remedy at law, he is to be at liberty to dismiss his bill, without costs, and without prejudice.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Washington, and was argued by counsel: On consideration whereof, it is the opinion of this court, that the circuit court erred in decreeing the defendant in that court to receive a conveyance for the tract of land in the proceedings mentioned, called Howard, and to pay therefor the purchase-money stipulated in the contract, dated the 10th of September 1822, and that so much of the said decree ought to be reversed; and that the cause be remanded to that court, with instructions to reform the said decree, so far as to direct the defendant to pay the penalty of $1000, with interest thereon from the time the money due from the government, and enjoined by order of that court, was directed to be placed out at interest, and to direct the title papers filed in the cause by the complainant to be re-delivered to him. But if the complainant shall prefer to pursue his remedy at law, he is to be at liberty to dismiss his bill, without costs, and without prejudice. Whereupon, it is ordered, adjudged and decreed by this court, that the circuit court erred, in decreeing the defendant in that court to receive a conveyance for the tract of land in the proceedings mentioned, called Howard, and to pay therefor the purchase-money stipulated in the contract, dated the 10th of September 1822: and that so much of the said decree be and the same is hereby reversed, and that this cause be and the same is hereby remanded to the said circuit court, with instructions to
*283] reform the said *decree, so far as to direct the defendant to pay the penalty of $1000, with interest thereon from the time the money due from the government, and enjoined by order of that court, was directed to be placed out at interest, and to direct the title papers filed in the case by the complainant to be re-delivered to him. But if the complainant shall prefer to pursue his remedy at law, he is to be at liberty to dismiss his bill, without costs, and without prejudice.

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*284] *The State of New Jersey, Complainant, *v.* The People of the State of New York.

Actions against states.

Congress has passed no act for the special purpose of prescribing the mode of proceeding in suits instituted against a state, or in any suit in which the supreme court is to exercise the original jurisdiction conferred by the constitution.

It has been settled, on great deliberation, that this court may exercise its original jurisdiction in suits against a state, under the authority conferred by the constitution, and existing acts of congress; the rule respecting the process, the persons on whom it is to be served, and the time of service, is fixed; the course of the court, after due service of process, has also been prescribed.

In a suit in this court instituted by a state against another state of the Union, the service of the process of the court on the governor and attorney-general of the state, sixty days before the return-day of the process, it is sufficient service.

At a very early period in our judicial history, suits were instituted in this court against states, and the questions concerning its jurisdiction and mode of proceeding were necessarily considered.

After due service of the *subpœna*, the state which is complainant, has a right to proceed *ex parte*; and if, after the service of an order of the court for the hearing of the case, there shall not be an appearance, the court will proceed to a final hearing.

New Jersey v. New York.

No final decree or judgment having been given in this court against a state, the question of proceeding to a final decree is not conclusively settled in this case, until the cause shall come on to be heard in chief.

The cases of the State of Georgia *v.* Brailsford; Oswald *v.* State of New York; Chisholm's Executors *v.* State of Georgia; State of New York *v.* State of Connecticut; Grayson *v.* Commonwealth of Virginia, cited, as to the jurisdiction and modes of proceeding in suits in which a state is a party.

Wirt, for the complainant, stated, that the *subpœna* had been regularly served, upwards of two months, and there was no appearance on the part of the state of New York.

The 17th section of the judiciary act of 1789, authorizes the court to make and establish all necessary rules for the conducting the business of the courts of the United States; this court has such a power, without the aid of that provision of the law. The seventh rule of this court, which is applicable to this matter, was made at August term 1791. "The Chief Justice, in answer to the motion of the attorney-general, informs him and the bar, that this court consider the practice of the court of king's bench and of chancery, in England, as affording outlines for the practice of this court; and that they will, from *time to time, make such alterations therein as circumstances may render necessary." (1 Pet. xxiii.) In 1796, [*285 the tenth rule was adopted: "Ordered, that process of *subpœna* issuing out of this court, in any suit in equity, shall be served on the defendant sixty days before the return-day of the said process; and further, that if the defendant, on such service of the *subpœna*, should not appear at the return-day contained therein, the complainant shall be at liberty to proceed *ex parte*." (Ibid. xxiv.)

