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The Admiralty Doctrine of Laches

*Uisdean R. Vass**
*Xia Chen***

INTRODUCTION***

This article is an analysis of the admiralty doctrine of laches, the historical development of that doctrine, the changes of the twentieth century, the current law, and a brief policy analysis. Laches is basically an equitable doctrine of time-bar: "Laches is a flexible measure of the time within which a claim in admiralty must be asserted."[1] The doctrine has played an essential role in American admiralty law, because up until recently there were few fixed prescriptive periods for admiralty causes. This article focuses specifically on the doctrine of laches in the admiralty area; it does not address laches as discussed in other areas of federal or state law. However, to the extent that non-admiralty laches cases have had an impact on admiralty law, reference will be made to such decisions.[2]

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*** This article has, as its genesis, research on the issue of laches which Mr. Vass undertook while practicing as an associate with the law firm of Stone, Pigman, Walther, Wittmann & Hutchinson in New Orleans, Louisiana.

1. Florida Bahamas Lines Ltd. v. The Steel Barge "Star 800" Inc., 433 F.2d 1243, 1250 (5th Cir. 1970).

2. For a broader review of laches, see Thomas G. Robinson, Comment, *Laches In Federal Substantive Law: Relation To Statutes Of Limitation*, 56 B.U. L. Rev. 970 (1976). Laches, in the non-admiralty context, arises in areas such as intellectual property, constitutional law, and employment discrimination. Factually, these areas are very different from admiralty. Additionally, cases in such areas do not ascribe the importance admiralty courts do to the passing of analogous prescriptive periods. Still, the essential concept of laches is the same, and there is much legal cross-fertilization. Laches in the laws of the various states is subject to slight variation. Interestingly, Louisiana apparently has no doctrine of laches. *See* Louisiana Civil Code article 3457 ("There is no prescription other than that established by legislation"); Corbello v. Sutton, 446 So. 2d 301, 302 (La. 1984) ("—we hold that the doctrine of laches has no place in this state—").

This article is divided into six parts. Part I covers the initial development of the laches doctrine from the earliest days of the American Republic up until the nineteen twenties. Part II focuses on the impact of *McGrath v. Panama Railroad Co.*, a highly regarded Fifth Circuit case decided in 1924.[3] Part III charts the end of the *McGrath* era from the Supreme Court's decision in *Gardner v. Panama Railroad Co.*, and reviews some further interpretative decisions handed down in the nineteen fifties and sixties.[4] Part IV analyzes some important, recent authorities. Part V is a synopsis of current doctrine. Lastly, Part VI is a brief policy analysis.

Originally, admiralty courts were wary of allowing plaintiffs to delay suits for a period longer than that allowed under analogous state or federal laws. This reticence, perhaps reinforced by conservative decisions such as *McGrath*, continued well into the twentieth century. However, in the wake of *Gardner v. Panama Railroad Co.*, courts have held that the passing of the analogous state or federal prescriptive period serves only to shift the laches burden to the plaintiff. The various appellate circuits, however, have disagreed on the nature of this burden. Most circuits hold that a plaintiff, after the passing of the analogous prescriptive period, need only "show" *either* lack of inexcusable delay *or* lack of prejudice. Other circuits take the opposite position, i.e., that the plaintiff must prove both elements. Still other courts have said that the elements should not be viewed independently, but are, in some sense, *legally* interrelated. There is general agreement that if the analogous prescriptive period has not passed, the defendant has the dual burden of proving both inexcusable delay and lack of prejudice.

In more recent times, courts have tended to focus on the issue of prejudice, more than on delay. Claims of prejudice are now subject to close scrutiny, even in cases where plaintiffs bear the burden of proof. And it is important to understand that the two elements of laches must be *causally related*. To prove laches it must be shown that *but for* the delay, the defendant would not have suffered prejudice. The view of the authors, more fully explained in the policy review section, is that it is difficult to justify the current doctrine of laches on policy grounds, at least with regard to *in personam* actions.

Finally, a few words about the authors' analytical approach, and the nature of the subject matter. There have been hundreds of reported admiralty cases discussing laches since the inception of the Republic. The writers do not attempt a comprehensive coverage of all the jurisprudence. Instead, the evolution of the doctrine is traced through the most important, or the most discursive and interesting, of the authorities.

3. 298 F. 303 (5th Cir. 1926).
4. 342 U.S. 29, 72 S. Ct. 12 (1951).

And laches itself is an ancient equitable defense. Courts rarely make swift radical changes in such ancient doctrines. Innovations in laches have generally been glacial, with legal emphases altering slowly over the years. There is great, though not unlimited, room for judicial discretion.

I. The Initial Development of the Doctrine

Laches is a particular application of the Latin maxim "*vigilantibus non dormientibus aequitas subvenit*" (equity aids the vigilant, not those who sleep on their rights).[5] The word "laches" is itself of Latin origin, deriving from the word "laxus," which means "lax."[6] Laches may have existed in Roman law, though this is not certain.[7] Apparently, laches appeared in English equity, before it emerged in the seventeenth century, as being the rule of prescription in admiralty.[8] Justice Story imported the doctrine into the jurisprudence of the fledgling American Republic in 1815.[9] Possibly the most significant early authority, however, also rendered by Justice Story, was *Willard v. Dorr*,[10] a fascinating case from an historical as well as legal perspective.

In *Willard*, Captain William Dorr, master of the "Jenny," set sail from Boston in 1807 on a voyage to China. After calling into Fiji in May 1808, and disembarking the principal part of the ship's cargo, the vessel continued on its way to China. Because of bad weather, however, and the onset of the monsoon season, the ship put into Guam for additional supplies. Further cargo was on-loaded in Guam, and the "Jenny" again sailed for China. On December 27, 1808, the "Jenny" was captured by a British warship and taken to Calcutta, India for adjudication.[11]

The Vice Admiralty Court in Calcutta ordered the sale of the "Jenny" and her cargo. Captain Dorr remained in Calcutta to handle the legal and other affairs of the ship. After the rendering of an adverse ruling by the Vice Admiralty Court, he filed an appeal, upon which he returned to Boston. His appeal was successful, and restitution of the sale proceeds of the ship, cargo and freight was ordered by the High Court of

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5. Cited in Stone v. Williams, 873 F.2d 620, 623 (2d Cir.), *cert. denied*, 493 U.S. 959, 110 S. Ct. 377, *vacated on other grounds*, 891 F.2d 401 (2d Cir. 1989).

6. James Hanemann, Jr., Comment, *Admiralty: The Doctrine of Laches*, 37 Tul. L. Rev. 811 (1963).

7. *Id.*

8. *Id.* at 812.

9. Brown v. Jones, 4 F. Cas. 404 (C.C.D. Mass. 1815) (No. 2017). *See also* discussion *id.* at 812-13.

10. 3 Mason 161 (1823).

11. In 1808, the British were at war with the French Empire. The United States did not join the war until 1812, however, and so the arrest of the "Jenny" was the seizure of a neutral ship.

Admiralty in Calcutta on May 16, 1811. But before the proceeds could be returned to the rightful owners, war broke out between the United States and Britain, resulting in the suspension of all further proceedings until 1815. Captain Dorr left the United States in 1810 and never returned. He died in 1813. The sale proceeds were not finally received in America until November, 1816.

Captain Dorr's successor brought suit against the owners of the "Jenny" for, *inter alia*, the captain's wages for the voyage as far as Guam or capture, his services in Calcutta, and the cost of his voyage home. There had been a delay in filing suit of more than twelve years from the end of the voyage.

The case appeared before the Federal Circuit Court of Appeals in Boston. Mr. Justice Story rendered the opinion. The court began by noting that "there is [sic] no prescribed limits beyond which, in the exercise of admiralty jurisdiction, the courts of the United States may not take cognizance of suits. . . ."[12] But despite this lack of definitive maritime prescription, Justice Story went on to state: "Where there are no positive bars, presumptions are often indulged, which are equally fatal to a recovery."[13] The court went on to hold that in admiralty a suit should not be allowed after the passing of the appropriate analogous state statute of limitations absent "special circumstances, constituting a just exception. . . ."[14]

The court found that the facts at issue constituted such a "special circumstance." Justice Story noted that Captain Dorr had properly fulfilled his duty to stay in Calcutta until the filing of the appeal and that his right to wages, at least for that part of the voyage beyond Fiji, would have been subject to great controversy prior to the success of his appeal in the High Court of Admiralty. The court further found that the Captain probably never knew of the success of his appeal, and that the circumstances suggested "that the parties were willing to leave the claims of Captain Dorr to be adjusted upon the final event of the appeal. . . ."[15]

Willard was a reasonably liberal application of the laches doctrine. The court might easily have focused on Captain Dorr's failure to sue for his wages up until his ship's arrival in Fiji. Perhaps the court might have looked to when Captain Dorr's successor *found out* about the successful appeal in Calcutta. Indeed, the "just exception" test was *per*

12. *Willard*, 3 Mason at 164.
13. *Id.*
14. *Id.*
15. *Id.* at 168.

se a rather liberal formulation, especially given the *laissez faire* spirit of the times.[16]

The same judge, however, adopted a somewhat more conservative approach in *The Brig Sarah Ann*.[17] In that case, the libelants were insurers of the subject vessel which went aground on the Island of Nantucket in 1828. The owners promptly abandoned the ship, offering title to the insurers. The insurers refused the offer, which, however, was not explicitly withdrawn. Ultimately, the insurers did accept the offer. The master of the "Sarah Ann," however, had previously sold the vessel to a third party, allegedly on the basis of necessity. Libelants were assigned title to the vessel in October, 1828, but suit was not brought until September, 1834.

