no provision made for its payment in the annual budget, and the supreme court, after dealing with all the questions involved in the acts of 1870 and 1876, in their mandate prescribe the form and terms of the writ and the time of the levy of the tax. That mandate will be followed in this case.

So far as this proceeding is concerned, the defendant must be credited with the amount seized under the *fieri facias*, namely, the sum of $40,000. For the balance of the judgment, with interest, the relator is entitled to a writ of *mandamus* as prayed for.

PRYZBYLOWICZ *v.* MISSOURI RIVER R. CO.

(*Circuit Court, D. Kansas.* November, 1881.)

1. CONSTITUTIONAL LAW — COMPENSATION FOR PRIVATE PROPERTY TAKEN FOR PUBLIC USE.
   The payment of compensation to the owner of private property taken for a public use is a condition precedent to any right divesting the owner of his possession, and a judgment in his favor for the value of the land, unpaid and unsecured, is not compensation made, and does not justify the dispossessing the owner of his property.
2. SAME—ESTOPPEL—ACQUIESCENCE OF OWNER.
   The owner of land may, by his own act, estop himself from demanding actual payment of compensation as a condition precedent to the taking for public uses, and if he expressly consents, or, with full knowledge of the taking, makes no objection, but permits a public corporation to enter upon his land and expend money, and carry into operation the purposes for which it is taken, he may not then be permitted to eject the parties from possession for want of payment of the compensation.
3. SAME—RAILROAD TAKING LAND.
   Where the owner of land has knowledge that a railroad company has taken possession of his land and makes no objection, but permits the company to build its road and operate its trains over the land, and exercises all the rights appertaining to a right of way for public uses for a period of 10 or 12 years, he or his grantee cannot be permitted to eject the company from the land.

Motion for New Trial.

FOSTER, J. The constitution of the United States provides that private property shall not be taken for public use without just compensation, etc. The constitution of this state contains the wise and salutary provision that right of way shall not be taken by any corporation without full compensation therefor be first made, etc. And the supreme court of this state, and the courts of other states having a like provision, hold that the payment of this compensation is a condition precedent to any right divesting the owner of his possession; that a judgment in his favor for the value of the land, unpaid and unsecured, is not compensation made, and does not justify the dispossessing the owner of his property. With this rule of law we are in full accord, and regard it as based upon the highest and most sacred principles of justice.

But going hand in hand with this doctrine is another rule of law, which is also well grounded in justice and right, and which is recognized and enforced by the courts, and that is that the owner of the land may, by his own act, estop himself from demanding actual payment of the compensation as a condition precedent to the taking for public uses. If the owner gives license, either express or fairly implied; if he expressly consents, or, with full knowledge of the taking, makes no objection, but permits the public corporation to enter upon and expend money and carry into operation the purposes for which it is taken,—he may not then be permitted to eject the parties from the possession for want of payment of the compensation.

The plaintiff in this case has no higher or greater rights in law or equity than Mrs. Mills, his grantor, would have if she was the plaintiff in this action. And if his grantor would have been estopped, then this plaintiff is estopped.

If Mrs. Mills had knowledge that this railroad company had taken possession of this land, and made no objection, but permitted the company to build its road and operate its trains over this land, and exercise all the rights appertaining to a right of way for public uses for a period of 10 or 12 years, she cannot now be permitted to eject the company from the land.

I have found, from all the evidence in this case, that Mrs. Mills did have this knowledge, and did acquiesce in the possession of the railroad company. It is true, there was no direct and positive evidence as to whether she did or did not have such knowledge and make such acquiescence, but, in the absence of any evidence on this point, it would not be a rash presumption to hold that an open, palpable, and notorious possession by the railroad company for a period of so many years would not likely occur without knowledge of the owner, living much of the time in the vicinity of the land. But in addition to this, in the condemnation proceedings this land is mentioned as a part of the right of way of the said road. Mr. Mills, her husband, gave his written consent that the road might pass through his land, (presumably this land of his wife.)

