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U. States
v.
Kirkpatrick.

[SURETY.]

The UNITED STATES v. KIRKPATRICK and others.

A bond, given on the 4th of December, 1813, for the faithful discharge of the duties of his office, by a Collector of direct taxes and internal duties, appointed (under the act of the 22d of July, 1813, ch. 16.) by the President, on the 11th of November, 1813, to hold his office until the end of the next session of the Senate, and no longer, and subsequently appointed by the President, with the advice and consent of the Senate, on the 24th of January, 1814, is to be restricted (as to the liability of the sureties) to the duties and obligations created by the Collection Acts passed antecedent to the date of the bond.

The second commission, issued under the appointment, with the advice and consent of the Senate, operates a revocation of the first commission, issued under the appointment by the President, which was to continue until the end of the next session of the Senate, and no longer; and the liability of the sureties in the bond did not extend beyond the duration of the first commission.

In general, laches is not imputable to the Government: and where the laws require quarterly or other periodical accounts and settlements, a mere omission to bring a suit, upon the neglect of the officer or agent to account, will not discharge his sureties.

The case of *The People v. Jansen*, (9 *Johns. Rep.* 332.) distinguished; and, so far as it conflicts with the present case, overruled.

In general, the debtor has a right to make the appropriation of payments; if he omits it, the creditor may make it: but neither party has a right to make an appropriation after the controversy has arisen.

In cases of long and running accounts, where balances are adjusted, merely for the purpose of making rests, the law will apply payments to extinguish the debts, according to the priority of time.

ERROR to the District Court for the Western District of Pennsylvania.

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This was an action of debt, commenced by the United States, in the Court below, against the defendants in error, J. Kirkpatrick and others, as the obligees of a bond, given by them to the United States, on the 4th of December, 1813, conditioned for the true and faithful discharge of the duties of the office of Collector of direct taxes and internal duties, by Samuel M. Reed, who had been appointed to that office by the President, on the 11th of November, 1813, and, by the terms of his commission, was to hold his office during the pleasure of the President, "and until the end of the next session of the Senate of the United States, and no longer." On the 24th of January, 1814, he was re-appointed to the same office, by the President, by and with the advice and consent of the Senate, and by the new commission issued to him, was to hold his office "during the pleasure of the President of the United States, for the time being." The pleadings upon which the cause was tried in the Court below, were extremely informal and confused, but they resulted substantially in the following questions of law, upon which the Judge instructed the jury, and a bill of exceptions was taken.

1. Whether the liability of the sureties to the bond, was limited to the duties and obligations imposed upon the Collector by the act of the 22d of July, 1813, ch. 16, and other acts relating to the assessment and collection of direct taxes and internal duties, passed antecedent to the execution of the bond, thus excluding the liability for mo-

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neys collected under subsequent statutes? Upon this point, the Court below instructed the jury that the responsibility of the sureties did not extend to the obligations created by the subsequent statutes.

2. Whether the jury were at liberty to impute laches to the government, from the delay of the proper officers to call the Collector to account, at the periods prescribed by law, from the year 1814 to 1818? The Court left it to the jury to decide whether, under the circumstances of the case, the Government had not waived its resort to the sureties.

3. Whether the responsibility of the sureties extended beyond the duration of the first commission? Upon this point, the Court below charged the jury, that the responsibility of the sureties extended to the re-appointment of the Collector under the new commission, until his duties and obligations were varied by the statutes enacted subsequent to the date of the bond.

4. How the payments, which had been made by the Collector, were to be appropriated? The balance found due in each account, had been carried forward to the succeeding account, and the Court was of opinion, that the Government could not make the appropriation, at the time of the trial, so as to apply the payments to the extinguishment of debts due subsequent to the time when the sureties ceased to be liable.

Upon these instructions a verdict was found for the defendants, upon which a judgment was rendered in the Court below, and the cause was brought by writ of error to this Court.