In consideration of the claimants' laches argument, Justice Story stated:

> Now, Courts of Admiralty, like Courts of Equity, govern themselves in the maintenance of suits by the analogies of the common law limitations; and are not inclined, *unless under very strong circumstances*, to depart from those limitations.[18]

The court was therefore inclined to find the claim time-barred. But in absence of adequate allegations in the record specifying inexcusable delay, it was found that laches could not be applied to the facts at issue.[19] The "very strong circumstances" test of *The Brig Sarah Ann*, however, appears more restrictive than the "just exception" formulation of *Willard v. Dorr*.

The most notable authority on the doctrine of laches from the last century is the United States Supreme Court case of *Young v. The Key City*.[20] This case involved the prosecution of a maritime lien against a vessel which had lost a shipment of the libelant's wheat in transit. Two years after the loss, the Northwestern Packet Company, the ship owner, merged its business with a trade competitor. It was well-known at the

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16. It is interesting to note that the court held that the Captain's successor could recover for Dorr's "services, as master, in effecting the appeal and procuring the necessary papers, and for the necessary promulgation of his stay at Calcutta for these purposes." *Id.* at 167. However, claims for other agency work performed by the Captain in Calcutta were held non-cognizable in admiralty jurisdiction. The same principle, *viz*, that a ship agent's contract with his principal is not cognizable in admiralty, remains, though much criticized, the law to this day. *See, e.g.*, E.S. Binnings, Inc. v. M/V Saudi Rujadh, 815 F.2d 660 (11th Cir. 1987); Outbound Maritime Corp. v. P.T. Indonesian Consortium of Constr. Indus., 582 F. Supp. 1136 (D.Md. 1984).

17. 2 Sum. 206 (1835).

18. *Id.* at 212 (emphasis added).

19. Justice Story found the argument of laches foreclosed because of the same reason in The Barque Chusan, 2 Story 455, 469 (1843).

20. 81 U.S. 653, 14 Wall. 896 (1871).

time of the merger that the owners of the "Key City" were exposed to substantial indebtedness. Accordingly, the new corporation issued stock to the former shareholders of Northwestern Packet Company with the proviso that no dividends would be paid until the former company's debts were met out of the net profits of the new corporation attributable to the Northwestern Packet shareholders.

Libelants delayed filing suit until three and a half years after the loss of the grain, and eighteen months after the merger of the ship owner with its trade competitor. The suit was dismissed on grounds of laches in the United States District Court for the District of Wisconsin, which judgment was affirmed on appeal to the Circuit Court of Appeals. Appeal was then taken to the Supreme Court.

Justice Miller, rendering the opinion of the Court, reversed the dismissal of the libel. After a review of previous authorities, the Court laid down the following principles as governing the scope of laches in the context of maritime liens:

> 1. That while the courts of admiralty are not governed in such cases by any statute of limitation, they adopt the principle that laches or delay in the judicial enforcement of maritime liens will, under proper circumstances, constitute a valid defence [sic].
> 2. That no arbitrary or fixed period of time has been, or will be, established as an inflexible rule, but that the delay which will defeat such a suit must in every case depend on the peculiar equitable circumstances of that case.
> 3. That where the lien is to be enforced to the detriment of a purchaser for value, without notice of the lien, the defence [sic] will be held valid under shorter time, and a more rigid scrutiny of the circumstances of the delay, than when the claimant is the owner at the time the lien accrued.[21]

Justice Miller's third precept directly bore on the gravamen of the claimants' laches argument, which sought to portray the new merged corporation as an innocent successor in title without notice of encumbrances. This ground of prejudice was a dominant factor favoring a finding of laches in many of the earlier cases.[22] The Court, however, found that the principle was not applicable in the instant case, because the new corporation had taken ownership of the "Key City" with

21. *Id.* at 660, 14 Wall. at 898.

22. *See, e.g., The Brig Sarah Ann*, 2 Sum at 211. "Now, I agree to the doctrine stated at the bar, that if an owner stands by, and knowingly suffers an innocent person, without giving him notice of his title, to purchase his property, and to be mislead by his silence in not asserting that title . . . a Court of Equity . . . will treat it as a fraud upon the purchaser, and grant an injunction against the positive assertion of that title." *See also The Barque Chusan*, 2 Story at 468; The Scow Bolivar, 1 Olcott 474 (1847).

adequate notice of the serious extent of the previous owner's indebtedness, and had even engineered a stock plan to cover possible future losses. It was also noted that the new corporation had paid nothing for the assets of the old shipowner.

In the *Key City*, the Supreme Court declined an opportunity to formulate more specific guidelines for the laches analysis. Other than stating that every case depends on its "peculiar equitable circumstance[s]," the Court merely emphasized that "innocent purchaser" prejudice should firmly tilt the balance towards an application of the laches doctrine. Nonetheless, the Court's careful search for, and failure to find, any suffered prejudice served to predate the emphasis which later courts would place on prejudice over delay.

In light of the Supreme Court's failure to lay down more specific guidelines in the *Key City*, subsequent courts found the latitude to fashion varying, and sometimes conflicting, approaches. In *Scull v. Raymond*, for instance, the district court for the Southern District of New York formulated a restrictive interpretation of the laches defense.[23] In *Scull*, the basic dispute arose from a collision in October, 1872, involving the schooner "William Wallace" and the steamer "Zodiac." The owners of the schooner filed an *in rem* action against the "Zodiac" five days later. The arrest of "Zodiac" was lifted after a stipulation had been entered by the New York & New Bern Steam-Ship Company, claimant and part-owner. The *other* part-owner, a New York merchant named Raymond, also appeared as claimant, but did not enter into the stipulation. Final decree was awarded in favor of libelants in 1880, but neither the stipulators nor their sureties could satisfy the judgment. An *in personam* suit was filed against Raymond in April, 1881.

On the facts, the court found that since Raymond had disassociated himself from the operations of the "Zodiac" prior to the time of the collision, he could not be liable for damage caused by the vessel. Additionally, however, the court found that the *in personam* libel, served eight and a half years after the collision, was barred by laches. Citing earlier authorities, the court recognized that there was no statute of limitations in admiralty, but noted that admiralty courts usually apply an appropriate state prescriptive period.[24] Despite finding that the schooner owners had diligently pursued their *in rem* rights from the date of the collision, the court reasoned that: "this has never been held to be a ground for the extension of the statutory period of limitation in regard to remedies *in personam*."[25]

The court's holding on laches demonstrated a strong commitment to abide by the provisions of local limitations statutes, especially in *in*

23. 18 F. 547 (S.D. N.Y. 1883).
24. *Id.* at 553.
25. *Id.*

personam cases. A later New York case, *Southard v. Brady*,[26] followed the *Scull* approach. In *Southard*, suit was filed more than six years after the occurrence of the events giving rise to the dispute.[27] The district court found that the suit was barred by laches. Appeal was taken to the Circuit Court, and the decision of the district court was affirmed.

Mr. Justice Lacombe, rendering the opinion of the court, began by emphasizing that:

> "Statutes of limitations are no longer received in an unfavorable light, as an unjust and discreditable defense. . . . They are now generally regarded with favor, as being in the interest of justice, by compelling parties to bring their actions promptly, so that debtors shall not be obliged to take care forever of their acquittances, or alleged debtors of the evidence which may enable them to defeat the claims advanced against them."[28]

The court then noted that although there are no prescriptive periods in admiralty, federal courts will not enforce stale maritime causes. Referring to the holding of Justice Story in *The Brig Sarah Ann*, the court stated: "Where there is nothing exceptional in the case, the court will govern itself by the analogies of the common-law limitations."[29] The court further observed that admiralty law allows for a finding of laches even before the running of the analogous state statute of limitations, if the circumstances are exceptional.

The Fifth Circuit took a more liberal approach to the question of laches in *The Alabama*,[30] which was an *in rem* claim for personal injuries. The libelant was a stevedore, who, on attempting to descend into the hold of the vessel, fell, and sustained injury because of the collapse of certain protruding planks. The accident occurred in August, 1906. After his release from the hospital in October, 1906, the libelant immediately contacted an attorney. The latter soon discovered that the United Fruit Company had owned or chartered the vessel at the time of the accident. He promptly offered to settle the case, but United Fruit did not respond. In anticipation of the vessel's return to New Orleans on November 13, 1906, the settlement offer was renewed, again without response.[31] The vessel left New Orleans on November 14, 1906, without legal action having been taken.

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26. 36 F. 560 (Cir. Ct. N.Y. 1888).

27. The report does not specify the details of the substantive cause of action, but narrates that the libelant owners had chartered the "T. Jeffrey Southard" to a respondent charterer in late 1875. The vessel sailed from Galveston, Texas, for the continent of Europe in March 1876. The charterer was served with the libel on October 23, 1883.

28. *Southard*, 36 F. 560.

29. *Id.* at 561.

30. 242 F. 431 (5th Cir. 1917).

31. *Id.* at 432.

