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

statute, the said schooner and her cargo became forfeited, the one-half to the use of the United States, and the other half to the informer; by reason whereof, the defendant, being collector, &c., on the 1st of July 1799, arrested, entered and took possession of the said vessel and cargo, for the use of the United States, and detained them as mentioned in the declaration, and as it was lawful for him to do.

The plaintiff, in his replication, admitted that the defendant was collector, &c., that at the time she sailed from Middletown for St. Croix, she was owned by a person then resident in the United States; and that a bond was given as stated in the plea; but alleged, that she sailed directly from Middletown to St. Croix, where she arrived on the 1st of February 1799, the said island of St. Croix then and yet being under the government of the King of Denmark. That one Josiah Savage, then and there being the owner and possessor of the said vessel, sold her, for a valuable consideration, at St. Croix, to the said Raapzat Heyleger, who was then, and until his death continued to be, a subject of the King of Denmark, and resident at St. Croix, who, on the 1st of March following, sent the said vessel, on his own account, and for his own benefit, on a voyage from Port de Paix to St. Croix, without that, that she was at any other time carried, &c.

To this replication, there was a general demurrer and joinder, and judgment for the plaintiff, which, upon a writ of error to the court for the trial of impeachments and correction of errors, in the state of New York, was affirmed. The defendant now brought his writ of error to this court, under the 25th section of the judiciary act of the United States. (1 U. S. Stat. 85.)

The only question which could be made in this court, was upon the construction of the act of congress, of June 13th, 1798 (1 U. S. Stat. 565), commonly called the non-intercourse act; the 1st section of which is in these
*501] words: "That no ship or vessel, owned, hired or employed, *wholly or in part, by any person resident within the United States, and which shall depart therefrom, after the 1st day of July next, shall be allowed to proceed, directly, or from any intermediate port or place, to any port or place within the territory of the French republic, or the dependencies thereof, or to any place in the West Indies, or elsewhere, under the acknowledged government of France, or shall be employed in any traffic or commerce with or for any person, resident within the jurisdiction or under the authority of the French republic. And if any ship or vessel, in any voyage thereafter commencing, and before her return within the United States, shall be voluntarily carried, or suffered to proceed, to any French port or place as aforesaid, or shall be employed as aforesaid, contrary to the intent hereof, every such ship or vessel, together with her cargo, shall be forfeited, and shall accrue, the one-half to the use of the United States, and the other half to the use of any person or persons, citizens of the United States, who will inform and prosecute for the same; and shall be liable to be seized, prosecuted and condemned, in any circuit or district court of the United States, which shall be holden within and for the district where the seizure shall be made."

The condition of the bond stated in the plea, corresponded exactly with that required by the 2d section of the act. The 70th section of the act of 2d of March 1799 (1 U. S. Stat. 678), makes it the duty of the several officers

of the customs, to seize any vessel liable to seizure, under that or any other act of congress respecting the revenue.

C. Lee, for the plaintiff in error.—The question is, whether the act of congress does not impose a disability upon the vessel itself?

This vessel was clearly within the literal prohibition of the act. She was "owned wholly by a person resident within the United States." She did "depart therefrom, after the 1st day of July (then) next." She did "proceed from an intermediate port or place, to a place in the West Indies, under the acknowledged government of France." She was also a vessel which, "in a voyage *thereafter commencing, and before her return within the United States," was "voluntarily carried, or suffered to proceed, to a French port." She had, therefore, done and suffered every act which, according to the letter of the law, rendered her liable to forfeiture, seizure and condemnation. [*502

It is true, that the decision of this court, in the case of the *Charming Betsy*, 2 Cr. 115, seems, at first view, to be against us. But the present question was not made, and could not arise, in that case, because that vessel had not been to a French port, nor had she returned from a French port to the United States. If such a trade as the present case presents were to be permitted, the whole object of the non-intercourse act would be frustrated. A vessel of the United States may, according to the judgment in the case of the *Charming Betsy*, be sold and transferred to a Dane, and he may trade with her as he pleases; but we say, it is with this proviso, that he does not send her from a French port to the United States. He takes the vessel with that restriction. If he trades to the United States, he is bound to know and respect their laws. The intention of the law was not only to prevent American citizens, but American vessels, from carrying on an intercourse with French ports.