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The *Attorney-General*, for the plaintiffs, mentioned the extreme laxity of the pleadings in the Court below, not with a view of preventing a decision upon the merits, which was very much desired by the Government, but in the hope of producing some reform. He argued, (1.) That the appointment of the Collector was permanent, neither limited in point of time, nor to the acts of Congress then in force, but extending to all laws on the subject of direct taxes and internal revenue, which might be passed during his continuance in office. The act of the 22d of July, 1813, ch. 544. [xvi.] makes a permanent partition of the whole territory of the United States into collection districts, preparatory to other distinct and separate laws, which were afterwards to follow. It looks to all future laws. There being, then, no existing law in force, all the laws to which the bond could refer were prospective. The case of the *People v. Jansen*,[a] which had been referred to in the Court below, was distinguishable, in several particulars, from the present. (2.) The instruction given to the jury, authorizing them to impute laches to the Government, was erroneous. Even in the case of private individuals, mere delay in proceeding against the principal debtor will not discharge a surety.[b] (3.) The charge of the Judge below was also erroneous, in authorizing the jury to apply the payments made by the Col-

a 9 *Johns. Rep.* 332. 340.

b The Trent Navigation Company v. Harley, 10 *East. Rep.* 34. Nares v. Rowles, 14 *East. Rep.* 510.

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lector to the balances due, under the acts in force when the bond was given. The rule is settled, that where debts are due on two different accounts, the debtor may make the application to either, at the time of payment. But, if he omit to do it, the creditor has a right to determine to which it shall be applied.[a]

Mr. *Alexander* and Mr. *Foster*, contra, contended, (1.) that the bond entered into by the defendants in error, was no farther obligatory on them, than for the faithful performance of the official duties of Reed, during the continuance of the appointment recited in the condition. The first commission was to continue in force, by its own terms, only until the end of the next session of the Senate; and the new commission was a revocation of it. Being with the advice and consent of the Senate, it is by a different authority, and the President might have nominated a different person. By carrying forward the balance due by Reed, under the first commission, to his account, as Collector under the second commission, it was shown, that his personal responsibility was looked to, and that no resort was intended to be had against the sureties. It has been held, that a guarantee of a partnership debt is not liable, where the partnership debt is discharged, by carrying the proportions of each partner to his separate account, without notice to

a Peters v. Anderson, 1 *Marsh. Rep.* 238. Newmarch v. Clay, 13 *East. Rep.* 239.

the guarantee.[a] This must be upon the principle, that the plaintiff had shown, by his own act, that he did not intend to resort to the surety, and that he looked to the debtors in a different capacity from that in which the guaranty was given. In *Lord Arlington v. Merrick*,[b] the action was debt on bond, dated the 1st of May, 18 *Car.* II., conditioned that, whereas, on the 30th of April, 1667, the plaintiff had deputed T. Jenkins to execute said office, from the 24th of June next for six months following, if said T. J. shall, &c., for and during all the time he shall continue Deputy Post Master, well, truly, and faithfully do, execute, and perform all the duties, &c. The defendant pleaded performance generally; and a breach was assigned on the last day of September, 22d of the King; and defendant demurred. The Court held, that the condition should refer to the recital only, by which the defendant was bound only for six months, and not longer.[c] This had been considered as a leading case ever since; and other analogous cases might be cited.[d] (2.) The subse-

a Cremer v. Higginson, 1 *Mason's Rep.* See also, 3 *Wheat. Rep.* 148. Note *a.* and the cases there collected. Commonwealth v. Fairfax, 4 *Hen. and Mumf.* 208., recognised by the Court to be law. Anderson v. Longden, 1 *Wheat. Rep.* 91.

b 3 *Saund.* 411.

c *Id.* 415. Sergt. Williams' Note (5.)

d Wright v. Russell, 3 *Wils.* 530. S. C. 2 *W. Bl. R.* 934. African Company v. Mason, cited in Stubbs v. Clough, *Str.* 227. Barker v. Parker, 1 *T. R.* 287. Barclay v. Lucas, 1 *T. R.* 291. Note *a.* Metcalf v. Bruin, 12 *East. Rep.* 400. The Wardens of St. Saviour v. Bostwick, 5 *Bos. & Pul.* 175. Commonwealth v. Baynton, 4 *Dall.* 282. Armstrong v. the United States, 1 *Peters' Rep. C. C.* 46. Liverpool Waterworks Company v. Atkinson, 6 *East Rep.* 507.

