

taken advantage of by the court upon its own motion, or by the appellee or the defendant in error at any time before hearing. Mere appearance does not amount to a waiver. In this case the objection was taken in time.

*Appeal dismissed.*

NOTE.—In *Thomas v. Purcell* the appeal was dismissed, for the reasons stated in the foregoing opinion.

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UNITED STATES *v.* GERMAINE.

1. Civil surgeons appointed by the Commissioner of Pensions under sect. 4777 of the Revised Statutes are not officers of the United States.
2. The Commissioner of Pensions is not the head of a department, within the meaning of sect. 2, art. 2, of the Constitution, prescribing by whom officers of the United States shall be appointed.
3. The present case distinguished from *United States v. Hartwell*, 6 Wall. 385.

ON a certificate of division in opinion between the judges of the Circuit Court of the United States for the District of Maine.

The facts are stated in the opinion of the court.

*Mr. Assistant Attorney-General Smith* for the United States.

*Mr. Thomas B. Reed, contra.*

MR. JUSTICE MILLER delivered the opinion of the court.

The defendant was appointed by the Commissioner of Pensions to act as surgeon, under the act of March 3, 1873, the third section of which is thus stated in the Revised Statutes as sect. 4777:—

“That the Commissioner of Pensions be, and he is hereby, empowered to appoint, at his discretion, civil surgeons to make the periodical examination of pensioners which are or may be required by law, and to examine applicants for pension, where he shall deem an examination by a surgeon appointed by him necessary; and the fee for such examinations, and the requisite certificates thereof in duplicate, including postage on such as are transmitted to pension agents, shall be two dollars, *which shall be paid by the agent for*