Carolina, made by the original Spanish owner, and the case has been submitted on the evidence and the grounds, taken in the argument below.

There is no doubt, that the property was Spanish, nor that the privateer La Popa was commissioned as a cruiser, whilst the Province of Carthagena had an organized government; and there is the fullest evidence, that her armament and equipment was unaffected by any charge of having been made in violation of our laws. The only question in the case is, whether an original Spanish owner is entitled to the aid of the courts of this country, to restore to him property of which he has been dispossessed by capture, under a commission derived from the revolted colonies? and this question is considered, by this court, as having *been fully decided by the principles assumed in the case of the *United States* v. *Palmer*, at the last term [*502 (3 Wheat. 610), and by the decisions in the cases of *The Estrella* (*ante*, p. 298), and *The Divina Pastora* (*ante*, p. 52), at the present term.

War notoriously exists, and is recognised by our government to exist, between Spain and her colonies. This is an appeal to the highest of all tribunals on a question of right. No neutral nation can act against either, without taking part with the other in the war. All that the law of nations requires of us, is strict and impartial neutrality. And no friendly nation ought to demand of the courts of this country to do an act which may involve it in a war with the victor. Our duty is, where the property of either is brought innocently within our jurisdiction, to leave things as we find them; much more, to restore them to that state from which they have been forcibly removed by the act of our own citizens. The treaty with Spain can have no bearing upon the case, as this court cannot recognise such captors as pirates, and the capture was not made within our jurisdictional limits. In those two cases only, does the treaty enjoin restitution.

Decree affirmed, with costs.

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*Wheaton *v.* Sexton's Lessee. [*503

Judicial sale.—Fraudulent conveyance.

A sale, under a *fi. fa.*, duly issued, is legal, as respects the purchaser, provided the writ be levied upon the property, before the return-day, although the sale be made after the return-day, and the writ be never actually returned.[1]

A deed made upon a valuable and adequate consideration, which is actually paid, and the change of property is *bonâ fide*, or such as it purports to be, cannot be considered as a conveyance to defraud creditors.[2]

Error to the Circuit Court for the District of Columbia. This was an action of ejectment, brought in the court below, by the defendant in error, Sexton, against the plaintiff in error, Wheaton, to recover the possession of a parcel of ground in the city of Washington, being lot number 17, in square 254, containing 8254¾ square feet, with the buildings thereon.

At the trial, the plaintiff produced and read in evidence to the jury, a deed of bargain and sale of the premises from John P. Van Ness and wife, and C. Stephenson, to Sally Wheaton, the wife of the defendant in ejectment; and a deed from one Watterson to the same, of the same premises;

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[1] S. P. McNitt *v.* Turner, 16 Wall. 365.

[2] Crane *v.* Hardy, 1 Mich. 56.

a writ of *fi. fa.* against the goods, chattels, lands and tenements of the defendant, issued from the court below, upon a judgment obtained by Sexton against Wheaton, with a return thereon by the marshal: "December the *504] 30th, 1815, sold the real property *in square 254, to Francis F. Key, Esq. for three hundred dollars ; sales of real property in square 253, countermanded by said Key ; sold personal property," &c. The writ was never actually returned, but for the first time, produced by the marshal in court, at the trial of this cause. The sale took place after the return-day mentioned in the writ. The plaintiff also produced and read in evidence a deed from the marshal to the plaintiff in ejectment, dated 30th May 1816, he having been the highest bidder, by Key, his attorney.

The defendant's counsel prayed the court to instruct the jury, that the lessor of the plaintiff could not recover. The court refused to give such instruction, but instructed the jury, that if they should be of opinion, from the evidence, that the writ of *fi. fa.* was levied by the marshal, upon the property in question, before the return-day of the writ, it was lawful for him to sell the same, under and by virtue of said writ, and that the facts respecting the said sale might be proved by parol. To which instruction, the defendant excepted.

The defendant, to show the legal title of the premises to be in one E. B. Caldwell, and not in the lessor of the plaintiff, gave in evidence a deed from the defendant in ejectment to said E. B. Caldwell, made and executed on the 23d of December 1811, conveying the premises to the said E. B. Caldwell, reciting the deeds from Van Ness, &c., and that it was understood, at the time of making those deeds, that the property should be absolutely for the sole use of said Sally Wheaton, &c., but it had been apprehended and *505] suggested, that the said Joseph Wheaton might *have a life-estate therein, to carry into effect the original intent of the conveyances, and for the consideration of five dollars, paid to him by E. B. Caldwell, the said Joseph Wheaton conveyed to him all his right, title and interest, in trust for the use of said Sally Wheaton. Whereupon, the court instructed the jury, that if the jury should be of opinion, from the evidence, that the said deed was made by the said Joseph Wheaton, without a valuable consideration therefor, *or* was made by him, with intent to defeat and delay, or defraud his creditor, the said Sexton, of his debt aforesaid, then the said deed was void in law, as to the said Sexton : to which the defendant excepted.

The jury found a verdict, and the court rendered a judgment for the lessor of the plaintiff. The cause was then brought to this court by writ of error. The cause was submitted, without argument.

March 12th, 1819. Johnson, Justice, delivered the opinion of the court. —The suit below was ejectment, and the defendant in this court recovered, under a title derived from a sale by the marshal of this district. The marshal's deed conveys the life-estate of Wheaton in the lands in question. And the plaintiff below proved the title in the defendant's wife, under conveyances executed after marriage. The defence set up was a conveyance executed by Wheaton, to a trustee, for the sole and separate use of his wife and *506] her heirs, and the deed purports to have been executed in consideration of, and to carry into *effect an original intention in the parties,

that the conveyances to his wife should inure to the same uses, although the conveyances in law operate otherwise. But there is no other evidence of this fact than what is contained in the deed, and it was executed but two days before the judgment.

