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.

irregularly issued, directed or served, the remedy was by motion, and not by plea; and 4th. Because the process was duly issued, directed and served. *497] But the court below adjudged the *plea to be good, and ordered the writ to be quashed as to both defendants. Whereupon, the plaintiffs sued out their writ of error.

By the 28th section of the act of congress of the 24th of September 1789 (1 U. S. Stat. 87), it is enacted, "That in all causes wherein the marshal, or his deputy, shall be a party, the writs and precepts therein shall be directed to such disinterested person, as the court, or any justice or judge thereof, may appoint: and the person so appointed, is hereby authorized to execute and return the same."

Swann, for the plaintiffs in error.—The provision of the act of congress was not intended for the benefit of the marshal, or his deputy, but of the other party. The word "shall," in this, as in many other cases, means may. It shall be directed to a disinterested person, if the other party shall request it. But if the direction of the writ to the marshal was an informality, it is cured by the general appearance of the deputy-marshal. Co. Litt. 325. *Blenkinson* v. *Iles*, 2 Ld. Raym. 1544. The record states, that there was judgment by default, at the rules, against both defendants, and that at the next court, on the motion of the defendants, by Walter Jones, jr., their attorney, it was ordered, that the suit be returned to the rules for proceedings anew. At the next rules, the record states, that "the said Lewis Summers, in his proper person, comes and defends the force and injury, &c., and prays *oyer* of the writ," &c. So that this plea in abatement was not put in, until after he had appeared by his attorney, and set aside the office-judgment.

But this is not a matter pleadable in abatement. If a person is improperly arrested, his remedy formerly was by a writ of privilege, but now it is by motion to be discharged. He cannot plead it.

C. Lee, contrà.—When the cause was sent back to the rules for proceedings anew, it was as if nothing had been done at the rules. Everything was to begin *de novo*. The defendant, Summers, is to be considered as then appearing for the first time; and instantly, upon his appearance, he pleaded in abatement *in propriâ personâ*.

*498] *It does not appear upon the writ, that he was a deputy-marshal. It could not, therefore, be taken advantage of, upon motion. Or, if it could, yet that is not the most regular way. Upon a motion, the fact must appear by affidavit, and the court must decide the fact. But upon a plea, the fact is put in issue and tried by the jury, the proper tribunal to try a question of fact.

The law is express and positive; "the writ shall be directed" to a disinterested person. There is no discretion in the court. Where it appears to the court, from the writ itself, that it ought to abate, there the court, *ex officio*, ought to give judgment against the plaintiff, though the defendant does not plead it in abatement; but it is otherwise, where it does not appear in the writ. 4 Bac. Abr. 44. Where the fact does not appear upon the record, it must be pleaded in due time.

Washington, J.—The defendant could not set aside the office-judgment, without entering his appearance.

C. Lee.—If such an appearance is to cure all antecedent error, no plea in abatement could be put in, although the office-judgment was irregularly obtained; nor could the defendant take advantage of irregularity, at the rules; although the court is, by the express provisions of the law, authorized to set aside the proceedings at the rules.

The Court were unanimously of opinion, that the appearance by attorney cured all irregularity of process. The defendant, perhaps, might have appeared *in propriâ personâ*, and directly pleaded in abatement. But having once appeared by attorney, he is precluded from taking advantage of the irregularity.

The judgment reversed, the defendant ordered to answer over, and the cause remanded for further proceedings.

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*Sands *v.* Knox. [*499

Non-intercourse act.

The non-intercourse act of June 13th, 1798, did not impose any disability upon vessels of the United States, sold *bonâ fide* to foreigners, residing out of the United States, during the existence of that act.

Error to the Court for the Trial of Impeachments and the Correction of Errors, in the state of New York.

Thomas Knox, administrator, with the will annexed, of Raapzat Heyleger, a subject of the King of Denmark, brought an action of trespass *vi et armis*, in the supreme court of judicature of the state of New York, against Joshua Sands, collector of the customs for the port of New York, for seizing and detaining a schooner called the Jennett, with her cargo.

The defendant, Sands, pleaded in justification, that he was collector, &c., and that after the 1st day of July 1798, viz., on the 16th of November 1798, the said schooner, then being called the Juno, was owned by a person resident within the United States, at Middletown, in Connecticut, and cleared for a foreign voyage, viz., from Middletown to the island of St. Croix, a bond being given to the use of the United States, as directed by the statute, with condition that the vessel should not, during her intended voyage, or before her return within the United States, proceed, or be carried, directly or indirectly, to any port or place within the territory of the French republic, or the dependencies thereof, or any place in the West Indies, or elsewhere, under the acknowledged government of France, unless by stress of weather, or want of provisions, or by actual force or violence, to be fully proved and manifested before the acquittance of such bond, and that such vessel was not, and should not be, employed, during her said intended voyage, or before her return as aforesaid, in any traffic or commerce with, or for, any person resident within the territory of that republic, or in any of the dependencies thereof. That afterwards, on the 8th of December 1798, she did proceed, and was voluntarily carried from Middletown to the island of St. Croix, in the West Indies, and from thence, before her return within the United States, to Port de Paix in the island of St. Domingo, being then a place under the acknowledged government of France, without being obliged to do so by stress of weather, or *want of provisions, or actual force and violence, whereby, and according to the form of the [*500