Mrs. Mills had relatives living in Leavenworth, and visited there herself. She also had an agent there who looked after her land and paid taxes on it, as I remember the evidence, and she probably had traveled over this road in going to or from Leavenworth. From all these facts and circumstances, it requires greater credulity than I am possessed of to believe she had no knowledge of the possession of the railroad company.

On these facts, and the law applicable thereto, this plaintiff cannot recover, and the motion for a new trial must be overruled.

NICHOLS, SHEPHERD & CO. *v.* KNOWLES.

(*Circuit Court, D. Minnesota.* June, 1881.)

1. APPLICATION OF VOLUNTARY PAYMENTS.
   The rule as to voluntary payments is that the debtor may direct the application of such payments upon one of several debts due from him to the creditor.
2. VOLUNTARY PAYMENT DEFINED.
   A voluntary payment, within the meaning of this rule, is one made by the debtor on his own motion, and without any compulsory process. A payment made upon execution does not fall within the rule.
3. CHATTEL MORTGAGE FORECLOSURE—STATUTE OF MINNESOTA.
   When, under the statute of Minnesota, a chattel mortgage is placed in the hands of the sheriff, with orders to seize and sell the mortgaged property for the purpose of paying the mortgage debt, the sale is made by virtue of legal proceedings, and the proceeds of the sale are in no sense voluntary payments, the application of which the debtor is authorized to direct.
4. SAME—APPLICATION OF PROCEEDS.
   Where the mortgage foreclosed does not direct how the proceeds of the sale of the mortgaged property shall be applied, and there are no circumstances from which it can be inferred that a *pro rata* application was intended by the parties, and some of the notes are secured by the indorsement of a third party as well as by the chattel mortgage, from which it would be inferred that the parties intended to apply the proceeds of the sale of the mortgaged property first to the notes not otherwise secured, so as to give the creditor the full benefit of all of his security, the creditor will have the right to apply the proceeds to the payment of any of the debts secured by the mortgage.

Action on Promissory Notes.

John W. Willis, for plaintiff.

C. D. O'Brien and *J. C. M. Searles*, for defendant.

MCCRARY, J. The rule as to voluntary payments is that the debtor may direct the application of such payments upon one of several debts due from him to the creditor. *Tayloe* v. *Sandiford*, 7 Wheat. 13. Does this rule apply to the present case? A voluntary payment, within the meaning of this rule, is one made by the debtor on his own motion, and without any compulsory process. A payment made upon execution does not fall within the rule. When, under the statute of Minnesota, a chattel mortgage is placed in the hands of the sheriff, with orders to seize and sell the mortgaged property for the purpose of paying the mortgage debt, the sale is made by virtue of legal proceedings, and the proceeds of the sale are in no sense voluntary payments, the application of which the debtor is authorized to direct.

If the debtor could not direct the application of the payments, could the creditor? It is strongly urged by counsel for defendant that neither party could direct a particular application, and that the law will apply the proceeds of the sale *pro rata* upon all the notes. Inasmuch, however, as the mortgage does not direct how the proceeds of the sale of the mortgaged property shall be applied, and since there are no circumstances from which it can be inferred that

à pro rata application was intended by the parties, I hold that the creditor had the right to apply the proceeds to the payment of any of the debts secured by the mortgage. *Gaston* v. *Barney*, 11 Ohio St. 506. This view is much strengthened by the fact that some of the notes were secured by the indorsement of a third party as well as by the chattel mortgage, from which it may be inferred that the parties intended to apply the proceeds of the sale of mortgaged property first to the notes not otherwise secured, so as to give the creditor the full benefit of all his security. *Stamford Bank* v. *Benedict*, 15 Conn. 437; *Martin* v. *Pope*, 6 Ala. 532; *Mathews* v. *Switzler*, 46 Mo. 301; *Field* v. *Holland*, 6 Cranch, 8; *Schuelenburg* v. *Martin*, 1 McCrary, 348; [S. C. 2 FED. REP. 747.]

Judgment for plaintiff.

