

EVANS *v.* PHILLIPS.*Error.*

A writ of error will not lie on a judgment of nonsuit.

ERROR to the Circuit Court of New York.

D. B. Ogden moved to dismiss the writ of error in this case, upon the ground, that the plaintiff had submitted to a nonsuit in the court below, upon which no writ of error will lie.

THE COURT directed the writ of error to be dismissed.

*74] *JUDGMENT.—This cause came on to be heard, on the transcript of the record; on consideration whereof, it is adjudged and ordered, that the writ of error be, and the same is, hereby dismissed, with costs, the plaintiff having submitted to a nonsuit in the circuit court. (*a*)

VAN NESS *v.* BUEL.*Rights of seizing officer.*

A collector of the customs, who makes a seizure of goods for an asserted forfeiture, and before the proceedings *in rem* are consummated by a sentence of condemnation, is removed from office, acquires an inchoate right, by the seizure, which, by the subsequent decree of condemnation, gives him an absolute vested right to his share of the forfeiture, under the collection act of the 2d of March 1799.¹

ERROR to the Circuit Court of Vermont. This was an action of *assumpsit*, in which the defendant in error, Buel, declared against the plaintiff in error, Van Ness, on the money counts, and gave evidence that the sums of money, for the recovery of which this suit was brought, were the proceeds of a moiety of a certain seizure of goods, as forfeited, which seizure was made in the district of Vermont, on the 6th day of July 1812, while the plaintiff below *75] was collector of the *customs for said district, &c., which goods were libelled, in September, 1812, in the district court, and condemned at the October term of the circuit court, 1813. That the plaintiff below was appointed collector on the 16th of March 1811, and remained in office until the 15th of February 1813, when he was removed from office by the president, and the defendant below appointed to the same office; and received the proceeds of the goods condemned. That various other parcels of goods were seized and libelled, while the plaintiff below was collector, but were condemned after his removal from office, and the proceeds received by the defendant below.

The court below charged the jury, that the defendant in error was entitled to recover a moiety of the seizures so made by him, during his continuance in office, and condemned after his removal. The jury found a verdict, and judgment was rendered for the plaintiff below; and a bill of exceptions having been taken to the charge of the court below, the cause was brought by writ of error to this court. The cause was submitted, without argument.

(*a*) See *Box v. Bennett*, 1 H. Bl. 432; *Kempland v. Macauley*, 4 T. R. 436.

¹ *Buel v. Van Ness*, 8 Wheat. 313.

Williams v. Peyton.

STORY, Justice, delivered the opinion of the court.—This case differs from that of *Jones v. Shore's Executors*, in two circumstances; first, that this is the case of a seizure of goods for an asserted forfeiture; and secondly, that before the proceedings *in rem* were consummated by a sentence, the collector who made the seizure was removed from office. In our *judgment, neither of these facts affords any ground to except this case [*76 from the principles which were established in *Jones v. Shore's Executors*. It was there expressly held, that the collector acquired an inchoate right by the seizure, which, by the subsequent decree of condemnation, gives him an absolute vested title to his share in the forfeiture. (a) Without overturning the doctrine of that case, the present is not susceptible to argument; and we, therefore, unanimously affirm the decision of the circuit court.

Judgment affirmed.

*WILLIAMS *et al.* v. PEYTON'S Lessee.

[*77

Execution of power—Tax sale.

In the case of a naked power, not coupled with an interest, the law requires that every pre-requisite to the exercise of that power should precede it.

The party who sets up a title, must furnish the evidence necessary to support it; if the validity of a deed depend on an act *in pais*, the party claiming under it is as much bound to prove the performance of the act, as he would be bound to prove any matter of record on which the validity of the deed might depend.

In the case of lands sold for the non-payment of taxes, the marshal's deed is not even *prima facie* evidence, that the pre-requisites required by law have been complied with; but the party claiming under it must show positively that they have been complied with.

This case was argued by *Jones* and *Talbot*, for the plaintiffs in error, and by *Taylor*, for the defendant in error.

The opinion of the court was delivered by MARSHALL, Ch. J.—This is an ejectment brought in the Circuit Court for the district of Kentucky, by

(a) Under the collection act of the 2d of March 1799, c. 128, and other laws adopting the provisions of that act, the 89th section of which enjoins the collector, within whose district a seizure shall be made or forfeiture incurred, to cause suits for the same to be commenced without delay, and prosecuted to effect; and authorizes him to receive from the court, in which a trial is had, or from the proper officer thereof, the sums so received, after deducting the proper charges, and on receipt thereof, requires him to pay, and distribute the same without delay, according to law, and to transmit, quarterly or yearly, to the treasury, an account of all the moneys received by him for fines, penalties and forfeitures, during such quarter. The 91st section declares, that all fines, penalties and forfeitures, recovered by virtue of the act, and not otherwise appropriated, shall, after deducting all proper costs and charges, be disposed as follows: "one moiety shall be for the use of the United States, &c., paid into the treasury thereof, by the collector receiving the same; the other moiety shall be divided between, and paid in equal proportions, to the collector and naval officer of the district, and surveyor of the port, wherein the same shall have been incurred, or to such of the said officers as there may be within the same district; and in districts where only one of the said officers shall have been established, the said moiety shall be given to such officer." Then follow provisions concerning the distribution, where the recovery has been had in pursuance of information given by an informer, or by any officer of a revenue-cutter.