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quent acts of Congress on the same matter had so varied and enlarged the duties of the Collector, as created by the statutes in force at the time the bond was given, that the sureties were not liable for moneys received under those acts, even admitting that they were liable beyond the continuance of the first commission. The learned counsel entered into a critical examination of the acts, to show that the duties of the officer were thus varied and enlarged, and cited the authorities in the margin to support the legal principle, that such alteration in his official duties would discharge the sureties from further liability.[a] (3.) That laches might be imputed to the government, through the negligence of their officers.[b] In the case of mere private individuals, the surety, or guarantee, may pay the debt, and proceed in Chancery to compel the creditor to enforce his demand against the principal, which he could not do in the case of the Government; and that was a sufficient reason to justify the Court below in leaving it to the jury to say, whether the neglect of the officers of the treasury was not a waiver of the guaranty.[c] And even

a Bartlett v. the Attorney-General, *Parker*, 277. *Comyn. Dig.* tit. Chancery, (2.) Stratton v. Rastall, 2 *T. R.* 366. Ludlow v. Simond, 2 *Caines' Cas. in Err.* 3 *Wheat. Rep.* 155. Note *a.*, and cases there cited. 1 *Bos. & Pull.* 419. King v. Baldwin, 2 *Johns. Ch. Rep.* 554. 18 *Ves.* 20.

b The People v. Jansen, 7 *Johns. Rep.* 332. Hunt v. U. S. 1 *Gall.* 34.

c King v. Baldwin, 2 *Johns. Ch. Rep.* 56. Wright v. Russell, 2 *W. Bl.* 934. 5 *Vin.* 108. pl. 14. Paine v. Packard, 13 *Johns. Rep.* 174.

in the case of a private individual, gross laches, or fraud, on the part of the creditor, will discharge the surety.[a] (4.) The Court below were not bound to direct the jury, that the subsequent payments should be applied to discharge subsequent balances; nor did it appear by the record, that the United States Attorney made such an election. The rule as between a private debtor and creditor, as to the appropriation of payments, is not applicable where the receiver is a public officer.[b] Where the whole case is complicated of law and fact, the whole may be left to the jury, unless some particular point is selected by the counsel for the consideration of the Judge, and his opinion is asked upon that point.[c]

The *Attorney-General*, in reply, insisted, that there was no limitation to the obligation of a surety, unless expressed on the face of the bond, or implied in law. In *Lord Arlington v. Merrick*,[d] the condition of the bond was expressly limited to six months. So all the other cases cited would be found to have some distinguishing feature; such as that the condition was to be faithful to the plaintiff, and the breach assigned was, that the defendant had failed to pay the plaintiff and his partner,

a Philips v. Astling, 2 *Taunt.* 206. Warrington v. Forbes, 8 *East. Rep.* 245. Duval v. Trask, 13 *Mass. Rep.* 154. Hunt v. United States, 1 *Gall.* 34. 3 *Wheat. Rep.* 154, 155. Note *a*, and cases there collected.

b United States v. January, 7 *Cranch*, 575.

c Boorman v. Smith, 2 *Serg. & Rawl*, 464.

d 3 *Saund.* 411.

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whom he had subsequently taken into the firm. There it was held, that the surety was not liable for subsequent defaults.[a] In the case of the *People v. Jansen*,[b] the statute of New-York made it the express duty of the public officers to prosecute diligently, and with effect, the suits which had been commenced against the principal; and their neglect to perform this duty, actually occasioned the loss for which the sureties were sought to be made responsible. So, also, in the exchequer case of *Bartlett v. the Attorney-General*,[c] a new duty was laid upon coals, by a statute passed subsequent to the giving of the bond by the Collector, under which statute a new deputation was given, and new security taken; it was, therefore, very properly held, that the sureties on the first bond were not liable for the moneys received on account of this duty. But, in the present case, the bond is to continue during his continuance in office, and is to secure all duties collected during that term. If it were an annual office, it might have been different.[d] As to the two commissions, the practice of the Government has been, to consider them as one continuing commission. A different construction would render the bond practically ineffectual. The objection which seeks to impute laches to the Government, on account of the mere omission of its officers to proceed against the

a 3 *Wils.* 530.
b 9 *Johns. Rep.* 332. 340.
c *Parker*, 277.
d Curling v. Chalklen, 3 *Maul. & Selw.* 502.