The case of the *Charming Betsy* was under the act of February 1800; but the present case arises under that of 1798, which is very different in many respects. The opinion in that case, so far as it was not upon points necessarily before the court, is open to examination. Neither the words of the law, nor the form of the bond, make any exception of the case of the sale and transfer of the vessel, before her return. If, therefore, a sale is made, it must be subject to the terms of the law; and although the vessel may not be liable to seizure upon the high seas, yet upon her return to the United States, it became the duty of the custom-house officer to seize her. The law ought to be so construed as to carry into effect the object intended. That object was, to cut off all intercourse with France, and by that means compel her to do justice to the United States. But if this provision of the law is to be so easily eluded, France will be in a better *situation than before, for she will receive her usual supplies, and we shall be weakened by the loss of the carrying trade. [*503

Bayard, contrà, was stopped by the court.

Marshall, Ch. J.—If the question is not involved, whether probable cause will justify the seizure and detention; if there are no facts in the pleadings which show a ground to suspect that there was no *bonâ fide* sale and transfer of the vessel, the court does not wish to hear any argument on

the part of the defendant in error. It considers the point as settled by the opinion given in the case of the *Charming Betsy*, with which opinion the court is well satisfied. The law did not intend to affect the sale of vessels of the United States, or to impose any disability on the vessel, after a *bonâ fide* sale and transfer to a foreigner.

Judgment affirmed.

Randolph *v.* Ware.

Principal and agent.

A promise by a merchant's factor, that he would write to his principal to get insurance done, does not bind the principal to insure.

This was an appeal from a decree of the Circuit Court for the district of Virginia, which dismissed the complainant's bill in equity.

Ware, the executor of Jones, surviving partner of the house of Farrell & Jones, British merchants, had, in the same court, at June term 1800, obtained a decree against William Randolph, administrator *de bonis non*, with
*504] the will annexed, of Peyton Randolph, for a large *sum of money, with liberty to William Randolph to file this bill against Ware, for relief in regard to fifty hogsheads of tobacco, shipped, in September 1771, in the ship Planter, Captain Cawsey, and consigned to Farrell & Jones ; a credit for which had been claimed, but was by the decree disallowed. The tobacco never came to the hands of Farrell & Jones, having been lost at sea without being insured.

The appellant contended, that he was entitled to a credit for the customary insurance price of the tobacco, viz., 10*l.* per hogshead, with interest.

1. Because, from the usage of the trade between the Virginia planter and the British merchant, it was the duty of the latter to have insured the tobacco, and that having failed so to do, he is responsible as insurer.

2. Because Thomas Evans, the appellee's agent for soliciting consignments and managing this business, having promised to get the insurance done, it is equivalent to the promise of his principals, Farrell & Jones, and they are responsible for the consequences.

3. It was contended, that the claim, under all circumstances disclosed in the record, if not fit to be decreed, according to the prayer of the bill, appears to be of a nature proper to be decided in a court of law, in pursuance of an order of the court of equity, and therefore, that the decree should be reversed, and an order made, directing a trial at law, to ascertain whether the appellee is not liable to the appellant for the value of the tobacco, and the interest from the month of September 1772, as standing in the place of insurer thereof.

C. Lee, for the appellant.—1. The common course of the trade was, for the British merchant to cause insurance to be made, upon notice of the shipment of tobacco ; and it appears by the letters exhibited in this record, that Farrell & Jones did, without any special orders, cause insurance to be made
*505] on some of the tobacco shipped by Randolph's executors. *Thus, in their letter of August 1st, 1769, to Richard Randolph, they say, "We have made the following insurance on the True Patriot, for the two estates,