Thereafter, the "Alabama" did not return to New Orleans until May 1911, and then only for two fleeting visits, one of which was not published in the Times-Democrat (local New Orleans newspaper). The "Alabama" next returned on December 16, 1913. The libelant commenced his *in rem* action a day later. The District Court for the Eastern District of Louisiana held that laches barred the complaint. The Fifth Circuit reversed.

The Court of Appeals found that libelant and his attorney had been unaware of the visits of the "Alabama" to New Orleans in 1911 until after the fact. Accordingly, the court held that: "There was no subsequent opportunity [to seize the "Alabama"] until the ship was libelled in 1913."[32] The substance of the claimants' laches argument was that the long delay had resulted in the loss of vital witnesses. But the court countered by observing:

> A party with a cause of action against a ship should not be penalized for undertaking to settle his claim amicably. . . . Doubtless the necessary facts could have been easily ascertained, and the necessary witnesses easily procured, at the time the vessel received the letter stating the claim. A little regard at that time for the rights of others, and a little courtesy to one representing those rights, would probably have been profitable.[33]

The court concluded that: "Libelant used all reasonable diligence in the institution of the suit. . . ." [34]

In *The Alabama*, the Fifth Circuit skated over some potential difficulties in the libelant's position. After the first offer of settlement had met with no response, might it not have been much more prudent to have simply seized the "Alabama" in November, 1906? Nor did the court even allude to the question of whether the libelant could have sued the shipowners or charterers *in personam*. On the other hand, it is clear that the Fifth Circuit was outraged by the claimants' failure to respond to the stevedore's repeated settlement offers. The issue of the defendant's good faith can, therefore, play a powerful role in the laches analysis.

The Fifth Circuit's "reasonable diligence" formulation seemed to suggest that an admiralty plaintiff is *not* under an absolute duty to promptly exhaust all possible opportunities for litigation. The court's examination of the "Alabama's" visits to United States ports was limited, after all, to the libelant's home port of New Orleans. A maritime lien can, of course, be enforced in any district court of the United States, assuming the availability of the appropriate vessel.

32. *Id.* at 433.
33. *Id.*
34. *Id.* at 436.

From the inception of the Republic to the early nineteen twenties, admiralty courts approached the question of laches from varying perspectives. Many authorities looked to analogous state prescriptive rules as being dispositive absent "special" or "extreme" circumstances, especially in *in personam* cases. But occasionally, as in *The Key City*, or *The Alabama*, the law seems to have been applied less rigidly. Overall, however, courts adopted no really clear and definitive formulation.

II. The McGrath *Era*

Shortly after the end of the First World War, a passenger was injured on a steamship while on a voyage from New York to Panama. One year and forty days later, the passenger, one Anna McGrath, filed suit against the steamship owner, the Panama Railroad Company. The District Court of the Canal Zone dismissed *McGrath v. Panama Railroad Co.*[35] on the basis of laches. The case was appealed to the Fifth Circuit.

Until 1903, Panama had been part of Colombia. The Colombian Civil Code, which continued to be the law of Panama in the post-independence period, allowed a three year prescriptive period for personal injury claims. The United States government, however, elected to suspend the effect of the Colombian Civil Code in the Canal Zone. By virtue of the Canal Zone Code of Civil Procedure, the applicable prescriptive period for personal injury claims was one year. Both the district court and the Fifth Circuit found that the analogous "state" prescriptive period was that of the Canal Zone.[36] Unfortunately, Anna McGrath's attorney wrongly advised her that the three year Colombian period was applicable. She failed to file suit within one year.

Affirming the decision of the district court, the Fifth Circuit noted that although an admiralty court is not bound by prescriptive periods, such limitations will be applied by analogy in the absence of equitable reasons to the contrary. Very significantly, the court observed:

> It would be inconsistent to permit him [a libelant] to sue in admiralty, with the same effect as at common law (as is true in the case of a libel *in personam*), after his [libelants'] right to sue at common law had become barred.[37]

The appellant attempted to argue that laches, after the passing of the analogous state prescriptive period, is triggered by a finding of unreasonable delay *and* prejudice to the defendant.[38] The reason for the

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35. 298 F. 303 (5th Cir. 1924).

36. There is little that is distinctly maritime about the analysis courts use to determine the analogous prescriptive period. See discussion in *In Re* Complaint of American Export Lines, Inc., 620 F. Supp. 490, 514-15 (S.D.N.Y. 1985).

37. *McGrath*, 298 F. at 304.

38. This deduction is made from review of the judgment's second to last paragraph.

delay, being a classic error of law, was clearly inexcusable. The Fifth Circuit, however, did not even consider whether the delay of forty days could have prejudiced the defendant. Instead, prejudice was presumed: "when equity adopts the statutory period, it adopts along with it the presumption of injury, until the contrary is shown."[39]

In *McGrath*, the Fifth Circuit was probably not going as far as earlier courts, such as *Scull*, which essentially held that analogous statutes of limitation should be applied mechanically in *in personam* cases. Perhaps the court might have accepted convincing, or even "exceptional" evidence of excusable delay and lack of prejudice. But nonetheless, the *McGrath* decision reflected the fact that the Fifth Circuit of 1924 felt distinctly uncomfortable about affording an *in personam* plaintiff greater rights under admiralty than under ordinary federal jurisdiction.[40]

The restrictive approach of *McGrath* was to be persuasive in admiralty courts until after the Second World War.[41] In *The Mar Mediterraneo*,[42] for instance, holders of bills of lading sued for damage to a cargo of sugar. The cargo had been transported from Germany in

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39. *Id.*

40. A similar conservative approach was taken by the Second Circuit in Nolte v. Hudson Navigation Co., 297 F. 758, 764 (2d Cir. 1924) ("But statutes of limitation are no longer regarded with disfavor. On the contrary, they are regarded with favor as being in the interest of justice. They are statutes of repose, and are enacted to compel parties to commence actions promptly. . . . They are founded upon public policy; and while a statute of limitations is not strictly a bar in admiralty, it has been thought that there is no sufficient reason why it should not be followed in admiralty, as it is also in the courts of equity." (authority omitted)).

41. However, the Fifth Circuit did not take a consistently narrow approach to laches in the century's second quarter. In United States v. Alex Dussel Iron Works, Inc., 31 F.2d 535 (5th Cir. 1929), for instance more liberal principles were articulated. In 1920, the United States steamship "Sacandaga" was being loaded with sugar in New Orleans for shipping to Bordeaux and Havre. A heated ingot was dropped into a hold of sugar, the result being fire damage to both ship and cargo. Written demand was made in 1923, and libel was filed by the United States, on behalf of itself and the cargo owners, in 1926. The district court dismissed the case because of laches.

The Fifth Circuit reversed and remanded, stating that the defense of laches can never be urged against the United States. *Id.* at 537. Regarding the libelants' claim on behalf of the cargo owners, however, the court held that all normal private law defenses could be urged. The court doubted that laches could be made out on the facts alleged. The court observed that:

> Laches consists of two elements, inexcusable delay in instituting suit and prejudice resulting to the defendant from such delay. Its existence depends upon the equities of the case, and not merely upon the lapse of time. *Id.* at 536.

In *Dussel*, the reason for the delay had been that the United States could not find an eyewitness to the accident until 1926. The *Dussel* court's characterization of laches as consisting of two elements, inexcusable delay and prejudice, has been endlessly repeated, and its observation that delay *per se* is not enough, actually represents in simplified form the current law of laches, as applied in most appellate circuits.

42. 13 F. Supp. 860 (E.D. La. 1936).

1920. Libel *in rem* was brought in 1926, after many opportunities for seizure had passed. The facts presented a classic case of laches, with witnesses having disappeared and other critical evidence having been lost.[43] The *Mar Mediterraneo* court did not decide which of two possible analogous state prescriptive deadlines were applicable, since both were long passed. The court rather stated:

> Though not strictly a bar in admiralty, there does not seem to be sufficient reason why the appropriate statute of limitations should not be followed by analogy in this court as in equity, especially where, as here, there are no exceptional circumstances that would render the running of the statute of limitations inequitable.[44]

Thus, the court in *The Mar Mediterraneo*, like so many other admiralty tribunals, restated the central principle of *McGrath*, *viz*, that the appropriate analogous state statute of limitations should be applied in admiralty, absent "exceptional circumstances."[45]

III. The Development of the Modern Doctrine

Ironically, the *McGrath* era ended with a case involving the same defendant, the Panama Railroad Company, and somewhat similar facts. In *Gardner v. Panama Railroad Co.*,[46] petitioner brought an *in personam* action for personal injuries sustained while sailing, as a passenger, aboard the "Panama," a steamship owned and operated by the defendant. The injury occurred on December 3, 1947. At that time all of the defendant's stock was owned by the United States government. Petitioner filed suit in April, 1948, but her case was dismissed on grounds that her exclusive remedy was to sue the United States pursuant to the Federal Tort Claims Act ("FTCA"). Shortly, thereafter, in November, 1948, she sued the United States under the FTCA. In the summer of 1949, however, Congress amended the FTCA to specifically exclude all claims against the Panama Railroad Company. Therefore, this second action was also dismissed. Finally, petitioner refiled suit against the Panama Railroad Company in the district court for the Canal Zone on October 19, 1949. As in *McGrath*, the analogous Canal Zone statute of limitations for

43. *Id.* at 862.
44. *Id.* at 863.
45. Other examples of courts applying the *McGrath* principles include, but are not limited to: Kane v. U.S.S.R., 189 F.2d 303 (3d Cir. 1951); Redman v. United States, 176 F.2d 713, 715 (2d Cir. 1949); Westfall Larson & Co. v. Man Hubble Tug Boat Co., 73 F.2d 200, 203 (9th Cir. 1934); Marshall v. Int'l Mercantile Marine Co., 39 F.2d 551, 552 (2d Cir. 1930); Pope v. McGrady Rodgers Co., 70 F. Supp. 780, 781 (W.D. Pa. 1947); "The Kermit," 6 F. Supp. 113 (S.D. Cal. 1934).
46. 185 F.2d 730 (5th Cir. 1950).

personal injuries was one year. Nearly two years had elapsed since the accident.