principal, on every periodical omission to account, is entirely novel, and, if it were to prevail, would be equally fatal to the most important interests of the public, and injurious to the sureties themselves, as it may often happen that the balance consists of outstanding duty bonds, which may soon afterwards be collected, and liquidate the balance. The law does not create any obligation to sue, which does not exist in the case of a private guaranty.

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Mr. Justice STORY delivered the opinion of the Court. *March 20th.*

In this case, the Court cannot but lament the extreme irregularity and laxity of the pleadings, if, indeed, the informal minutes upon the record be entitled, in any measure, to the appellation of pleadings. Some apology is, indeed, to be found in the asserted inaccurate local practice in the State Courts; but it is impossible, without breaking down the best settled principles of law, not to perceive that the very errors in the pleadings are, of themselves, sufficient to justify a reversal of the judgment, and an award of a repleader. The agreement of the parties, filed in the case, may, indeed, help the formal defects, but cannot be admitted to dispense with the substance of appropriate pleas; for, otherwise, it would be difficult to ascertain what was tried, or to be tried; and we might as well dispense with the declaration itself, as with the subsequent pleadings. It is to be hoped that, in future, a more cor-

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rect practice will find its way into the District Court.

Three errors have been insisted upon by the Government, as contained in the charge of the Court below. The first is, that the Judge limited the responsibility of the sureties upon the Collector's bond, to the duties and obligations imposed by the acts of Congress, antecedently passed, thus excluding the liability created by the subsequent statutes. The second is, the direction of the Judge, that the jury were at liberty to impute laches to the Government, from the delay to call the Collector to account, at the periods prescribed by law, and the consequent injury to the sureties. The third is, the direction, that the payments made by the Collector might, under the circumstances, be applied to the discharge of the balance due from collections made under the acts which were in force when the bond was given.

Liability of the sureties confined to the duties and obligations created by the acts passed antecedent to the date of the bond.

As to the first point. The Collector was appointed, under the act of the 22d of July, 1813, ch. 16., for the assessment and collection of direct taxes and internal duties. In the 2d section it provides, "That one Collector, &c. shall be appointed for each of the said collection districts, &c.; and if the appointment of the said Collectors, or any of them, shall not be made during the present session, the President of the United States shall be, and is hereby, empowered to make such appointment, during the recess of the Senate, by granting commissions, *which shall expire at the end of their next session.*" The 18th section of the same act further provides, "that each Collec-

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tor, &c. shall give bond, with one or more good and sufficient sureties, &c. in at least double the amount of the taxes assessed in the collection district for which he may be appointed, which bond shall be payable to the United States, with condition for the true and faithful discharge of the duties of his office, according to law, and particularly for the due collection and payment of all moneys assessed upon such district." The condition of this bond principally refers, as will appear on an inspection of the act, to assessments of *direct* taxes. But the subsequent acts, (act of the 24th of July, 1813, ch. 21. s. 14., and ch. 24. s. 6., and ch. 25. s. 3. and s. 10., and the act of the 3d of August, 1813, ch. 38. s. 2. and s. 5., and ch. 51. s. 13.) laying internal duties, contain provisions enlarging the authority of the Collector; and the act of 2d of August, 1813, ch. 55., expressly extends the liability under the bond, to the due collection and payment of all moneys accruing from the duties laid by these acts. So that there is no doubt that, as to bonds subsequently given, the language of the condition is to receive an interpretation which shall secure the fidelity of the Collector under all these acts. The Collector, whose bond is in question, was appointed by the President, on the 11th of November, 1813, and, by the terms of his commission, he was to hold his office during the pleasure of the President, " and until the end of the next session of the Senate of the United States, *and no longer*." The bond in question was given by the Collector, and by the defendants, as his sureties, on the 4th of

