he is called by that number (*tercero*); and because he can oppose either of the parties or both, the word "opposer" is added (*tercero opositor*), and his act is called third opposition. If he comes to aid another party in the same right, he accepts the suit as he finds it, and acts conjointly; if his rights are independent, adverse, or paramount, his suit is treated as an original suit and is conducted as ordinary suits.

The third opposer is technically a party to the cause, and really subject to the decree. La Canada, Juicos Civiles 393.

Nor do the admiralty or ecclesiastical codes afford any sanction to the motion. Their jurisdiction being largely *in rem*, they allow persons who have a present and certain claim to the *res*, to propound their interest, if the court has jurisdiction, and by the act, the persons become parties to the suit, liable for costs and entitled to appeal. The various codes, then, differ in the time and manner of calling parties before the court. The conditions of a suit at the common law in general are settled at its institution, and new and independent parties are not

introduced in the subsequent stages. The courts of chancery are more liberal in reference to the time of making parties and in the extent of their amendments. But in both courts, the plaintiff is the *dominus litis*, and third persons may not come in unless he amends the proceedings, or his bill is fitted for it as being a representative bill. But in the civil, admiralty, and ecclesiastical courts, the power of third persons to propound their rights in the subject of dispute is not so dependent upon the will of the prior parties. But all the codes of procedure unite in this -- that persons must come in according to a regular course of procedure, accepting the authority of the Court, citing adverse parties to defend, and yielding to whatever decree it may pronounce. The more than imperial claim, in this instance, is for all the faculties of a suitor, without a submission to the obligations and restrictions of one. But it is supposed that precedents in the English chancery support a pretension of the Attorney General to intervene according to his motion. An important class

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of the rights of the Crown are represented there by the Queen's Attorney General, but how? He is introduced upon the record as a "technical" party to the suit, and the Crown is bound by the decree. When the right is adverse to the plaintiff, the Attorney General is made a party by prayer in the bill and the service of a copy. If he fails to appear, it is a *nil dicit*, and if he appears and will not answer, a decree *pro confesso* is taken. Danl.Ch.Pr. 175, 501, 548; Dick. 729; 1 Y. & J. 509.

And Courts there exercise over the Attorney General the same authority which they exercise over every other suitor, and he would not be permitted more than any other suitor to prosecute any proceeding merely vexatious, or which had no legal object. *The Queen v. Prosser*, 11 Beav. 306.

The cases cited, of *Penn v. Lord Baltimore*, *Hovenden v. Annesly*, *Attorney General v. Galway*, and the analogous cases of *Dolder v. Bank of England* and *Burgess v. Wheat*, Cas.temp.Hard. 332; 2 Sch. & Lef. 617; 1 Moll. 95; 10 Ves. 352; 1 Eden.Ch. 177, are instances of the application of the rule that the Court will require the Crown to be made a party to the record, under the name of the

Attorney General, and that he comes as an actual and obedient party, and not in any illusory and indeterminate form, so that if the claim of the Attorney General to represent the United States in Courts to the extent claimed is tenable, the manner of the intervention here is inadmissible.

But I do not admit that the Attorney General has any corporate or juridical character, or that he can be introduced upon the record, in his official name, as an actor or respondent in a suit. His duties are strictly professional duties, and his powers those of an attorney at law. Whatever he may do for the United States a special attorney might be retained to do; nor can the United States appear in his name nor by his agency in cases where they may not be a party.

I have considered this motion upon the concessions of the argument, but the principle lying at the foundation of the case should not form the basis of a judgment merely on the strength of such concessions, and hence I proceed to its examination.

"The judicial power of the United States extends to all cases in law and equity arising under the Constitution and laws of the United States and treaties made under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to controversies to which the United States shall be a party; to controversies between two or more states; and between a state or the citizens thereof and foreign states, citizens, and subjects. "

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"In all cases affecting ambassadors &c.;, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction only."

It was not in the design of the Constitution to alter or even to modify the existing relations of any of the sovereign parties named in this article to legal jurisdictions by enlarging their liability to suit, but its purpose was to erect tribunals to which they might resort for the determination of the suits which they might legally commence or might voluntarily submit or were subject to according to their

preexisting conditions. Thus, no suit can be commenced against the United States, foreign states or ambassadors, and public ministers; nor are they brought within the jurisdiction of the courts of the United States to any degree beyond that to which they were liable without this constitutional clause. The construction which allows the exemption of these parties as sovereigns or their representatives to operate sanctions also the title of the states to the same right, for they are mentioned in the same clause, and the jurisdiction conceded to this Court in reference to them is expressed in similar or identical language.