The defendant successfully pled laches in the district court. The district court's decision expressly relied on *McGrath*. In a brief opinion, the Fifth Circuit affirmed.[47] The Supreme Court reversed, stating:

> Though the existence of laches is a question primarily addressed to the discretion of the trial court, the matter should not be determined merely by reference to and a mechanical application of the statute of limitations. The equities of the parties must be considered as well. Where there has been no inexcusable delay in seeking a remedy and where no prejudice to the defendant has ensued from the mere passage of time, there should be no bar to relief.[48]

The Supreme Court went on to note the petitioner's transparent diligence, and observed that: "There is no showing that respondent's position has suffered from the fact that the claim has not yet proceeded to trial on its merits."[49] The impact of *Gardner* was significant. The Supreme Court emphasized that the admiralty doctrine of laches is truly based on equity. By implication, the "exceptional circumstances" test of *McGrath* was disapproved of, as being in practice "a mechanical application of the statute of limitations."[50] This is not to say that *Gardner* overruled, or even explicitly criticized *McGrath*. In fact, the *Gardner* Court even cited *McGrath* in support of its decision.[51] But now the emphasis had changed: "mechanical application[s]" were out, and the "equities of the parties" had to be considered.[52] Analogous prescriptive periods were now to serve only in the allocation of the burden of proof.

Gardner, however, left open one major question: does the plaintiff, *after the analogous prescriptive period passes*, bear a *conjunctive* burden, i.e., of proving lack of inexcusable delay *and* no prejudice, or a *disjunctive* burden, i.e., of proving lack of inexcusable delay *or* no prejudice? And, in broader terms, what is the relationship between the two

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47. *Id.*

48. 342 U.S. 29, 30-31, 72 S. Ct. 12, 13 (1951).

49. *Id.*

50. *Id.*

51. *Id.* However, subsequent authorities have noted that the Gardner decision effectuated a real change from the strict "exceptional circumstances" test of *McGrath*. *See, e.g.*, Larios v. Victory Carriers, Inc., 316 F.2d 62, 65-66 (2d Cir. 1963) (highlighting "erroneous reasoning" of *McGrath*).

52. *Id.*

elements of laches?[53] These issues have never been satisfactorily resolved by the Supreme Court, but some guidance was given in *Gutierrez v. Waterman Steamship Corp.*[54] In that case, a Puerto Rican longshoreman, while unloading the S.S. "Hastings" in the Port of Ponce, slipped on spilled beans lying on the dock and thereby suffered injury. The plaintiff filed suit some time after the running of the analogous one-year Puerto Rican prescriptive period. However, the relevant records and eye-witnesses were all available. The defendant's laches defense was rejected, and plaintiff proceeded successfully to trial.

On appeal, the First Circuit reversed, holding, *inter alia*, that the laches defense was sound. The defendant had been prejudiced, the appellate court held, because the "availability to respondent of the witnesses when the libel was filed was not as advantageous to it as would have been an opportunity to examine them at an earlier date."[55] The Supreme Court reversed the appellate court as to all matters, including laches.

The *Gutierrez* Court expressed an unwillingness to interfere with what it saw as being the district court's credibility assessment: "The trial court which heard the witnesses was the proper judge of which evidence was credible; that [defendant's] records differ from [plaintiff's] testimony here does not mean that respondent was prejudiced. . . ."[56] More generally, the Court held:

> *The test of laches is prejudice* to the other party. [authority omitted]; *Cities Service Oil Co. v. Puerto Rico Lighterage Co.*, 305 F.2d 170, 171 (C.A. 1st Cir.) (both unreasonable delay and consequent prejudice).[57]

This language would seem to indicate that prejudice is always necessary for a finding of laches. The logical consequence is the adoption of a type of disjunctive approach, i.e., if the plaintiff can negate prejudice, that is sufficient to rule out laches. This conclusion would seem especially sound given the Court's reliance on *Cities Service Oil Co. v. Puerto Rico Lighterage Co.*,[58] a clearly disjunctive authority. The

53. The issue of admiralty laches has come before the Supreme Court twice since *Gardner*. In Czaplicki v. The S.S. Hoegh Silvercloud, 351 U.S. 534, 76 S. Ct. 946 (1956), for instance, the Court, finding lack of proof on both delay and prejudice, reversed a Second Circuit decision affirming a district court's dismissal of suit based on laches. The *Czaplicki* Court reaffirmed the equitable nature of laches and the non-mechanical application of analogous prescriptive periods, but there was no attempt to clarify the burden issue left open by *Gardner*.

54. 373 U.S. 206, 83 S. Ct. 1185 (1963).

55. *Id.* at 208, 83 S. Ct. at 1187 (paraphrasing reasoning of appellate court).

56. *Id.* at 216, 83 S. Ct. at 1191.

57. *Id.* at 215, 83 S. Ct. at 1191 (emphasis added).

58. 305 F.2d 170, 171 (1st Cir. 1962).

Gutierrez holding, however, does not make clear what should happen when a burdened plaintiff is able to prove excusable delay but *not* lack of prejudice.[59] In any event, most federal appellate courts, in the wake of *Gardner* and *Gutierrez*, adopted disjunctive rules. This is now clearly true of the First,[60] Fourth,[61] Fifth,[62] Eighth,[63] Ninth,[64] and Eleventh[65] Circuits. The same is probably true of the Seventh Circuit.[66] The nature of the doctrine in the Tenth Circuit has not been clearly determined.[67]

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59. It might be noted, however, that courts have not read *Gutierrez* to *require* a finding of laches in such circumstances. *See, e.g.*, Sandvik v. Alaska Packers Ass'n, 609 F.2d 969, 972-73 (9th Cir. 1979) (citing *Gutierrez*, but noting that: "Even the presence of prejudice does not necessarily require dismissal.").

60. *See, e.g.*, Edelmann v. Chase Manhattan Bank, N.A., 861 F.2d 1291, 1293 n.9 (1st Circuit 1988) (non-admiralty case); Puerto Rican-American Ins. v. Benjamin Shipping, 829 F.2d 281, 283-85 (1st Cir. 1987); *Cities Serv.*, 305 F.2d at 171 ("A suit in admiralty is barred by laches only when there has been both unreasonable delay in the filing of the libel and consequent prejudice to the party against whom suit is brought."—reversing a district court finding laches where delay was unexcused but plaintiff had shown lack of prejudice).

61. Riddick v. Baltimore Steam Packet Co., 374 F.2d 870 (4th Cir. 1967); Giddens v. Isbrandtsen Co., 355 F.2d 125, 128 (4th Cir. 1966) (ruling that under Federal Rule of Civil Procedure 8(c), the burden of proving laches, as an affirmative defense, is on the defendant, but also noting that the passing of the analogous prescriptive period creates presumptions of inexcusability and prejudice—"However, even if the delay be beyond the preceptive statutory period, or appear inordinate on other considerations, and although it be explained only insubstantially *or not at all*, the defendant is not relieved of his burden of proving prejudice. But he may either rest on the inference alone or introduce additional evidence." (emphasis added)).

62. *See* discussion *infra* text accompanying note 75.

63. Azalea Fleet v. Dreyfus Supply & Mach. Corp., 782 F.2d 1455, 1458 (8th Cir. 1986); Cotton v. Mabry, 674 F.2d 701, 704 (8th Cir. 1982) (non-admiralty case); Goodman v. McDonnell Douglas Corp., 606 F.2d 800, 804 (8th Cir. 1979) ("For the application of the doctrine of laches to bar a lawsuit, the plaintiff must be guilty of unreasonable and inexcusable delay that has resulted in prejudice to the defendant.").

64. Stevens Technical Servs., Inc. v. S.S. Brooklyn, 885 F.2d 584, 588 (9th Cir. 1989) ("Laches requires the presence of both inexcusable delay and prejudice"); Sandvik v. Alaska Packers Ass'n., 609 F.2d 969, 973 (9th Cir. 1979) ("Even the presence of prejudice does not necessarily require dismissal. It may be outweighed by the strength of the excuse for the delay"); Espino v. Ocean Cargo Line, Ltd., 382 F.2d 67, 70 (9th Cir. 1967).

65. The Eleventh Circuit covers Alabama, Georgia, and Florida. These states were part of the old, pre-1981 Fifth Circuit, which included Alabama, Florida, Georgia, Louisiana, Mississippi, and Texas. The Eleventh Circuit is bound by the rulings of the old Fifth Circuit. Bonner v. City of Prichard, Ala., 661 F.2d 1206, 1207 (11th Cir. 1981). *See also* Conagra, Inc. v. Singleton, 743 F.2d 1508, 1517 (11th Cir. 1984) (laches requires proof of both delay and prejudice).