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December, of the same year; and it follows, in its terms, the requirements of the act of Congress. On the 24th of January, 1814, the President, with the advice and consent of the Senate, re-appointed the party Collector, &c.; and by his new commission, he was to hold his office "during the pleasure of the President of the United States for the time being." No new bond was taken under this commission. Under these circumstances, the District Judge held, that the liability of the sureties was strictly confined to the duties and obligations created by the acts passed antecedent to the date of the bond. And we are of opinion that this is the true construction of the condition of the bond. There is nothing in the original act, under which the appointment was made, which contemplates a permanent and continuing liability for all duties under all laws which might be subsequently passed. In its terms, the condition, as expounded by the other parts of the act, had a principal reference to the assessments of direct taxes; and it is extended farther in its operation, only by the express and positive directions of the act of 2d of August, 1813, ch. 55. s. 1. To this extent, therefore, it may well be of force; but to go beyond it, would be to exceed the legislative declaration, and create a general, where the act had fixed a limited, responsibility. If the argument on behalf of the Government were correct, the provision, so solicitously placed in this last act, was wholly unnecessary; for the liability would expand with the new duties imposed by every successive act of the Legislature. But the act itself

furnishes no ground for such an exposition; and we do not feel ourselves at liberty to give to contracts of this sort further efficacy than the laws and the parties must have had in their contemplation.

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The liability of the sureties confined to the duration of the first commission.

This point, however, becomes of comparatively small importance in the cause, if another, which has been argued in this connexion, cannot be maintained. We allude to the question as to the duration and force of the original commission of the Collector. Strictly speaking, this question does not arise upon the present record. For, although the Court below decided, that, in point of law, both commissions constituted but one continuing appointment, the second commission operating only as a confirmation of the first, yet, as the verdict was found for the defendants on another ground, and no exception was taken by them, it is not matter of error which can be assigned upon the present occasion. But, as it is manifest that the same question must arise upon any subsequent trial, if there should be a reversal of the judgment, and will form a most important, and, perhaps, decisive, ground of argument; and as all the parties are desirous of our opinion on this point, and it has been fully argued from its bearing on the other points in the cause, and might have been material, if our decision on the first point had been different, we have no hesitation in declaring our opinion, that the decision of the Court below was founded in mistake.

The act under which this appointment was made, authorizes the President, in the recess of the Se-

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nate, to make appointments, by granting commissions, *which shall expire at the end of their next session.* The first commission is, as has been already stated, in conformity to this provision of the act, and is, by express terms, limited to continue to the "end of the next session of the Senate, and *no longer.*" It follows, therefore, both by the enactment of law and the form of the grant, that the first commission must have expired of itself at that period; and, as the next session of the Senate ended in April, 1814, that is the utmost extent to which it could reach. The bond in question was given with express reference to this commission; and its obligatory force was, consequently, confined to acts done while that commission had a legal continuance, and could not go beyond it. And here would have been the natural termination of the liability. But, in the mean time, a new appointment was made by the President, with the advice and consent of the Senate; and as soon as that was accepted by the Collector, it was a virtual superseding and surrender of the former commission. The two commissions cannot be considered as one continuing appointment, without manifest repugnancy. The commissions are not only different in date, and given under different authorities and sureties, but they are of different natures. The first is limited in its duration to a specified period; the second is unlimited in duration, and during the pleasure of the President. If the latter operated merely as a confirmation of the former, then it confirmed its existence only during the original period fixed by the law. But

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such an effect is not pretended, and would be irreconcilable with the terms and intent of the commission. It has been suggested, that the practice of the Government has been, to consider such commissions as one continuing commission. But whatever weight the practice of the Government may be entitled to, in cases of doubtful construction, it can have no influence to change the clear language of the law. In short, if the nomination to, and approval by the Senate, was a mere confirmation, and not equivalent to a new appointment, there was no necessity for the second commission; and yet, the argument supposes, that it could not be dispensed with; for if no commission had been issued, the first, by its own limitation, would have expired.

Laches not imputable to the Government.