Construing these two rules together, they bring us, in the case before the court, to that part of the English practice where the party may proceed to a hearing. There is no necessity for those proceedings here, which are resorted to in England to compel an appearance; nor would the practice in England be proper in the case before the court. The object of the bill is, to quiet a title; it is a bill of peace. Here, the rule considers the party, when served with process, in the same situation as if he had appeared.

The question is, what is to be done, when all the process to compel an appearance is exhausted? what is the next step? It is to take the bill *pro confesso;* but in England, formely, by a standing rule in chancery, before this can be done, the party must have appeared. Afterwards, to prevent the process of the court being eluded, the statute of 25 Geo. II. was enacted, by which it was provided, that if no appearance was entered by one who had absconded, the court would make an order for an appearance, and if no appearance was entered, the bill should be taken *pro confesso*. This statute regulated the practice in the courts of chancery of England in 1791, when the seventh rule of this court was adopted. But this statute applied only to the case of a party absconding, and it was only to force an appearance. In the present case, as has been observed, we stand as if all the proceedings for such a purpose had been exhausted.

Different practices prevail in relation to such a case, in the several states of the Union. In New Jersey, the practice is to file the proofs in the cause, and proceed to a hearing. This is not the course which is pursued in Virginia. As to the practice in England: 2 P. Wms. 556; Moseley 386; Harr. *Chan. Pract. by Newland 156; 1 Grant's Chan. Pract. [*286

96. Something is now to be done in this case: and it is for the court to determine, what that may be. If the court desire it, it is fully competent to them to make any new rule relative to the future proceedings in the case. In the court of chancery in England, the party could take a decree, *pro confesso*, and consider it as final. But this is not the wish of the complainant. It is desired, that the proceedings should be carried on with the utmost respect to the other party; and the wish of the state of New Jersey is to have an examination of the case, and a final decree, after such an examination.

It is, therefore, proposed, that the court direct a rule to be entered that the bill be taken *pro confesso*, unless the party against whom it is filed appear and answer before the rule-day in August next; and if they do not, that the cause be set down for a final hearing, at the next term of this court, on such proofs as the complainants may exhibit.

BALDWIN, Justice, suggested, that it might be proper to argue certain questions arising in this case, in open court: such as, what was the proper duty of the court in the case? what was the practice in England? and whether this court had power to proceed, in suits between states, without an act of congress having directed the mode of proceeding? he did not propose this as a matter personal to himself; but as a member of the court.

Wirt said, that the jurisdiction which was to be exercised was given by the constitution, and the 17th section of the act of congress authorized the court to establish such rules as to the manner in which the power should be executed. There are cases in which the court have taken this jurisdiction. *Chisholm* v. *State of Georgia*, 2 Dall. 419; *Grayson* v. *State of Virginia*, 3 Ibid. 320.

When the *subpœna* was asked for, at last term of this court (3 Pet. 461), the case of *Chisholm* v. *State of Georgia* was then particularly referred to; *287] and it was considered, that *although the amendment to the constitution has taken away the jurisdiction of this court, in suits brought by individuals against a state, it has left its jurisdiction, in suits between states, in the situation in which it stood originally. The court, in awarding the process of *subpœna*, had reference to these cases.

If an elaborate argument of the questions which the case presents is desired, time is asked to prepare for it; and sufficient time to give notice to the attorney-general of the state of New Jersey to attend and assist in the argument.

MARSHALL, Ch. J., delivered the opinion of the court.—This is a bill filed by the state of New Jersey against the state of New York, for the purpose of ascertaining and settling the boundary between the two states.