66. *See* de Furgalski v. Siegel, 618 F. Supp. 295, 300 (N.D. Ill. 1985).

67. *See* Rea v. An-San Corp., 79 F.R.D. 25, 28-29 (W.D. Okl. 1978) (due to small number of admiralty cases in Tenth Circuit, law of laches is undeveloped—court rejecting defense of laches, finding excusable delay and lack of prejudice.).

The Fifth Circuit, with its large volume of admiralty cases, has been the leading "disjunctive circuit." Possibly the best Fifth Circuit discussion of laches can be found in *Akers v. State Marine Lines, Inc.*[68] Briefly, the facts of the case were as follows: plaintiff suffered an alleged injury on April 17, 1960, and filed suit against his employer in a Texas court. The plaintiff, however, proceeded to dismiss this suit, because, subsequently, he became wrongly convinced that he could not sue his employer. A few years later, the plaintiff learned of the Supreme Court's decision in *Reed v. Steamship Yaka*,[69] which led him to believe that he could, after all, sue his employer. Therefore, he brought the instant suit, which was promptly dismissed by the district court on grounds of laches.

The Fifth Circuit began its analysis by agreeing with the district court that the appropriate analogous state prescriptive period was three years, which had lapsed.[70] Therefore, the burden of proof was allocated to the plaintiff. Since the reason for the delay had been an error of law, the court held that the delay was inexcusable.[71] But the court's inquiry did not end there:

> A suit in admiralty is barred by laches *only* when there has been both unreasonable delay in the filing of the libel *and* consequent prejudice to the party against whom suit is brought. As we have repeatedly emphasized,
>
> > "Laches is much more than time. *It is time plus prejudicial harm*, and the harm is not merely that one loses what he otherwise would have kept, but that delay has subjected him to a disadvantage in asserting and establishing his claimed right or defense."[72]
>
> If it can be shown that respondents have suffered no prejudice from the delay, then *the unexcused delay alone is not sufficient to cause the libel to be dismissed.*[73]

Thus, under *Akers*, a burdened plaintiff must show *either* lack of inexcusable delay *or* lack of prejudice. On the facts, the court found that there existed genuine issues of material fact relative to whether the defendant had been prejudiced by the delay. Accordingly, the case was remanded so that both parties could be afforded full opportunity to

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68. 344 F.2d 217 (5th Cir. 1965).
69. 373 U.S. 410, 83 S. Ct. 1349 (1963).
70. *Akers*, 344 F.2d at 220.
71. *Id.*
72. Citing Point Landing Inc. v. Alabama Dry Dock & Shipbuilding Co., 261 F.2d 861, 865 (5th Cir. 1958) (per Judge John Brown). This language is amongst the most frequently quoted laches holdings.
73. *Id.* (emphasis added).

offer whatever evidence was available, on the question of prejudice.[74] Numerous Fifth Circuit cases have reiterated the disjunctive principles of *Akers*.[75]

The position of the Third Circuit, on the other hand, appears to be that the plaintiff, after the passing of the analogous prescriptive period, bears a conjunctive burden. In *Burke v. Gateway Clipper, Inc.*,[76] the plaintiff alleged that he had suffered various injuries while working aboard a ship on the Ohio River. The accident happened on June 18, 1958, but the complaint, asserting violations of the Jones Act and the unseaworthiness and maintenance and cure doctrines, was filed over ten years later, in December, 1968. The Jones Act claim was, of course, subject to the statutory prescriptive period of three years, and the same period was held to be the analogous prescriptive period for the other two claims. These were dismissed on grounds of laches.

On appeal, the Third Circuit reversed, and remanded for further consideration of laches. Referring to the burden allocation rule of *Gardner*, the Third Circuit held:

> This Circuit requires the plaintiff to come forward and prove that his delay was excusable and that it did not unduly prejudice the defendant. [authorities omitted]
>
> . . .
>
> We are aware that other circuits place the burden of proving inexcusable delay and prejudice on the defendant. We see no new and compelling reason to reverse the well-established and thoroughly considered line of decisions of this Circuit requiring the plaintiff to disprove both inexcusable delay and lack of

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74. *Id.* at 221.

75. *See, e.g.*, West Wind Africa Line Ltd. v. Corpus Christi Marine Servs. Co., 834 F.2d 1232, 1234 (5th Cir. 1988) (defendants' burden is conjunctive); Albertson v. T.J. Stevenson & Co., Inc., 749 F.2d 223, 233 (5th Cir. 1984); Pizani v. M/V Cotton Blossom, 669 F.2d 1084, 1087 (5th Cir. 1982); Mecom v. Levingston Shipbuilding Co., 622 F.2d 1209, 1215 (5th Cir. 1980); Barrios v. Nelda Faye Inc., 597 F.2d 881, 885 (5th Cir. 1979) (defendants' burden is conjunctive); Watz v. Zapata Off-shore Co., 431 F.2d 100, 112 (5th Cir. 1970); Esso Int'l Inc. v. S.S. Captain John, 443 F.2d 1144, 1150 (5th Cir. 1971); Crews v. Arundel Corp., 386 F.2d 528, 530 (5th Cir. 1967); Molnar v. Gulfcoast Transit Co., 371 F.2d 639, 642 (5th Cir. 1967); Fidelity & Casualty Co. of N.Y. v. C/B Mr. Kim, 345 F.2d 45, 50 (5th Cir. 1960); Dow Chem. Co. v. Barge UM-23B, 424 F.2d 307, 310 (5th Cir. 1969); Byrd v. The M/V Yozgat, 420 F.2d 954, 955 (5th Cir. 1970); Phillips v. Springfield Ins. Co., 418 F.2d 236 (5th Cir. 1969); *In Re* Casco Chem. Co., 335 F.2d 645, 651 (5th Cir. 1964); McConville v. Florida Towing Corp., 321 F.2d 162, 168 (5th Cir. 1963); Pure Oil Co. v. Snipes, 293 F.2d 60, 70 (5th Cir. 1961); Point Landing Inc. v. Alabama Dry Dock & Shipbuilding Co., 261 F.2d 861, 865 (5th Cir. 1958); McDaniel v. Gulf & South Am. Steamship Co., 228 F.2d 189, 192 (5th Cir. 1955).

76. 441 F.2d 946 (3d Cir. 1971).

prejudice to the defendant when, as here, more than three years have passed since the cause of action accrued.[77]

Thus, in the Third Circuit, after the passing of the analogous prescriptive period, *laches consists of* inexcusable delay *or* prejudice.[78] In the authors' view, a conjunctive approach is inconsistent with the Supreme Court's ruling in *Gutierrez* that "the test of laches is prejudice to the other party," at least in those instances where the plaintiff has no excuse for delay but there has been no prejudice.[79] At least one district court in the Sixth Circuit appears to favor a conjunctive approach to laches in admiralty.[80]

The Second Circuit has opted for a third, and ultimately more confusing, alternative, namely, that the elements of laches are legally interrelated. The genesis of the Second Circuit's approach is found in *Larios v. Victory Carriers, Inc.*[81] In *Larios*, a seaman was injured in a collision off the coast of Europe between the S.S. "Ioannis" and the S.S. "Stony Point." Larios had been a hand on the S.S. "Ioannis." The collision took place on June 18, 1957. Larios spent six months recovering in France and Germany, during which time he was assured by representatives of the S.S. "Ioannis" that his injuries would shortly disappear. He returned to work on the S.S. "Ioannis," until he finally left her in Texas, in December, 1958. He thereafter stayed in the United States for six months, when he again left for Germany. He returned to the United States on September 12, 1960, having successfully obtained permanent residency.[82] A little over a week later, he filed suit against the owners and other joint controllers of the S.S. "Ioannis" and the S.S. "Stony Point." The analogous state prescriptive period was New York's three-year statute of limitations for personal injuries.[83]

Two of the defendants, Victory Carriers, Inc. and the Alexander S. Onassis Corp., filed motions for summary judgment on grounds of

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77. *Id.* at 949-50 (emphasis added).

78. *See also* EEOC v. Great Atl. & Pac. Tea Co., 735 F.2d 69, 80 (3d Cir. 1984) ("In that case, [when the analogous prescriptive period has passed] the burden shifts to the plaintiff to justify its delay *and* negate prejudice." (emphasis added)); Pierre v. Hess Oil Virgin Islands Corp., 624 F.2d 445, 450 (3d Cir. 1980); Gruca v. United States Steel Corp., 495 F.2d 1252, 1260 (3d Cir. 1974); Mooz v. Dravo Corp., 429 F.2d 1156, 1160 (3d Cir. 1970); Lipfird v. Mississippi Valley Barge Line, 310 F.2d 639, 642 (3d Cir. 1962). *But see* Claussen v. Mene Grande Oil Co., C.A., 275 F.2d 108, 111-13 (3d Cir. 1960) (apparently applying the disjunctive rule).

79. *See supra* discussion of *Gutierrez* at note 59.

80. Keller v. Standard Sand and Gravel Co., 365 F. Supp. 1 (S.D. Ohio 1973). *But see* TWM MFG. Co., Inc. v. Dura Corp., 722 F.2d 1261, 1268 (6th Cir. 1983) (applying a disjunctive approach in context of patent law).

81. 316 F.2d 63 (2d Cir. 1963).

82. *Id.* at 67.