I am aware that at an early day in the existence of this Court, a contrary opinion was expressed by a majority upon a motion for an interlocutory order in a suit against a state, and I propose to examine the principle established in the controversy of which that opinion is a part.

While the Constitution was under discussion, General Hamilton (Federalist, 81) said "That it is in the nature of sovereignty not to be amenable to the suit of an individual without its consent," and contended

"That to ascribe to the federal courts, by mere implication and in destruction of a preexisting right of the state governments, a power which would involve such consequences would be altogether forced and unwarrantable."

So Mr. Madison, replying to the vehement and prophetic denunciations of Patrick Henry in a careful exposition of the judiciary clause, calmed the Virginia convention by assuring it that

"It is not in the power of individuals to call any state into court. The only operation the clause can have is that if a state should wish to bring a suit against a citizen, it must be brought in the federal court."

And the late Chief Justice Marshall supported him, saying:

"With respect to disputes between a state and citizens of another state, its jurisdiction has been decried with unusual vehemence. I hope no gentleman will think a state will be called at the bar of a federal court. It is not rational to suppose

that the sovereign power shall be dragged before a court. The intent is to enable

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states to recover claims of individuals residing in other states. I contend this construction is warranted by the words."

Virginia Deb. 387, 405, 406.

When these assurances from the most accredited friends of the new government were disappointed by the institution of suits in this Court against several of the states by individual plaintiffs shortly after the adoption of the Constitution, a strong sentiment of wrong was felt, and corresponding indignation expressed. This indignation was not occasioned by any apprehension of consequences to the states as debtors, but by the fact that they supposed their rights to be violated. The history will bear no other interpretation. In *Chisolm v. Georgia*, that state instructed counsel to present to the Court a written remonstrance and protestation against the exercise of jurisdiction, but not to argue the cause. The Attorney General opened the case of the plaintiff by saying:

"He did not want the remonstrance of Georgia to satisfy him that the motion for judgment was unpopular. Before that remonstrance was read, he had learned from the acts of another state that she too condemned it."

The Court awarded a writ of inquiry upon the default of the state sustaining the jurisdiction upon arguments of the utility, justice, and safety of the delegation of the power, and of the diminution and abasement wrought upon the states by the Constitution. Mr. Justice Wilson states the case "as one of uncommon magnitude." He says:

"One of the parties is a state, certainly respectable, claiming to be sovereign. The question to be determined is whether this state, so respectable and whose claim soars so high, is amenable to the jurisdiction of the Supreme Court of the United States? This question, important in itself, will depend on others more important still, and may perhaps be ultimately resolved into one no less radical than this: do

the people of the United States form a nation?"

It is not difficult to perceive the profound misconception of the relations of the states to the Union which dictated his judgment. The following year, the Legislature of the Commonwealth of Virginia adopted a resolution which contains a reply to the question:

"Resolved unanimously that a state cannot, under the Constitution of the United States, be made a defendant at the suit of any individual or individuals, and that the decision of the Supreme Federal Court that a state may be placed in that situation is incompatible with and dangerous to the sovereignty and independence of the individual states, as the same tends to a general consolidation of these confederated republics,"

and instructed their Senators and Representatives

"to unite their utmost and earliest exertions to obtain such amendments as will remove or explain any clause which can be construed to imply

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or justify a decision that a state is compellable to answer in any suit by any individual or individuals in any court of the United States."

One month after, January, 1794, the Senate was moved by Mr. Strong, of Massachusetts, to adopt the Eleventh Amendment to the Constitution, declaring that the Constitution should not be construed to authorize such suits. Various attempts were made in both branches of Congress to limit the operation of the amendment, but without effect. It was accepted without the alteration of a letter, by a vote of 23 to 2 in the Senate and 81 to 9 in the House of Representatives, and received the assent of the state legislatures. Georgia ratified the amendment as "an explanatory article," her legislature

"concurring therewith, deeming the same to be the only just and true construction of the judicial power by which the rights and dignity of the several states can be effectively secured."

Thus the supreme constitutional jurisdiction of the United States, the concurrent action of Congress, and the state legislatures, expressing a consent nearly unanimous, corrected the opinion of the Supreme Court and intercepted its final judgments in these cases by declaring that the Constitution should not be so construed as to allow them.

The Reporter of the Court closes the volume which contains the case of *Chisolm* by saying

"The writ of inquiry was not sued out and executed, so that this cause and all other suits against states were swept at once from the records of the Court by the amendment of the Constitution."

