and *cargo were lost, it is not conceived, that Lieutenant Maley ought to be charged with the cost of a subsequent ineffectual attempt, not made at his instance, to repair the original neglect. What may be the claim of Shattuck, on the government of the United States, for this sum, is not for this court to inquire; but his claim against Lieutenant Maley is not admitted.

This court affirms so much of the sentence of the circuit court, as awards compensation for the Mercator, and her cargo, to the libellant, and approves of the sentence on the report of the commissioners, except as to that part which rejects the claim for advances for the outfits of the vessel, and the wages of the crew, and which admits the charges of $540, on account of the expenses attending the application to the government of the United States, and of $326.12, on account of expenses attendant on the ineffectual attempt which was made to prosecute an appeal in England. In these respects, the account is to be reformed, for which purpose, so much of the sentence of the circuit court as respects this part of the subject is reversed, and the case is remanded to the circuit court to be further proceeded in, as to justice shall appertain.

Lawrason *v.* Mason.

Letter of credit.

A letter from the defendants to J. M., saying, that they would be his security for 130 barrels of corn, payable in twelve months, will sustain an action of *assumpsit* against the defendants, by any person who, upon the faith of the letter, shall have given credit to J. M. for the corn.[1]

Error to the Circuit Court for the district of Columbia.

This was an action of *assumpsit*, brought by Mason against Lawrason, surviving partner of the firm of Lawrason & Smoot, upon the following note:

*"Alexandria, 28th November 1800. [*493

"Mr. James McPherson,

"Dear Sir—We will become your security for one hundred and thirty barrels of corn, payable in twelve months."

(Signed) Lawrason & Smoot."

The declaration contained several counts, laying the *assumpsit* in different forms, but the substance of each was, that the plaintiff, relying on, and placing confidence in, the promise of the defendants, and at their instance and request, sold and delivered the corn to McPherson, at the price of three dollars a barrel, who, although requested, never paid the plaintiff therefor, of which the defendants had notice, whereby the defendants became liable, and in consideration thereof, promised to pay.

The defendants pleaded the general issue; and at the trial, a verdict was taken for the plaintiff, subject to the opinion of the court, upon a demurrer to evidence, which stated, in substance, that the defendants signed and delivered the said note to McPherson; that he applied to the agent of the plaintiff for the corn, and offered three dollars a barrel, payable in twelve months; that the agent consulted the plaintiff, who agreed that

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[1] And see Union Bank *v.* Coster, 3 N. Y. 203.

McPherson should have the corn on those terms, if he would give security; that McPherson then offered, as his security, Lawrason & Smoot. The agent agreed to take them, if they would give their assumption in writing. In a few days afterwards, McPherson sent to the agent the said note of Lawrason & Smoot. Before the corn was delivered, the agent informed the plaintiff what had passed between himself and McPherson, relative to the corn, and also showed him the note, and asked him whether it would do; to which he replied, he supposed it would. But they called upon Lawrason, and asked him if he was content to be McPherson's security for this corn. He hesitated, at first, but said, he must be so, as he had promised; or, as his word was out, he would; or words to that effect; whereupon, the
*494] plaintiff suffered McPherson to take the corn, *at the price of three dollars per barrel, which he agreed to give.

That there was another debt due to the plaintiff from McPherson, about the 1st of January 1801, which he was unable to pay. That about the 1st of January 1800, McPherson gave his promissory note for the amount due for the corn, payable to Lawrason & Smoot, with intent that they should indorse it, but upon its being presented to Smoot, he refused, saying, that McPherson had failed to furnish them with meal, which he had agreed to deliver to them for their indorsement; he, therefore, would not become security, but, upon being shown the note of 28th of November, he acknowledged that it had been given by them.

The plaintiff also produced the certificate of discharge of McPherson, under the bankrupt law, dated the 15th of September 1802, and proved by witnesses, that he became insolvent in the year 1800.

Upon this demurrer, the judgment of the court below was for the plaintiff.

Swann, for the plaintiff in error.—The promise in this case was not made to the plaintiff; and no action can be maintained against a person who is a stranger to the consideration, and who is not a party to the agreement. *Jordan* v. *Jordan*, Cro. Eliz. 369; Esp. N. P. 105, 106. Perhaps, an action might lay for the deceit, but not for the *assumpsit*. The will of both parties must concur, at the same moment. If I make an offer of goods, at a certain price, and give time to the other party to consider of it, and within the time, the other party agrees to the terms, I am not bound to comply. There was no consideration, and consequently, no contract. *Cooke* v. *Oxley*, 3 T. R. 653.

Besides, it does not appear that the money was ever demanded of McPherson; and until he had refused to pay, no right of action could accrue against the defendant.

*495] *C. Lee*, contrà.—There is an essential difference between common contracts and a letter of credit. The latter is a mercantile instrument, bottomed upon the principle of good faith. It is a promise to him who will give credit to the third person, and the consideration is, the actual delivery of the money or goods to the third person, upon the faith of the letter of credit. This is, therefore, a promise to the plaintiff, and a good consideration is raised by the delivery of the corn, upon the faith of the defendant's note in writing. All the forms of action upon a letter of credit, are in *assumpsit*.

It is objected that no demand was made on McPherson; the answer is, that he was known to both parties to be insolvent.

Marshall, Ch. J., delivered the opinion of the court to the following effect:—This action is grounded upon a note in writing, which was certainly intended by the defendants to give a credit to McPherson. They are bound, by every principle of moral rectitude and good faith, to fulfil those expectations which they thus raised, and which induced the plaintiff to part with his property. The evidence was clear, that the credit was given upon the faith of the letter.

Unless, therefore, there is some plain and positive rule of law against it, the action ought to be supported. In the case cited from Espinasse, the rule is laid down too broadly. If compared with analogous cases, it will be found to be considerably modified. Thus, if money be delivered by A. to B., to be paid over to C., although no promise is made by B. to C., yet C. may recover the money from B. by an action of *assumpsit*. If it be said, that in such a case, the law raises the *assumpsit* from the facts, and if the facts do not imply *an *assumpsit*, no action will lie; it may be answered, that in the present case, there is an actual *assumpsit* to all the world, and any person who trusts, in consequence of that promise, has a right of action. [*496

It has been suggested by the counsel for the defendants, that although an action of *assumpsit* will not lie, yet, possibly, the plaintiff might support an action for the deceit. But an action for the deceit must be grounded upon the breach of the promise. And if an action will lie, in any form, the present seems to be, at least, as proper as any other.

Judgment affirmed.

Knox & Crawford *v.* Summers and Thomas.

Appearance.— Waiver.

An appearance of the defendant, by attorney, cures all antecedent irregularity of process.
Quære? Whether a deputy-marshal can plead in abatement, that the *capias* was not served on him by a disinterested person?[1]
Knox *v.* Crawford, 1 Cr. C. C. 260, reversed.

Error to the Circuit Court of the district of Columbia.

The plaintiffs in error brought an action of debt on a bond, against the defendants, in the court below; to which the defendant, Summers, after *oyer* of the writ, pleaded in abatement, that on the day of the issuing of the original writ, as well as on the day of its service on him, he was one of the marshal's deputies for the district of Columbia, and that the writ was not directed to a disinterested person, appointed by the court of the district of Columbia, or by any justice or judge thereof, to execute the same.

To which plea, the plaintiffs demurred specially; 1st. Because the plea was filed long after the appearance of the defendant, Summers; 2d. Because, after his appearance to the suit, no objection can be urged to the irregularity of the service of the process; 3d. Because, if the process was

[1] See the opinion of the court below, 1 Cr. C. C. 260.