The constitution of the United States declares, that "the judicial power shall extend to controversies between two or more states." It also declares, that "in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction." Congress has passed no act for the special purpose of prescribing the mode of proceeding in suits instituted against a state, or in any suit in which the supreme court is to exercise the original jurisdiction conferred by the constitution. The act to establish the judicial

courts of the United States, § 13, enacts, "that the supreme court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also, between a state and citizens of other states or aliens; in which latter case, it shall have original, but not exclusive jurisdiction." It also enacts, § 14, "that all the before-mentioned courts of the United States shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." By the 17th section, it is enacted, "that all the said courts of the United States shall have power "to make and establish all necessary rules for the ordinary conducting business in the *said courts, provided such rules are not repugnant to the laws of the United States." "An act [*288 to regulate processes in the courts of the United States" was passed at the same session with the judiciary act, and was depending before congress at the same time. It enacts, "all writs and processes issuing from the supreme or a circuit court shall bear teste," &c. This act was rendered perpetual in 1792. The first section of the act of 1792 repeats the provision respecting writs and processes, issuing from the supreme or a circuit court. The second continues the form of writs, &c., and the forms and modes of proceeding in suits at common law, prescribed in the original acts, and in those of equity, and in those of admiralty and maritime jurisdiction, according to the principles, rules and usages which belong to courts of equity and to courts of admiralty, respectively, as contradistinguished from courts of common law; except so far as may have been provided for by the act to establish the judicial courts of the United States: subject, however, to such alterations and additions as the said courts, respectively, shall, in their discretion, deem expedient, or to such regulations as the supreme court of the United States shall think proper, from time to time, by rule, to prescribe to any circuit or district court concerning the same.

At a very early period in our judicial history, suits were instituted in this court against states; and the questions concerning its jurisdiction and mode of proceeding were necessarily considered. So early as August 1792, an injunction was awarded, at the prayer of the state of Georgia, to stay a sum of money recovered by Brailsford, a British subject, which was claimed by Georgia, under her acts of confiscation. This was an exercise of the original jurisdiction of the court, and no doubt of its propriety was ever expressed. In February 1793, the case of *Oswald* v. *State of New York* came on. This was a suit at common law. The state not appearing on the return of the process, proclamation was made, and the following order entered by the court: "Unless the state appear by the first day of the next term, or show cause to the contrary, judgment will be entered by default against the said state." *At the same term, the case of *Chisholm's Executors* v. *State* [*289 *of Georgia* came on, and was argued for the plaintiffs, by the then attorney-general, Mr. Randolph. The judges delivered their opinions *seriatim*; and those opinions bear ample testimony to the profound consideration they had bestowed on every question arising in the case. Mr. Chief Justice Jay, Mr. Justice Cushing, Mr. Justice Wilson, and Mr. Justice Blair, decided in favor of the jurisdiction of the court; and that the process served on the governor and attorney-general of the state was

sufficient. Mr. Justice IREDELL thought an act of congress necessary to enable the court to exercise its jurisdiction. After directing the declaration to be filed, and copies of it to be served on the governor and attorney-general of the state of Georgia, the court ordered, "that unless the said state shall either in due form appear, or show cause to the contrary in this court, by the 1st day of the next term, judgment by default shall be entered against the said state." In February term 1794, judgment was rendered for the plaintiff, and a writ of inquiry was awarded, but the 11th amendment to the constitution prevented its execution.

Grayson v. *State of Virginia*, 3 Dall. 320, was a bill in equity. The *subpœna* having been returned executed, the plaintiff moved for a *distringas*, to compel the appearance of the the state. The court postponed its decision on the motion, in consequence of a doubt, whether the remedy to compel the appearance of the state should be furnished by the court itself, or by the legislature. At a subsequent term, the court, "after a particular examination of its power," determined, that though "the general rule prescribed the adoption of that practice which is founded on the custom and usage of courts of admiralty and equity," "still it was thought, that we are also authorized to make such deviations as are necessary to adapt the process and rules of the court to the peculiar circumstances of this country, subject to the interposition, alteration and control of the legislature. We have, therefore, agreed to make the following general orders: "1. Ordered, that when process at common law or in equity shall issue against a state, the same shall be served upon the governor or chief executive magistrate, and the attorney-general of such state. *2. Ordered, that the process of *subpœna* issuing out of this court, in any suit in equity, shall be served on the defendant, sixty days before the return-day of the said process; and further, that if the defendant, on such service of the *subpœna*, shall not appear at the return-day contained therein, the complainant shall be at liberty to proceed *ex parte*." 3 Dall. 320.