The course of argument which excluded the jurisdiction of such cases applies with equal force to suits by foreign states against the states of the Union. And the considerations which forbid suits against the states by individuals, indicated with such clearness in the *Federalist*, form the basis of the luminous and masterly judgments in the English chancery in the case of *Duke of Brunswick v. King of Hanover*, 6 Beav. 1; 2 H.L. 1, where the delicacy, difficulty, and danger of the jurisdiction and its want of practical value are fully set forth, and the conclusion announced

"That it is a general rule, in accordance with the laws of nations, that a sovereign prince resident in the dominions of another is exempt from the jurisdiction of the Courts there."

It is clear the Constitution did not abrogate any law of nations, and the only question is whether the states consented to suits without any reciprocal right, or whether the existence of such a power in foreign states could possibly assist any objects of the confederacy. On the contrary, would not such a promiscuous grant jeopard its tranquility and peace? The answer of Mr. Madison to the Virginia convention is positive and direct. "I do not

conceive," he says,

"that any controversy can ever be decided in these Courts, between an American and foreign state, without the consent of parties. If they consent, provision is here made. The disputes ought to be tried by the national tribunal. This is consonant with the law of nations."

Virginia Deb. 391. To this consent it may be that Congress would be a necessary party.

The nature of the jurisdiction in regard to the states having been considered, the inquiry can now be made, can the United States be a party to a suit between two or more states? The Constitution does not mention such a case. There were before the federal convention propositions to extend the judicial powers to questions "which involve the national peace and harmony," "to controversies between the United States and an individual state," and in the modified form, "to examine into and decide upon the claims of the United States and an individual state to territory." None was incorporated into the Constitution, and the last was peremptorily rejected. The jurisdiction of this Court over cases to which the United States and the states are respectively parties is materially different -- the one original, the other appellate only. There was no encouragement nor serious countenance to the proposition to vest this Court with jurisdiction of such cases. This Court is organized and its members appointed by one of the parties. Their influence extends with the jurisdiction of this Court, their means of reputation with its powers, their habitual connection with the federal legislation naturally inspires a sentiment in favor of the federal authority. These operative causes of bias were known, and apprehensive as the states were of consolidation and the overbearing influence of the central government, we can well understand why only the modified proposal as to jurisdiction was pressed to a vote. I repeat that the enumeration of the parties in this article of the Constitution did not enlarge the liabilities of the states to suits, but it only provided tribunals where suits might be brought, to which they were already subject, or might desire to commence. Nor does the clause authorizing suits between two or more states afford any contradiction to this conclusion.

The Articles of Confederation, by which they were then combined, allowed Congress, as the occasion might arise, to appoint special tribunals

"to which all disputes and differences now subsisting or that might hereafter arise between two or more states concerning boundary, jurisdiction, or any other cause whatever,"

should be submitted.

Similar provisions for special and occasional tribunals in matters of jurisdiction and boundary formed a part of the plan of the Constitution till near the close of the convention, when

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they were stricken out and the general jurisdiction over those as well as other controversies delegated to this Court. My conclusion after an examination of the clause is that it is only in controversies between the states that one of their number can be impleaded in this Court without its explicit consent, and that this jurisdiction is special as to the controversy and the parties, embracing none except those between the states of the Union; that the Court has no original jurisdiction of the United States, and none of a controversy between them and an individual state, and consequently that they have no title to appear as a party to the record nor in any undefined and uncertain relation to it.

And now the question arises whether the United States can or ought to be concluded as to its property without a privilege to appear and be heard, by a judgment of the Court, upon a question of boundary submitted by two or more of the states for its adjudication?

Without assigning any effect to the judgment that may be rendered, or anticipating whether the rights of the United States may be reserved, I will assume that the United States will be estopped by the judgment, and that no reservation of its proprietary rights can be made, and consider whether under such circumstances there is injustice. The government of Florida involves in this suit her highest claims

-- those of sovereignty and jurisdiction -- and fulfills its chief political obligations in its prosecution. If individual claims are affected by the decree in such a suit, it is because they are so incorporated in the rights of their sovereign as to have no separate or independent existence. She is the representative of all the proprietary rights and interests of her people in their contest with another sovereign. The United States, in resigning its sovereignty over the Territory of Florida to the people and by recognizing its government, relinquished its authority over this controversy and consented that its proprietary claims to the waste and unappropriated lands should abide the issue to which the state, in her wisdom and fidelity, should attain. This sovereign control of Florida was modified upon her accession to the Union. After this, if the controversy was settled by negotiation and compact, the consent of Congress was necessary to its binding operation, as in other cases of compact. If it was settled contradictorily, then this tribunal was appointed to make the determination.