The rule as to the application of voluntary payments is that the debtor or party paying the money may, if he chooses, direct its appropriation; if he fail, the right devolves upon the creditor; if he fail, the law will make the application according to its own notions of justice.[1] It is generally conceded that this doctrine has been borrowed from the civil law;[2] but this has been denied;[3] and, without doubt, in its application to particular cases by the courts in England and this country, the rules of the civil law have been much relaxed.[4]

The direction by the debtor as to how the payment shall be applied, need not be express, but may be inferred from circumstances;[5] but if he does not exercise his right to direct the application of the payment, and it is not fairly inferred from the circumstances under which the payment was made, the money paid becomes the absolute property of the creditor, and he may apply it as he chooses,[6] provided he does not, without the debtor's consent, appropriate the payment to an illegal or invalid claim,[7] such as a claim for usurious interest,[8] or liquor sold in violation of law,[9] or a note made without consideration to hinder and defraud creditors.[10] If, however, the debtor consent to the appropriation of the payment to an illegal item, he cannot revoke such consent;[11] nor will a court of equity, under such circumstances, withdraw a payment so

1 U. S. v. Kirkpatrick, 9 Wheat. 720; U. S. v. January, 7 Cranch, 572; Field v. Holland, 6 Cranch, 8; U. S. v. Eckford, 1 How. 250; Jones v. U. S. 7 How. 681; Gordon v. Hobart, 2 Story, C. C. 243; Cremer v. Higginson, 1 Mason, 338; Mayor, etc., Alexandria v. Patten, 4 Cranch, 317; Nat. Bank v. Merchants' Nat. Bank, 94 U. S. 439; Stone v. Seymour, 15 Wend. 19; Pickering v. Day, 2 Del. Ch. 333; Youmans v. Heartt, 34 Mich. 401; Nat. Bank v. Bigler, 83 N. Y. 53; Baker v. Stackpoole, 9 Cow. 420; Chester v. Wheelright, 15 Conn. 562; Washington Bank v. Presscott, 20 Pick. 343; Whitaker v. Groover, 54 Ga. 174; Jones v. Williams, 39 Wis. 300; Lee v. Early, 44 Md. 84; Bell v. Radcliff, 32 Ark. 645; Moore v. Kirk, 78 Pa. St. 97; Stewart v. Hopkins, 30 Ohio St. 502; Meggott v. Mills, 1 Ld. Raymond, 286; Simson v. Ingham, 2 Barn. & C. 65; Clayton's Case, 1 Mer. 586-610; Brooke v. Enderby, 2 Brod. & B. 70. See, generally, 2 Pars. Cont. 629-635; 2 Whart. Cont. §§ 923-934.

2 Pattison v. Hull, (note,) 9 Cow. 773; STORY, J., in Gass v. Stinson, 3 Sumn. 110; Milliken v. Tufts, 31 Me. 500. See, also, 3 Amer. Law Reg. 705; 1 Amer. Law Mag. 31.

3 1 Amer. Lead. Cas. *294-295.

4 Moss v. Adams, 4 Ired. Eq. 42. Consult 1 Domat, B. 4, tit. 1, § 8; 1 Evans' Pothier, (3d Amer. Ed.) 422-429; Wood, Civil Law, 293; 2 Bell's Com. 535.

5 Tayloe v. Sandiford, 7 Wheat. 13; Mayor, etc., v. Patten, 4 Cranch, 317; Sawyer v. Tappan, 14 N. H. 356; Fowke v. Bowie, 4 Har. & J. 566; Stone v. Seymour, 15 Wend. 19; Hanson v. Rounsavell, 74 Ill. 238.

6 Nat. Bank v Bigler, 83 N. Y. 53; Cremer v. Higginson, 1 Mason, 323; 1 Amer. Lead. Cas. *294.

7 Caldwell v. Wentworth, 11 N. H. 431; Ayer v. Hawkins, 19 Vt. 26; Bancroft v. Dumas, 21 Vt. 456; Rohan v. Hanson, 11 Cush. 44; Parchman v. McKinney, 12 Smedes & M. 631.