83. *Id.* at 65.

laches. The district court simply noted that the three-year period had run and dismissed the case. Noting the *Gardner* holding, the Second Circuit found that the passing of the analogous prescriptive period merely serves to allocate the burden of proof.[84] The court then went on to hold that the "presumption of prejudice" associated with the lapsing of the analogous prescriptive period, means only: "that if the plaintiff proffers no pleading or presents no proof on the issue of laches, the defendant wins."[85]

Interestingly, the *Larios* court placed a lot of importance on the element of delay. The court held that, after the passing of the analogous prescriptive period, the plaintiff must prove lack of inexcusable delay, while the defendant has the obligation to show prejudice.[86]

The *Larios* court further explained that the two elements of laches are not independent: "A weak excuse may suffice if there has been no prejudice; an exceedingly good one might still do even when there has been some."[87] This language seems to imply that, depending on the circumstances, the plaintiff's burden could be conjunctive (weak excuse/ no prejudice) or disjunctive (strong excuse/prejudice). This conclusion is supported by the court's interpretation of the seemingly conjunctive language in *Gardner*:[88] But saying that a plaintiff who has fully cleared each of two hurdles will win is not the same as saying that a plaintiff must fully clear each of two hurdles to win.[89]

Very significantly, the court concluded its recitation of legal principle by observing: Even on this [legally interrelated] approach there may be cases where the plaintiff's evidence as to excuse for the delay is so insubstantial that the court need not call on the defendant to come forward with evidence of prejudice.[90]

The logical inference from this language is that a plaintiff who has no excuse for his or her delay loses on laches if the analogous prescriptive period has passed. On the other hand, the plaintiff with a strong excuse will prevail, despite a showing of prejudice. On the facts, the court found that the plaintiff's excuse for the delay was at least worth com-

84. *Id.* at 66. ("When the suit has been brought after the expiration of the state limitation period, a court applying maritime law asks why the case should be allowed to proceed; when the suit, although perhaps long delayed, has nevertheless been brought within the state limitation period, the court asks why it should not be.").

85. *Id.*

86. *Id.* However, the court subsequently asserted that the "ultimate burden" is still on the plaintiff as to both delay and prejudice. *Id.* at 67.

87. *Id.* at 67.

88. Gardner v. Panama R.R. Co., 342 U.S. 29, 31, 72 S. Ct. 12, 13 (1951) ("Where there has been no unexcusable delay in seeking a remedy and where no prejudice to the defendant has ensued from the mere passage of time, there should be no bar to relief.").

89. Larios v. Victory Carriers, Inc., 316 F.2d 63, 67 (2d Cir. 1963).

90. *Id.*

paring to any evidence of prejudice which the defendants might be able to produce, and the case was remanded for this purpose.[91]

IV. Some Recent Cases

In 1980, Congress enacted 46 U.S.C. § 763(a), which provides a fixed prescriptive period of three years for all personal injuries (including death) in admiralty. Thus, the admiralty doctrine of laches has now a more circumscribed, commercial scope, applying mainly in cases of tortious property damage and contract.

This last historical part looks at how courts have applied the now less applicable doctrine in recent times. The emphasis has recently been placed on the element of prejudice. And it seems as if courts are now, in general, giving closer scrutiny to laches defenses. Two particularly important cases are chosen for review.

In *Azalea Fleet v. Dreyfus Supply & Machinery Corp.*,[92] the dispute arose from a barge breakaway on the Mississippi River. The plaintiff, Azalea, had installed a defective timberhead on the barge which gave in under the application of normal pressure. This particular accident, along with other contributing factors, caused a series of collisions, leading to a massive and complex litigation. In July, 1981, the owner of the barge, Consolidated Grain & Barge Company, made demand for indemnity against Azalea. Azalea rejected this request, but the demands continued.

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91. While *Larios* still appears to be good law in the Second Circuit, subsequent decisions have served to muddy the waters. About ten years later, in Hill v. W. Bruns & Co., 498 F.2d 565 (2d Cir. 1974), the Second Circuit reversed a finding of laches in the district court, emphasizing the importance of prejudice: "Laches is a doctrine aimed at avoiding the commencement of stale claims in equity where it is impossible or difficult for a defendant to defend because evidence has been destroyed or lost and the defendant [is] thereby prejudiced as a result of the delay in the institution of the action." *Hill*, 498 F.2d at 568.

However, a subsequent panel, in Public Adm'r of the County of N.Y. v. Angela Compania Naviera S.A., 592 F.2d 58, 63-64 (2d Cir. 1979), seemed to take a third approach, vaguely focusing on both delay and prejudice. Later courts have had more direct recourse to *Larios*—see Dickey v. Alcoa Steamship Co., Inc., 641 F.2d 81, 82 (2d Cir. 1981)—or taken the more evenhanded approach of *Public Adm'r*. *See* DeSilvio v. Prudential Lines, Inc., 701 F.2d 13, 15 (2d Cir. 1983). While district courts in the Second Circuit appear to believe that *Larios* is still the law, some have confessed to a certain degree of confusion. *See, e.g.*, LaGares v. Good Commander Shipping Co., 487 F. Supp. 1243, 1244 (S.D.N.Y. 1980); De Monte v. Shipping Corp. of India, Ltd., 476 F. Supp. 392, 396 (S.D.N.Y. 1979) ("under *Larios* this action would be barred automatically [because of the inexcusable nature of the delay]; under *Hill* we must focus on prejudice; under *Public Adm'r* both factors must be considered in general, but it is unclear whether the *Larios* rule still operates to bar the action where the [analogous] statute [of limitations] has run and the plaintiff has offered no excuse for the delay.").

92. 782 F.2d 1455 (8th Cir. 1986).

Finally, on May 27, 1982, Consolidated was cast in judgment for a portion of the total damage, and very shortly thereafter, on June 3, Consolidated filed a third party demand for indemnity against Azalea. On June 22, Azalea notified Dreyfus, which had supplied the timberhead, that the federal court for the Eastern District of Missouri had found Consolidated liable because of its defective timberhead, that Azalea had installed the timberhead, and that Dreyfus had supplied it. Demand for indemnity was made, with suit being filed a little later, on July 28, of the same year.

Was the plaintiff's indemnity claim barred by laches? Azalea did not inform Dreyfus of its indemnity claim until eleven months after Consolidated's first demand for indemnity. This, according to defendant, constituted failure to comply with the "timely notice" requirement of the Uniform Commercial Code.[93] Additionally, the defendant argued that the plaintiff had absolutely no excuse for the delay. The defendant further argued that it had suffered the following prejudice: loss of the opportunity to take part in the settlement negotiations between other parties involved in the dispute and inability to take part in the pretrial discovery and to cross-examine an important witness who testified as to causation of the barge collision. Lastly, the defendant pointed to the fact that the timberhead baseplate, which would have identified the manufacturer, was no longer available.[94]

Despite these reasonable arguments, the district court granted summary judgment for the plaintiff, and the court of appeals affirmed. The court held that Azalea was not guilty of "inequitable or bad conduct, . . . or unreasonable delay" since it gave notice to Dreyfus as soon as it knew that the defendant had supplied the timberhead.[95] The court of appeals also pointed out that the cases relied upon by the defendant to show that an eleven month delay was unreasonable as a matter of law, did not apply to the case at bar since those cases involved breach of warranty claims rather than laches.[96]

On the other hand, the court held that the defendant was not substantially prejudiced by the delay. After reviewing the defendant's prejudice arguments, the court found that the defendant was not prejudiced by the delay, because it probably would not have settled the claim earlier in any event. Nor was the defendant prejudiced by the loss of opportunity to take part in the discovery process. It could have initiated its own discovery, since it was a party to the suit for over one

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93. *Id.* at 1459.

94. *Id.*

95. Vollmar Bros. Constr. v. Archway Fleeting & Harbor Service, Inc., 596 F. Supp. 112, 118 (E.D. Mos. 1984).

96. *Azalea Fleet*, 782 F.2d at 1459 n.4.

and a half years before trial. The court also noted that the loss of the timberhead baseplate was not caused by the plaintiff's delay. Instead it was due to the actions of the barge owner, and was, in fact, unavailable to the plaintiff itself.[97]

In conclusion, since neither unreasonable delay nor substantial prejudice were proved, the defense of laches was rejected. It is of interest to note that the burden of proof fell upon the defendant. In this respect, the court stated:

> Because the case was decided on strict liability principles, the applicable statute of limitations was five years, running from the date the cause of action accrued . . . [authorities omitted]. Therefore Azalea brought its claim within the statutory period and Dreyfus bears the burden of proving laches.[98]

One's overall impression, from conducting a careful review of the *Azalea Fleet* court's holding, is that the defendants' claim of prejudice was subjected to exacting scrutiny.

Another recent case, *Ali A. Tamini v. M/V Jewon*, focuses on the same issue of prejudice.[99] In *Ali A. Tamini*, the plaintiff owned a rotary drill rig, which was loaded onto the M/V Jewon while she was docked in Houston, Texas. Shortly afterwards, a loading stevedore negligently dropped a heavy piece of equipment onto the rig. This happened on October 30, 1981. At the time of the accident, the vessel was under subcharter to Salen Dry Cargo AB, which had intended to ship the rig to the plaintiff in Saudi Arabia. After settlement talks failed, Tamini filed suit against Salen in New York on December 3, 1983. However, no defendants were actually served at that time. Instead, proceedings were stayed pending an arbitration, which began on July 19, 1984 and concluded a year later with an award in favor of Tamini for $111,884.54 plus interest. Salen, however, had previously filed bankruptcy. Tamini thereafter elected to pursue his *in rem* rights against the M/V Jewon. He located her in Port Elizabeth, South Africa, and threatened to seize her. In response, the owner's Protection and Indemnity Association agreed to issue a letter of undertaking whereby it obligated itself to defend the vessel in New York and satisfy a judgment up to $130,000.00.