Nor do I perceive that the executive department has any title to disturb the parties or the Court with the expression of anxieties or apprehensions that this Court will be lured to perform what Congress alone may do, or that these constitutional conditions

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will not be honorably fulfilled. The existence of this federal government, in its whole extent, is a testimonial to the magnanimous and disinterested polity of the states of the Union; nor is the concession which submits to a tribunal of justice the peaceful and rational adjustment of the controversies between sovereign states the least weighty of the proofs of those dispositions. It seems to me that it is the duty of this Court to come to the exercise of the jurisdiction the states have conferred in the same spirit -- to exercise it according to the letter of their submission -- to exclude from it suspicion, jealousies, interventions from any authority, but to meet the parties to the controversy with confidence.

Dissenting from every part of the order, I have filed the reasons for the dissent.

ORDER

Ordered that the Attorney General have leave to adduce evidence, either written or parol, and to examine witnesses and file their depositions in order to establish the boundary claimed by the United States.

After the motion of the Attorney General for leave to intervene in this suit had been decided, Mr. Westcott and Mr. Johnson on behalf of the State of Florida, moved for leave to take out commissions to examine witnesses in the case, and for sundry orders to expedite the case and prepare it for trial.

Among the orders moved for was the following:

"That the consent of the State of Florida being hereby given thereto, the Attorney General of the United States may, in behalf of the United States, use the name of said complainant whenever he may deem it advisable that the United States should sue out any commission to take any testimony or procure any proofs in said cause, he giving notice thereof to the solicitors or counsel for said parties as aforesaid."

This part of the motion was opposed by the counsel for the State of Georgia, and in behalf of that state a motion was made to appoint a commissioner and surveyor to survey the premises in dispute and take testimony and report to the Court, the motion stating particularly how the duty was to be performed. This motion was opposed by the counsel for the State of Florida.

MR. CHIEF JUSTICE TANEY delivered the opinion of the Court.

The Court have considered the above motions.

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The motion to authorize the Attorney General of the United States to take testimony and to conduct the proceedings on behalf of Florida with the assent of the state is refused. Each state must conduct its proceedings for itself. Whatever

the Attorney General does in the case must be for the United States, and in the name of the United States, and with reference to its interest or duty in this controversy.

The motion on behalf of the State of Georgia to appoint one or more persons to make the necessary surveys and to report their opinion to the Court is also overruled. Each party is at liberty to cause surveys to be made and maps prepared and filed by such person as the state may select or, if they can agree, they may jointly appoint one. And these surveys and maps and the proofs applicable to them will be examined and considered by the Court at the hearing, with the other testimony. But the Court does not deem it advisable to appoint one or more persons to make these surveys and examinations as officers of the Court, and thinks the case will be better brought before it by leaving each state to act for itself.

The Court therefore overrules the motions and, for the purpose of preparing the case for hearing, makes the following order:

Final Order

On consideration of the several motions filed yesterday by the complainant's counsel and of the arguments of counsel thereupon had, as well in support of as against the same, it is ordered by the Court that the said motions be and they are hereby overruled. And it is further now here ordered by the Court that the said parties in said cause be allowed until the first Monday of December, 1855, to obtain, take, and file the testimony and proofs by said parties respectively to be adduced and given in evidence on the hearing of said cause, and that to enable said parties respectively so to do, commissions in the usual form be issued by the clerk to examine witnesses upon application of either party, accompanied by interrogatories, a copy whereof has been served upon the adverse party or its solicitor or counsel twenty days previous to such application in order that cross-interrogatories may be filed within said twenty days by such adverse party, and that the commissioner or commissioners in each instance, if not agreed upon by the counsel of the respective parties, be named by the Chief Justice or one of the Associate Justices of this Court, and that forthwith, on the return of any

commission executed, the clerk do open and file the same and cause the same to be printed for the use of said parties.

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And also that any exceptions to testimony may be taken at the final hearing, and if exceptions be then taken to the competency of testimony which the opposite party can remove by further proof, the Court will reserve the decision and give time to the party to produce it.

And also that said cause be set for final hearing on the bill, answer, replication, exhibits, testimony, and proofs, so adduced, filed, and admitted, on the second Monday of January, 1856, unless cause be then shown to the Court for the continuance thereof.

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