At the trial, two bills of exception were taken ; the first of which brings up the question, whether a sale by the marshal, after the return-day of the writ, was legal. The court charged that it was, provided the levy was made before the return-day. And on this point, the court can only express its surprise that any doubt could be entertained. The court below were unquestionably right in this instruction. The purchaser depends on the judgment, the levy and the deed. All other questions are between the parties to the judgment and the marshal. Whether the marshal sells, before or after the return, whether he makes a correct return, or any return at all, to the writ, is immaterial to the purchaser, provided the writ was duly issued, and the levy made before the return.

The second bill of exception brings up the question, whether the deed to Caldwell, in trust for Mrs. Wheaton, was not fraudulent and void as against creditors. In ordinary cases, a voluntary conveyance of a man, to the use of his wife, when circumstanced as Wheaton, was, would unquestionably be void. But it is contended, that, in this instance, a court of equity would have decreed Wheaton to make the conveyance he did execute, and therefore, it was not a voluntary conveyance. That there are cases in *which the court would lend its aid to protect the acquisitions of a wife from [*507 the creditors of a husband, may well be admitted ; but on this case, it is enough to observe, that if the husband may, upon his own recital, make out such a case, there would no longer exist any difficulty in evading the rights of creditors.

Yet this court is not satisfied, that the court below has given an instruction that comports with the law of the case. The instruction of the court, given on motion of the plaintiff below, is, that the deed was void in law, " if it was made by the said Joseph Wheaton, without a valuable consideration therefor, *or* was made by him with intent to defeat, delay or defraud his creditors." Had the conjunction *and* been substituted in this instruction for *or*, it would have been entirely unimpeachable ; but as it now reads, it must mean, that even had a valuable consideration been paid, if the deed was made, with intent to defeat creditors, it was void. We know of no law which avoids a deed, where a valuable (by which, to a general intent must also be understood adequate) consideration is paid, and the change of property be *bonâ fide*, or such as it professes to be. Of such a contract, it cannot be predicated, that it is with intent to defeat or defraud creditors, since, although the property itself no longer remains subject to the judgment, a substitute is furnished by which that judgment may be satisfied. Nor is it any impeachment of such a deed, that it is made to the use of the family of the maker. The trustee, in that case, becomes the benefactor, and not the husband. It is *not a provision made by him for his [*508 family, but by another.

Although, from anything that appears in this cause, this court can see no ground on which the jury could have found otherwise than they did, yet if the instruction was erroneous, and to the prejudice of the defendant below,

as this court cannot estimate its influence on the minds of the jury, the judgment must be reversed.

Judgment reversed.

Sergeant's Lessee *v.* Biddle *et al.*

Depositions.

Depositions taken according to the proviso in the 30th section of the judiciary act of 1789, under a *dedimus potestatem*, "according to common usage, when it may be necessary to prevent a failure or delay of justice," are, under no circumstances, to be considered as taken *de bene esse*, whether the witnesses reside beyond the process of the court or within it; the provisions of the act relative to depositions *de bene esse* being confined to those taken under the enacting part of the section.

March 9th, 1819. This cause was argued by *Martin* and *C. J. Ingersoll*, for the plaintiff, and by *Hopkinson* and *Sergeant*, for the defendants. The facts are fully stated in the opinion of the court.

March 12th. Washington, Justice, delivered the opinion of the court.—
*509] *The only question certified by the circuit court for the district of Delaware to this court is, whether certain depositions, taken under a commission issued from that court to Philadelphia, could, under the circumstances of the case, be given in evidence to the jury?

This question arises out of the following facts: On the 25th of October 1817, a consent rule was entered in this case, "for a commission to issue to take depositions on both sides, to be directed to Thomas Bradford, jr., and William J. Duane, of Philadelphia; interrogatories to be filed on ten days' notice." The agreement of the counsel, under which this rule was entered, was filed in court, on the 11th of November, of the same year. On the 27th of October 1817, an *ex parte* rule was entered, on the motion of the defendants' counsel, "for a commission to issue to the city of Philadelphia, on the part of the defendants, to be directed to George Vaux and William Smith, or either of them, commissioners on the part of the defendants, on ten days' notice of filing interrogatories, with liberty to the plaintiff's counsel to name a commissioner or commissioners, if they should choose to do so, at any time before issuing the commission."

After the counsel for the lessor of the plaintiff had opened his case, and gone through his evidence, the counsel for the defendants, having opened his case, offered to give in evidence to the jury sundry depositions of witnesses, taken under a commission to Philadelphia, bearing date the 31st of
*510] October 1817, directed to George Vaux and William Smith, or *either of them, and to George M. Dallas and Richard Bache, or either of them. This evidence was objected to by the plaintiff's counsel, on the ground, that the depositions so taken were to be considered, in point of law, as taken *de bene esse*. In support of this evidence, the defendants stated, and the opposite counsel admitted, that previous to the execution of this commission, an agreement had been entered into, that the same should be executed by George M. Dallas, one of the commissioners on the part of the plaintiff, and George Vaux, another of the commissioners on the part of the defendants; and that it was further agreed, and so indorsed on the commission, that the said George Vaux might be permitted to take a solemn affirmation, instead of an oath, and that the commissioners who should act,