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In *Huger* v. *State of South Carolina*, the service of the *subpœna* having been proved, the court determined, that the complainant was at liberty to proceed *ex parte*. He accordingly moved for and obtained commissions to take the examination of witnesses in several of the states. 3 Dall. 371. *Fowler* v. *Lindsey*, and *Fowler* v. *Miller*, 3 Dall. 411, were ejectments depending in the circuit court for the district of Connecticut, for lands over which both New York and Connecticut claimed jurisdiction. A rule to show cause why these suits should not be removed into the supreme court by *certiorari*, was discharged, because a state was neither nominally nor substantially a party. No doubt was entertained of the propriety of exercising original jurisdiction, had a state been a party on the record. In consequence of the rejection of this motion for a *certiorari*, the state of New York, in August term 1799, filed a bill against the state of Connecticut (4 Dall. 1), which contained an historical account of the title of New York to the soil and jurisdiction of the tract of land in dispute; set forth an agreement of the 28th of November 1783, between the two states, on the subject; and prayed a discovery, relief and injunction to stay the proceedings in the ejectments depending in the circuit court of Connecticut. The injunction was, on argument, refused, because the state of New York was not a party to the ejectments, nor interested in their decision.

It has, then, been settled by our predecessors, on great deliberation, that this court may exercise its original jurisdiction in suits against a state, under the authority conferred by the constitution and existing acts of congress. The rule respecting the process, the persons on whom it is to be served, and the time of service, are fixed. The course of the court on the failure *of the state to appear, after the due service of process, has been also prescribed. [*291

In this case, the *subpœna* has been served, as is required by the rule. The complainant, according to the practice of the court, and according to the general order made in the case of *Grayson* v. *Commonwealth of Virginia*, has a right to proceed *ex parte;* and the court will make an order to that effect, that the cause may be prepared for a final hearing. If, upon being served with a copy of such order, the defendant shall still fail to appear, or to show cause to the contrary, this court will, as soon thereafter as the cause shall be prepared by the complainant, proceed to a final hearing and decision thereof. But inasmuch as no final decree has been pronounced or judgment rendered in any suit heretofore instituted in this court against a state; the question of proceeding to a final decree will be considered as not conclusively settled, until the cause shall come on to be heard in chief.

Baldwin, Justice, did not concur in the opinion of the court, directing the order made in this cause.

The *subpœna* in this cause having been returned executed, sixty days before the return-day thereof, and the defendant having failed to appear, it is, on motion of the complainant, decreed and ordered, that the complainant be at liberty to proceed *ex parte:* and it is further decreed and ordered, that unless the defendant, being served with a copy of this decree, sixty days before the ensuing August term of this court, shall appear on the second day of the next January term thereof, and answer the bill of the complainant, this court will proceed to hear the cause on the part of the complainant, and to decree on the matter of the said bill.

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*John Smith, T., Plaintiff in error, *v.* United States, Defendant in error. [*292

Accounting department.—Treasury transcripts.—Practice in error.

Action of debt on a bond, executed by Alpha Kingsley, a paymaster in the army, and by John Smith, T., and another, as his sureties, to the United States; the condition of the obligation was, that Alpha Kingsley, "about to be appointed a district paymaster," &c., "and who will, from time to time, be charged with funds to execute and perform the duties of that station, for which he will be held accountable," &c., shall "well and truly execute the duties of district paymaster, and regularly account for all moneys placed in his hands to carry into effect the object of his appointment."

On the trial, the plaintiff gave in evidence a duly certified copy of the bond, and a "transcript from the books and proceedings of the treasury department, of the account of Alpha Kingsley, late district paymaster, in account with the United States;" in this account, A. K. was charged with moneys advanced to him for pay, subsistence and forage, bounties and premiums, and contingent expenses of the army; and credited with disbursements of the same, for the