8 Pickett v. Merchants' Nat. Bank, 32 Ark. 346.

9 Phillips v. Moses, 65 Me. 70.

10 McCausland v. Ralston, 12 Nev. 195.

11 Brown v. Burns, 67 Me. 535.

made and actually applied.[1] After the right of appropriation has passed to the creditor, because of a failure on the part of the debtor to direct the appropriation to any specific account, the creditor need not obtain the consent of the debtor in appropriating it to any valid claim;[2] and he may even so apply it as to prevent some of the debts or items from being barred by the statute of limitations;[3] but he cannot apply it to a debt not due in preference to a debt actually due.[4] Where a creditor holds two claims—one in a representative capacity, as trustee or executor, and one in his individual capacity—he cannot apply a payment made by the debtor, without designating upon which account he pays it, to his individual claim in preference to the claim due him in his representative character.[5] Whether the creditor has actually made an appropriation of a payment to a particular account, and when, may be inferred from all the circumstances of the case;[6] and he may reserve his right to appropriate a payment to one of several accounts, until called upon by the debtor to make such appropriation; but, so far as the interests of third persons may be affected, he must act within a reasonable time.[7] Where, however, a creditor has made an appropriation of a payment to a particular debt, and so informed the debtor, he cannot afterwards change such appropriation, and apply it in satisfaction of another claim;[8] and neither of the parties can make the appropriation after a controversy upon the subject has arisen between them; and, *a fortiori*, not at the trial.[9]

Where neither debtor nor creditor makes the application, the law will make it, "according to its own notion of the intrinsic equity and justice of the case,"[10] and, as this depends so much upon the circumstances of each case, it is impossible to lay down any general rule; but the following propositions are settled: (1) The payment will be applied in satisfaction of the debt whose security is most precarious.[11] (2) To a debt secured by mortgage rather than to a simple account.[12] (3) In extinguishment of a certain rather than a contingent liability.[13] (4) To extinguish debts prior in time.[14] (5) To extinguish an existing debt, rather than one to become due.[15]

St. Paul, Minn., August 28, 1883. ROBERTSON HOWARD.

1 Feldman v. Gamble, 26 N. J. Eq. 494.

2 McLendon v. Frost, 57 Ga. 448.

3 Jackson v. Burke, 1 Dill. 311; Williams v. Griffith, 5 Mees. & W. 300; Waugh v. Cope, 6 Mees. & W. 824; Ashby v. James, 11 Mees. & W. 542; Murphy v. Webber, 61 Me. 478; Bancroft v. Dumas, 21 Vt. 456; Mills v. Fowkes, 5 Bing. N. C. 455; Brown v. Burns, 67 Me. 535; Pond v. Williams, 1 Gray, 630; Ramsay v. Warner, 97 Mass. 8. Compare Moniteau Bank v. Miller, 73 Mo. 187; Wood v. Wylds, 6 Eng. (Ark.) 754; Burn v. Boulton, 2 C. B. 476.

4 Bobe's Heirs v. Stickney, 36 Ala. 495; Kidder v. Norris, 18 N. H. 534.

5 Cole v. Trull, 9 Pick. 325; Scott v. Ray, 13 Pick. 361. See Fowke v. Bowie, 4 Har. & J. 56.

6 Shaw v. Picton, 4 Barn. & C. 716; Frazer v. Bunn, 8 Car. & P. 704; Williams v. Griffith, 5 Mees. & W. 340; Allen v. Culver, 3 Denio, 284; Brady's Adm'r v. Hill, 1 Mo. 315; Starrett v. Barber, 20 Me. 457.

7 Simson v. Ingham, 2 Barn. & C. 65; Seymour v. Marvin, 11 Barb. 80; Dorsey v. Wayman, 6 Gill, 59; Bosanquet v. Wray, 6 Taunt. 597; Mayor, etc., v. Patten, 4 Cranch, 317; and see Emery v. Tichout, 13 Vt. 15; Smith v. Loyd, 11 Leigh, 517; Stamford Bank v. Benedict, 15 Conn. 438; Heilbron v. Bissell, 1 Bail. Eq. 435.

8 Offutt v. King, 1 McArthur, 312; Page v. Patton, 5 Pet. 304; Cremer v. Higginson, 1 Mason, 337; Hilton v. Burley, 2 N.H. 193; McMaster v. Merrick, 41 Mich. 505; Seymour v. Marvin, 11 Barb. 80.

