

vestigation of the regularity of the judicial proceedings leading to the judgment and sale thereunder of the land in question; and, if satisfied of the validity of the sale, to draw the balance of the money in the hands of the sheriff arising from the sale, after satisfaction of the judgment and costs. Johnson accordingly went to the county seat of Bates county, made the examination, and, being satisfied thereby that plaintiff had lost his land, drew from the sheriff the said balance in his hands, amounting to \$41.10, and, after returning to Kansas City, explained to plaintiff the situation, and gave him his opinion, informing him after the satisfaction of the judgment and costs in the tax suit there remained in the hands of the sheriff the sum of \$51.90; that the sheriff held in his hands another execution against the plaintiff in favor of one George Hale for the sum of \$10.80, to which he had applied that sum in satisfaction; and that he had drawn from the sheriff the remaining sum of \$41.10. This sum Johnson, on the 28th day of September, 1881, paid over to plaintiff, taking his receipt therefor, which is here in evidence. This sum the plaintiff retained in his possession, as his money, at the time of the institution of this suit, on the 5th day of November, 1885, and until the 17th day of October, 1887, when, at the instance of Judge Kregel, before whom the cause was then on trial, he paid it into court as the condition of any judgment herein in his favor. I am unable to perceive how such act of paying this money into court can avail the plaintiff in the action of ejectment. It is a naked possessory action at law, and as such the right of the plaintiff to maintain his action must be determined by the facts and the law as they stood at the time of the institution of suit. No equitable principle is involved. The plaintiff could not strengthen his cause by any subsequent act. If he was estopped or barred of his right of action at the time of the institution of suit at law, it so remains to the end of the litigation. And even if the character of the action were such as to permit of such after restitution, the plaintiff has not done complete equity. He has reaped the benefit of the sale in having a judgment and execution against him satisfied out of the proceeds in favor of said Hale. He yet enjoys the fruit thereof, and has offered no restitution. He also held and enjoyed the residue, \$41.10, for over six years, and then paid into court the principal sum, without interest. This is not equity, if the case is to be decided on equitable principles. It may not be technically correct to call it an estoppel, but, be it estoppel, election, or ratification, I undertake to say, both on reason and authority, that where a party, with full knowledge, such as the plaintiff unquestionably had, of the fact that his land had been taken under execution in a judicial proceeding, and sold by the sheriff, and after he has made examination into the facts and particulars thereof, with all the facts open and accessible to him then as now, takes from the sheriff the balance of the proceeds of sale, appropriates and enjoys it, as did the plaintiff in this case, he has made his election to abide by the result. He has completely ratified the proceeding, and it does not, after the lapse of five years, lie in his mouth to question its validity, especially as against a third party, who has since, in good faith, made last-

ing and valuable improvements thereon. The authorities are all one way on the question. *Vallette v. Bennett*, 69 Ill. 632; *State v. West*, 68 Mo. 229; *Kelly v. Hurt*, 74 Mo. 562; Big. Estop. 574-579; *Pendleton Co. v. Amy*, 13 Wall. 305, 306. So Freeman on Executions (§ 307,) says:

"When defendant, having knowledge of a sale, permits it to stand unquestioned for a long period, his inaction affords a very strong presumption that he acquiesced in the sale. This acquiescence cannot be withdrawn after several years, and when the property has probably passed into the hands of a stranger to the original sale."

The rule is thus stated in 2 Pom. Eq. Jur. § 965:

"When a party, with full knowledge of his rights, and of all the material facts, freely does what amounts to a recognition of the transaction as existing, or acts in a manner inconsistent with its repudiation, or lies by for a considerable time, and knowingly permits the other party to deal with the subject-matter under the belief that the transaction has been recognized, or freely abstains, for a considerable length of time, from impeaching it, so that the other party is reasonably induced to suppose that it is recognized, there is acquiescence, and the transaction, though originally impeachable, becomes unimpeachable in equity. Even where there has been no act or language properly amounting to an acquiescence, a mere delay, a mere suffering of time to elapse unreasonably, may of itself be a reason why courts of equity refuse to exercise their jurisdiction in cases of active and constructive fraud, as well as in other instances. It has always been a principle of equity to discourage stale demands. Laches are often a defense wholly independent of the statute of limitations."

Viewed either at law or in equity, plaintiff's action must fail. Judgment will go for defendant, with leave to plaintiff, after satisfaction of the costs herein, to withdraw the sum of \$41.10 heretofore paid into this court.

MISSOURI PAC. R. CO. v. TEXAS & PAC. R. CO., (LABOY, Intervenor.)¹

(Circuit Court, E. D. Louisiana. June 16, 1888.)

CARRIERS—OF PASSENGERS—INJURIES—BOARDING MOVING TRAIN.

No recovery can be had from a railroad company for injuries received while attempting to board a moving train without the advice or direction of defendant's agents.²

On Exceptions to Master's Report.

The intervenor, William Laboy, sought to recover of the Texas & Pacific Railroad Company damages for injuries received while attempting to board the defendant's train, operated by the receivers of said road. The master reported adversely to the claim, and the intervenor excepted.

¹ Publication delayed by inability to obtain copy of opinion at time of rendition.

² On the general subject of negligence in alighting from and boarding moving trains, see *Covington v. Railroad Co.*, (Ga.) 6 S. E. Rep. 593, and note; *Watson v. Railway Co.*, (Ga.) 7 S. E. Rep. 554 and note.