Then, as to the point of laches, we are of opinion that the charge of the Court below, which supposes that laches will discharge the bond, cannot be maintained as law. The general principle is, that laches is not imputable to the Government; and this maxim is founded, not in the notion of extraordinary prerogative, but upon a great public policy. The government can transact its business only through its agents; and its fiscal operations are so various, and its agencies so numerous and scattered, that the utmost vigilance would not save the public from the most serious losses, if the doctrine of laches can be applied to its transactions. It would, in effect, work a repeal of all its securities. On the other hand, the mischiefs to the agents and their sureties would be scarcely less tolerable. For if, where the laws, as in the

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present instance, require quarterly accounts and settlements, a mere omission to account is to be deemed a breach of the bond, for which a suit must be immediately brought, upon the peril of loss from imputed laches; the Collectors and their sureties would be oppressed with the most expensive and vexatious litigation; and their whole real estate, which by law is subjected to a lien, upon the commencement of a suit, would be perpetually embarrassed in its transfers. This consideration of public or private inconvenience, is not to overrule the settled principles of law, but it is certainly entitled to great weight, where a new doctrine is to be promulgated. It is admitted, that mere laches, unaccompanied with fraud, forms no discharge of a contract of this nature, between private individuals. Such is the clear result of the authorities. Why, then, should a more rigid principle be applied to the government? a principle which is at war with the general indulgence allowed to its rights, which are ordinarily protected from the bars arising from length of time and negligence? It is said, that the laws require, that settlements should be made at short and stated periods; and that the sureties have a right to look to this as their security. But these provisions of the law are created by the Government for its own security and protection, and to regulate the conduct of its own officers. They are merely directory to such officers, and constitute no part of the contract with the surety. The surety may place confidence in the agents of the Government, and rely on their fidelity in office; but he has of this the same means

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of judgment as the Government itself; and the latter does not undertake to guaranty such fidelity. No case has been cited at the bar, in support of the doctrine, except that of *The People v. Jansen*, in 7 *Johns. Rep.* 332. In respect to that case, it may be observed, that it is distinguishable from the present in some of its leading circumstances. But if it were not, we are not prepared to yield to its authority. It is encountered by other authorities, which have been cited at the bar; and the total silence in the English books, in a case of so frequent occurrence, affords strong reason to believe, that it never has been supposed, that laches would be fatal in the case of the Government, where it would not affect private persons. Without going more at large into this question, w care of opinion, that the mere laches of the public officers constitutes no ground of discharge in the present case.

Appropriation of payments.

The last ground respects the manner in which the Court below laid down the law respecting the appropriation of payments. In our opinion, there is no error in the charge on this point. The general doctrine is, that the debtor has a right, if he pleases, to make the appropriation of payments; if he omits it, the creditor may make it; if both omit it, the law will apply the payments, according to its own notions of justice. It is certainly too late for either party to claim a right to make an appropriation, after the controversy has arisen, and *a fortiori* at the time of the trial. In cases like the present, of long and running accounts, where debits and credits are perpetually occur-

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ring, and no balances are otherwise adjusted than for the mere purpose of making rests, we are of opinion, that payments ought to be applied to extinguish the debts according to the priority of time: so that the credits are to be deemed payments *pro tanto* of the debts antecedently due.

Upon the whole, it is the opinion of the Court, that for the error of the District Court, on the question of laches, the judgment ought to be reversed, and a *venire facias de novo* awarded, with directions, also, to allow the parties liberty to amend their pleadings.

[Constitutional Law. Chancery.]

Osborn and others, *Appellants*,

v.

The President, Directors, and Company of the Bank of the United States, *Respondents*.

The act of incorporation of the Bank of the United States gives the Circuit Courts of the United States jurisdiction of suits by and against the Bank.

This provision in the charter is warranted by the 3d article of the Constitution, which declares, that "the judicial power shall extend to *all cases*, in law and equity, arising under this Constitution, *the laws of the United States*, and treaties made, or which shall be made, under their authority."

It is unnecessary for an attorney or solicitor, who prosecutes a suit for the Bank of the United States, or other corporation, to produce a warrant of attorney under the corporate seal.

Whatever authority may be necessary for an attorney or solicitor to appear for a natural or artificial person, it is not a ground of re-