The defendant moved for summary judgment, on grounds, *inter alia*, that the action was time-barred by laches. The district court dismissed the *in rem* complaint for lack of diligent prosecution.[100] The district court concluded that the defendant was "sufficiently prejudiced"

97. *Id.* at 1460.
98. *Id.* at 1459.
99. 808 F.2d 978 (2d Cir. 1987).
100. Technically, the dismissal was based on Federal Rule of Civil Procedure 41(b), but the reasoning was based on laches. *Ali A. Tamini*, 808 F.2d at 980.

by the "moderate" delay in bringing the *in rem* action to warrant dismissal on the merits.[101] The plaintiff appealed, and the Second Circuit vacated and remanded.

The court of appeals based its decision on the prejudice issue. The district court's finding of prejudice, based on the assumption that the arbitration award was binding on the defendant, was rejected. Instead, the court pointed out that the defendants were *not* prejudiced by their lack of participation in the earlier arbitration proceedings. This was because "[t]hey were not parties to either the arbitration agreement or the arbitration proceedings and were not bound by the award."[102] Furthermore, there was no showing that the defendants' failure to participate in the arbitration prejudiced them in their claim-over against Salen, because the arbitration award was issued after the subcharterer's filing of bankruptcy. Nor was there any showing that an earlier seizure of the M/V Jewon would have made the defendants' claim-over possible before bankruptcy. Furthermore, the court held, it was not clear that "a pre-bankruptcy judgment against Salen would have been collectible in whole or in part."[103]

Finally, the court observed that both parties agreed that the ultimate responsibility for the damage to the rig rested with the loading stevedore. Therefore, the real laches issue was whether the defendant's rights against the stevedoring company had been prejudiced. The district court had not addressed this matter.

Finally, the court of appeals cautioned that "dismissal of an action with prejudice is a drastic remedy which should be applied only in extreme circumstances,"[104] and concluded that "the district court's drastic remedy of dismissal on the merits is without adequate factual and legal support."[105] Like the *Azalea Fleet* case, the *Ali A. Tamini* decision serves to underscore the radical importance of prejudice in the modern doctrine of laches.

V. A Synopsis of the Doctrine

The maritime doctrine of laches supplies the rule of prescription for the many admiralty causes of action which have no statutorily fixed prescriptive period. Laches is an ancient equitable doctrine, and is within the sound discretion of the district court.[106] The first issue to be de-

101. *Id.* at 980.
102. *Id.* at 981.
103. *Id.*
104. *Id.* at 980.
105. *Id.* at 982.
106. Akers v. State Marine Lines, Inc., 344 F.2d 217 (5th Cir. 1965); Gardner v. Panama R.R. Co., 342 U.S. 29, 72 S. Ct. 12 (1951).

termined is the identity of the analogous state or federal prescriptive period. The answer is arrived at by the application of normal rules of statutory construction and interpretation. A good rule of thumb is to consider what limitations period would apply "to a comparable non-admiralty action filed in state court in the state in which the cause of action arose."[107]

After the issue of the appropriate analogous prescriptive period has been resolved, the burden of proof is allocated to either the plaintiff (if the analogous period has passed), or to the defendant (if it has not).[108] In the event that the plaintiff has the burden of proof, he is (in most circuits) required to prove *either*: (1) that his delay in filing suit was not unreasonable; *or* (2) that the defendant has suffered no prejudice from the delay. However, the Second and Third Circuits appear to have different rules, and the rule in some other circuits is not clear. But if the analogous prescriptive period has not passed, the defendant bears the burden to prove *both*: (1) that the delay was unreasonable; *and* (2) that he was prejudiced thereby.[109] Laches, then, partakes of two elements: delay and prejudice.

Of those two elements, prejudice is by far the most important.[110] Modern courts are inclined to review a defendant's prejudice claims very carefully, even in cases where the burden is on the plaintiff. It will never be enough for a defendant to assert, *simpliciter*, that the suit, if not barred, will expose him to the possibility of losing what he might otherwise have kept.[111] The most typical cases of prejudice are where the defendant has: lost access to witnesses or documents critical to his defense, or where it has otherwise become impossible to review and analyze the situation in controversy;[112] lost the right to contribution or indemnity;[113] lost the right to pass on costs to its customers;[114] or lost the right to participate in prior discovery, prior arbitration proceedings, or settlement negotiations.[115] Courts, however, will review allegations such as these through the prism of causation. Mere loss of the right to participate in arbitration or settlement negotiations, for example, is not enough. The critical question is whether the defendant would have

107. Sandvik v. Alaska Packers Ass'n, 609 F.2d 969, 971 (9th Cir. 1979).

108. Gardner v. Panama R. Co., 342 U.S. 29, 31, 72 S. Ct. 12, 13 (1951).

109. Barrios v. Nelda Faye, Inc., 597 F.2d 881 (5th Cir. 1979).

110. *Sandvik*, 609 F.2d at 972; Ali A. Tamini v. M/V Jewon, 808 F.2d 978 (2d Cir. 1987).

111. Point Landing, Inc. v. Alabama Dry Dock & Shipbuilding Co., 261 F.2d 861, 865 (5th Cir. 1958).

112. Delgado v. The Malula, 291 F.2d 420 (5th Cir. 1961).

113. Stevens Technical Servs., Inc. v. S.S. Brooklyn, 885 F.2d 584 (9th Cir. 1989).

114. Puerto Rico Marine Management, Inc. v. El Verde Poultry Farms, Inc., 590 F. Supp. 1174 (D.P.R. 1984).

115. Azalea Fleet v. Dreyfus Supply & Mach. Corp., 782 F.2d 1455 (8th Cir. 1986).

prevailed in the arbitration, or *entered* into a settlement.[116] And the loss of a right to assert a contribution or indemnity claim must constitute the loss of a viable economic right. For example, the loss of a right to sue a previously bankrupt corporation will not amount to prejudice.[117] And time and again, courts have focused on the notice issue. When was the defendant first appraised of the possibility of plaintiff's bringing his claim? Early and effective notice, negating prejudice, has defeated numerous laches defenses.[118]

It may well be that, in the nature of things, tort defendants find it easier to win on laches than do other defendants. Tort claims, perhaps, rely more on eyewitnesses and particular situation analyses.[119] The passage of time is more likely to prejudice defendants' abilities to mount effective defenses in such cases.[120] On the other hand, indeed, courts are unlikely to find prejudice in cases where a more or less intact set of documents constitutes the essence of the proof.[121] But even the loss of witnesses or documents will not amount to prejudice *per se*. Pertinent issues will be, when were the witnesses or documents lost, and how relevant or effective could they have been?[122] If the witnesses and documents disappeared the day after the accident, the prejudice was not caused by the delay.

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116. *Id.*

117. Stevens Technical Servs., Inc. v. S.S. Brooklyn, 885 F.2d 584 (9th Cir. 1989).

118. *See, e.g.*, West Wind Africa Line Ltd. v. Corpus Christi Marine Services Co., 834 F.2d 1232, 1234 (5th Cir. 1988); Claussen v. Mene Grande Oil Co., C.A., 275 F.2d 108, 113 (3d Cir. 1960); Rea v. An-Sar Corp., 79 F.R.D. 25, 29 (W.D. Okl. 1978).

119. Puerto Rican-American Ins. Co. v. Benjamin Shipping Co., 829 F.2d 281, 284 (1st Cir. 1987) (witnesses and records lost—finding of laches); Albertson v. T.J. Stevenson & Co., Inc., 749 F.2d 223, 233 (5th Cir. 1984) (it was established that "Stevenson had a uniform policy of retaining records, logs, and other reports of a particular voyage for a period of only ten years, and that all such [relevant] records, reports and logs . . . had been destroyed approximately three years before Albertson initiated this suit.").

120. Delgado v. The Malula, 291 F.2d 420, 422 (5th Cir. 1961) ("In these circumstances, it was certainly within the considered discretion of the District Court to conclude on equitable principles that this cause came too late and on the trial the respondent would be without defenses, evidence of defenses, or any reasonable means of obtaining evidence of defenses.").

121. Loverich v. Warner Co., 118 F.2d 690, 693 (3d Cir.), *cert. denied*, 313 U.S. 577, 61 S. Ct. 1104 (1941) (thirteen year delay caused no prejudice because medical records, which were the *only* relevant evidence, were available).

122. Vega v. The Malula, 291 F.2d 415, 419 (5th Cir. 1961) ("On the surface the respondent made a plausible showing of prejudice. Years had gone by. The vessel was sunk and the equipment in question was long since lost. Finally, a seaman who was responsible for maintenance of this cargo gear was no longer living. The trouble was that this did not make any difference. The respondent through his responsible representatives knew not only of the occurrence but knew as well that it was a patent case of unseaworthiness as to which it had no defense on liability.").