9 U. S. v. Kirkpatrick, 9 Wheat. 720; Nat. Bank v. Mechanics' Nat. Bank, 94 U. S. 437.

10 Cremer v. Higginson, 1 Mason, 338; Pickering v. Day, 2 Del. Ch. 333; Nat. Bank v. Nat. Mechanics' Bank, 94 U. S. 437.

11 Field v. Holland, 6 Cranch, 8; Stamford Bank v. Benedict 15 Conn. 437.

12 Pattison v. Hull, 9 Cow. 747; Gwinn v. Whitaker, 1 Har. & J. 754; Neal v. Allison, 50 Miss. 175.

13 Bank v. Rosevelt, 9 Cow. 409; Portland Bank v. Brown, 22 Me. 295.

14 Smith v. Loyd, 11 Leigh, 512; Pierce v. Knight, 31 Vt. 701; Fairchild v. Holly, 10 Conn. 175; Pickering v. Day, 2 Del. Ch. 333; Truscott v. King, 6 N. Y. 147; Jones v. Kilgore, 2 Rich. Eq. (S. C.) 65 Jones v. U. S. 7 How. 692; Emery v. Tichout, 13 Vt. 29; Leef v. Goodwin, Taney, 462; U. S. v. Kirkpatrick, 9 Wheat. 720.

15 New Orleans v. Pigniolo, 29 La. Ann. 837; Thomas v. Kelsey, 30 Barb. 273; Baker v. Stackpoole, 9 Cow. 420.

UNITED STATES v. REID and others.

(Circuit Court, S. D. New York. August 2, 1883.)

1. DISTRICT COURT—JUDGMENT AFFIRMED—REV. ST. § 636.
When a judgment of the district court is affirmed in the circuit court, the judgment does not remain in the district court as the judgment of that court, to be enforced by its process, but becomes the judgment of the circuit court.
2. SAME—EXECUTION AGAINST BODIES OF DEFENDANTS—CODE CIVIL PROC. (N. S.) § 549.
An action of debt for the value of merchandise forfeited for entry by means of false and fraudulent practices and appliances, under section 2864 of the Revised Statutes of the United States, is not an action "to recover a fine or penalty," or "an action upon contract, express or implied," within the meaning of section 549 of the Code of Civil Procedure of the state of New York, and consequently an execution against the bodies of the defendant cannot be issued out of a circuit court of the United States in that state for damages and costs.

Motion to Set Aside Execution.

Edwin B. Smith, for defendants.

Elihu Root, U. S. Atty., for plaintiff.

WHEELER, J. This was an action of debt, for the value of merchandise forfeited for entry by means of false and fraudulent practices and appliances under section 1 of chapter 76, Act 1863, (12 St. at Large, 737; Rev. St. § 2864.) The plaintiff recovered judgment in the district court at March term, 1873. On writ of error brought by the defendants the judgment was affirmed in this court at April term, 1879. An execution against the bodies of the defendants has been issued out of this court for the damages, and costs of both courts. The defendants have moved to have the judgment of this court made to be for costs in this court only, and to set aside the execution because it runs against the bodies of the defendants. The judgment of this court appears to have been entirely correct. When the judgment of the district court was affirmed in this court, the judgment did not remain in the district court as the judgment of that court, to be enforced by its process, but became the judgment of this court. Rev. St. § 636. If this were not so, and the form of entering the judgment was clerically wrong, proceedings to correct the record should be taken before the justice who directed the entry. This part of the motion must be denied.

Whether the execution could properly issue in such a case is to be determined by the laws of the state. Rev. St. §§ 990, 991; *Low* v. *Durfee,* 5 FED. REP. 256. The law of the state directly applicable is found in the Code of Civil Procedure, § 549. That section allows process to issue against the body in actions, (1) to recover a fine or penalty; * * * (4) in an action upon contract, express or implied, other than a promise to marry, where it is alleged in the complaint that the defendant was guilty of a fraud in contracting or incurring the liability; and in no other cases claimed to be appli-