the decision was void under the 7th article, and also any act of legislation confirming it.

From the foregoing considerations, I am brought to the conclusion, that this case is not strictly a suit at common law; and that this court may, under the act of 1824, as it did in the case of Armor, look into the record, and from the facts there set forth, determine the question of law: and as the court below refused to order the testimony to be taken down; I think, the defendant has been deprived of a right secured to him by law; and that for this error, the judgment should be reversed, and the cause sent down for further proceedings; with instructions to the district court to order the testimony to be taken down at the trial.

This cause came on to be heard, on the transcript of the record from the district court of the United States for the district of Louisiana, and was argued by counsel: On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said district court in this cause be and the same is hereby affirmed, with costs and damages, at the rate of six per centum per annum.

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*459] *Farrar and Brown *v.* United States.

Appearance by attorney-general.

The practice has uniformly been, since the seat of government was removed to Washington, for the clerk of the court to enter, at the first term to which any writ of error or appeal is returnable, in cases in which the United States are parties, the appearance of the attorney-general of the United States; this practice has never been objected to. The practice would not be conclusive against the attorney-general, if he should, at the first term, withdraw his appearance, or move to strike it off; but if he lets it pass for one term, it is conclusive upon him, as to an appearance.

The decisions of this court have uniformly been, that an appearance cures any defects in the form of process.

Benton moved the court for leave to reinstate this case, which had been dismissed on a former day of the term for want of an appearance of the plaintiffs in error. At the first term, when the writ of error was filed, the clerk of the court had entered the appearance of the attorney-general of the United States, according to the usual practice in such cases.

The *Attorney-General* now said, he should not object to the reinstatement, if the court thought it proper under the circumstances; but he had intended to take an objection, at the time when the suit was dismissed, if any person had then appeared. It was, that the citation for the writ of error was returnable to a day out of term, to wit, on the first Monday of January 1828, instead of the second Monday of that year.

Marshall, Ch. J., delivered the opinion of the court, as follows:—The practice has uniformly been, ever since the seat of government was removed to Washington, for the clerk to enter, at the first term to which any writ of error or appeal is returnable, the appearance of the attorney-general, in every case to which the United States are a party, by entering his name on the docket. This practice must have been known to every attorney-general,

*460] and has never been objected to. *It might be considered, therefore, as having an implied acquiescence, on the part of the attorney-

general; although it is admitted, that there is no evidence of any express assent. We do not say, that this practice would be conclusive against the attorney-general, if he should, at the first term, withdraw such appearance, or move to strike it out, in order to take advantage of any irregularity in the service of process. But if he lets it pass for that term, without objection; we think it is conclusive upon him as to an appearance.

The decisions of this court have uniformly been, that an appearance cures any defect in the service of process; and there is nothing to distinguish this case from the general doctrine. The cause, therefore, is ordered to be reinstated.

On consideration of the motion made by the attorney-general, on the part of the defendants in error in this cause, to dismiss the writ of error in this cause, on the ground, that the citation is made returnable to a day during the vacation, to wit, on the first Monday in January, A. D. 1828, whereas, the return-day should have been the second Monday in January, A. D. 1828, it is ordered by the court, that inasmuch as the said defect is cured by the appearance of the attorney-general on the part of the defendant, said motion be and the same is hereby overruled.[1]

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*State of New Jersey, Complainants, *v.* People of the State of New York, Defendants. [*461

Process against a state.

The *subpœna* issued on the filing of a bill, in which the state of New Jersey were complainants and the state of New York were defendants, was served upon the governor and attorney-general of New York, sixty days before the return-day, the day of the service and return inclusive; a second *subpœna* issued, which was served on the governor of New York only, the attorney-general being absent; there was no appearance by the state of New York. This is not like the case of several defendants, where a service on one might be good, though not on another; here, the service prescribed by the rule is to be on the governor, and on the attorney-general; a service on one is not sufficient to entitle the court to proceed.

Upon an application by the counsel for the state of New Jersey, that a day might be assigned to argue the question of the jurisdiction of this court to proceed in the case, the court said, they had no difficulty in assigning a day; it might be as well to give notice to the state of New York, as they might employ counsel in the *interim*. If, indeed, the argument should be merely *ex parte*, the court could not feel bound by its decision, if the state of New York desired to have the question again argued.

A notice was given by the solicitors for the state of New Jersey to the governor of the state of New York, dated the 12th of January 1830, stating that a bill had been filed on the equity side of the supreme court, by the state of New Jersey, against the people of the state of New York, and that on the 13th of February following, the court would be moved in the case for such order as the court might deem proper, &c.; afterwards, on the day appointed, no counsel having appeared for the state of New York, on the motion of the counsel for the state of New Jersey, for a *subpœna* to be served on the governor and attorney-general of the state of New York; the court said, as no counsel appears to argue the motion on the part of the state of New York, and the precedent for granting it has been established, upon very grave and solemn argument, the court do not require an *ex parte* argument in favor of their authority to grant the *subpœna*, but will follow the precedent heretofore established; the state of New York will be at liberty to contest the proceeding, at a future time, in the course of the cause, if they shall choose so to do.

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[1] For a decision on the merits, see 5 Pet. 373.