The element of unreasonable delay is more difficult to assess. One thing that is certain, however, is that once the analogous prescriptive period has passed, failure to file suit because of ignorance of the law will *always* be found unreasonable. This position is fully consistent with the legal maxim: *ignorantia leges neminem excusat.*[123] On the other hand, justifiable ignorance of fact *will* excuse delay.[124] Findings of unreasonable delay are likely to arise from the indolence of the plaintiff, and, in this connection, courts sometimes find that the delay element is related to prejudice. This is especially likely to be the case in those relatively rare instances where the defendant has to carry the burden of proof. Where the analogous prescriptive period has *not* passed, there almost *has* to be an element of culpability in the delay. Where Congress or state legislatures change the analogous prescriptive periods, or otherwise change applicable law, this will likely be found to amount to excusable delay.[125] Good faith settlement negotiations are also likely to constitute a reasonable excuse, especially if defendant violates any agreed terms.[126] If the plaintiff makes prior unsuccessful attempts to arrest the defendant's ship, this is also likely to point to reasonable delay.[127] If a plaintiff delays in bringing suit in order to allow general average adjustments to be made, this is also a good excuse for delay.[128] Additionally, if the defendant threatens the plaintiff's employment, this can point to excusable delay,[129] but the plaintiff's mere vague fear of loss of employment will not suffice.[130] Bad faith on the part of either plaintiff or defendant can swing the balance.[131]

It is possible that, generally, courts are more inclined to apply laches in *in personam* actions than in *in rem* or *quasi in rem* actions. This is because the admiralty context does not impose any special burden on the *in personam* plaintiff relative to the filing and service of suit.[132] With the *in rem* and *quasi in rem* actions, of course, things are different. In that type of case, plaintiffs have the unusual difficulty of locating

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123. Akers v. State Marine Lines, Inc., 344 F.2d 217 (5th Cir. 1965).

124. United Brands Co. v. M.V. Isla Plaza, 770 F. Supp. 220 (S.D.N.Y. 1991).

125. Jones v. Reagan, 748 F.2d 1331, 1335 (9th Cir. 1984).

126. Chantier Naval Voisin v. M/Y Daybreak, 677 F. Supp. 1563, 1570 (S.D. Fla. 1988).

127. *Id.*

128. Deutsche Shell Tanker-Gesellschaft v. Placid Ref. Co., 767 F. Supp. 762, 781 (E.D. La. 1991).

129. Taylor v. Crain, 195 F.2d 163, 165 (3d Cir. 1952).

130. Delpy v. Crowley Launch & Tugboat Co., 99 F.2d 36, 37 (9th Cir. 1938); *Chantier*, 677 F. Supp. 1563.

131. *Chantier*, 677 F. Supp. 1563.

132. Claussen v. Mene Grande Oil Co., 275 F.2d 108 (3d Cir. 1960) (*in personam* case reviewing whether plaintiff had been diligent in not bringing a prior *in rem* action); *see also Chantier*, 677 F. Supp. 1563.

the ship for long enough to seize it. Courts also must consider what steps the plaintiff should have taken in order to locate the ship sooner.[133] This is a difficult analysis, involving, as it does, the following issues: (1) the resources available to plaintiff for the search, (2) plaintiff's sophistication, (3) the size of the claim, (4) whether claimant has other ships which could be seized *quasi in rem*, (5) whether the claimant is American, or whether its ship (or ships) regularly frequented plaintiff's home port (or American ports), (6) whether plaintiff has attempted to lien the vessel in a foreign jurisdiction, and whether this course of action, if available, would have been reasonable, and (7) the practical elusiveness of the vessel.[134] Such a review needs to be done on an equitable, case-by-case basis. If the plaintiff is a seaman, he, as a ward of the court, may be better placed in the delay analysis.[135] On the other hand, the ease of modern communications serves to make delay less excusable.

Procedurally, laches claims are rarely dispensed with by motion.[136] The dual issues of prejudice and delay usually give rise to matters of material fact. As alluded to above, laches is committed to the sound discretion of the district court, but, of course, when a district court is mistaken in law, appellate review will be made on the *de novo* standard.[137]

VI. Policy Review

As a matter of policy, and in terms of present day realities, the writers find that, for purposes of prescription, admiralty suits should be divided into those filed *in personam*, and those filed *in rem* or *quasi in rem*. It is not clear why *in personam* suits in admiralty should have, as a prescriptive rule, the now-liberal laches doctrine.

Consider the following hypotheticals. A, a New Orleans stevedore, enters into a contract to unload a ship for B, a Florida shipowner. B fails to pay. A contract to load or unload a ship sounds in admiralty. When suing B, A has the benefit of the laches doctrine. X, a New Orleans ship agent, enters into a contract to service B's ships when they dock in New Orleans. B fails to pay. A contract of ship agency does not sound in admiralty. X, in suing B, is bound by either Louisiana or Florida prescriptive periods. The writers cannot justify the different results. Both A and X will have to complete the same process: the successful filing and service of suit against B, the Floridian shipowner

133. *See especially Claussen*, 275 F.2d 108.

134. *Id.*

135. Teal v. Eagle Fleet, Inc., 933 F.2d 341, 345 (5th Cir. 1991); Jones v. Reagan, 748 F.2d 1331, 1337 (9th Cir. 1984) ("seamen's 'wardship" . . . requires the courts to construe . . . ancient admiralty law in a manner most favorable to the seamen").

136. Akers v. State Marine Lines, Inc., 344 F.2d 217 (5th Cir. 1965); Vega v. The Malula, 291 F.2d 415, 416 (5th Cir. 1961).

137. *See* Taurel v. Central Gulf Lines, Inc., 947 F.2d 769 (5th Cir. 1991); Espino v. Ocean Cargo Line, Ltd., 382 F.2d 67, 70 (9th Cir. 1967).

defendant. Why then should A be able to take advantage of the laches doctrine?

The writers believe that in circumstances such as these, the analogous prescriptive period should be applied, as the old cases say, "mechanically." However, two caveats should be added. Firstly, an admiralty plaintiff in A's position should be entitled to benefit from the equitable tolling principles which are available to X, the non-admiralty plaintiff.

Secondly, the defendant, B, should lose the right to plead laches against A *before* the analogous prescriptive period has run. The fact that the plaintiff has acted within the analogous prescriptive period set by state or federal governments, should, in the *in personam* context, amount to a conclusive presumption against time-bar. However, in extreme circumstances, the defendant would still be able to take advantage of the equitable doctrine of *waiver*. Waiver constitutes the implied or express voluntary relinquishment of a right. It has been little used in admiralty. Importantly, unlike laches, it is *not* a doctrine of prescription. Were the writers' suggestions to be adopted, the judicial determination of what constitutes the analogous prescriptive period would assume much greater importance.

It is easier to justify a special equitable doctrine of prescription in *in rem* or *quasi in rem* cases. In such a case, the plaintiff must, after all, enforce his or her rights by seizing a ship. The appropriate ship or ships may be unavailable for years on end, but, alternatively, may lie in the plaintiff's back yard for months. It is often difficult for admiralty plaintiffs, especially small business vendors in America's ports, to work out which party is responsible, *in personam*, for their debts. Such plaintiffs often face a maze of contractual relationships, including agents, operators, shipowners and charterers. But maritime debts can always be collected *via* the classic *in rem* action, given the availability of the vessel.[138]

In such circumstances, it really is unfair to try to enforce fixed prescriptive periods. There is a *maritime* reason for departing from a normally equitable and predictable prescriptive analysis. And on the other hand, there is something particularly lax about failing to pursue an obvious opportunity for an *in rem* action. The action is *so* effective: the *res* is "responsible" for its associated debt, no matter what cargo it carries, whose voyage it has embarked on, or whether (subject to laches) years have passed.

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138. The Federal Maritime Lien Act, 46 U.S.C. §§ 971 et seq., was amended in 1971 to make the *in rem* action a more effective tool for admiralty plaintiffs. In other words, the purpose of the change was to "[p]rotect terminal operators, ship handlers, ship repairers, stevedores, and other suppliers who in good faith furnish necessaries to a vessel." M.R. 92-340, 92 Cong. 1st Sess.; reprinted in 1971 U.S. Code Cong. & Ad. News 1363, at 1363.

The element of special "laxness" can justify, in the authors' submission, the continuing application of laches to cases where the analogous prescriptive period has not yet run. In connection with *in rem/quasi in rem* actions, the authors would favor the continuing application of laches in the basic form that it now exists in, say the Fifth Circuit. But courts should be able to find laches in cases of *egregious* delay despite lack of evidence of prejudice.

Using the seven factors set forth above at page 521, the basic underlying question should be: "What could this particular plaintiff reasonably have done in this particular set of circumstances." The rules for *quasi in rem* actions should be similar, but more leeway should be afforded to the plaintiff. The *quasi in rem* procedure is not so easy to use as is its sister *in rem* action.

CONCLUSION

To conclude, the writers believe that the trend in admiralty courts is to look on laches with increasing disfavor. This century's evolution of the disjunctive rule has served to assist plaintiffs by easing their burden of proof. Now that there is a definite prescriptive period for maritime personal injury and death actions, it is possible that there will be less successful laches defenses. Perhaps the admiralty doctrine of laches, that "wand of equity," as Justice Brown of the Fifth Circuit has termed it, has grown "gentler and kinder."[139]

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139. Fidelity & Casualty Co. of N.Y. v. C/B Mr. Kim, 345 F.2d 45, 52 (5th Cir. 1960).