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COMMENTS

THE DEFENSE OF LACHES AND A CORRELATIVE

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The term laches,[1] when used in a legal sense, generally brings to mind the image of the complainant who has slept on his rights for an unreasonable length of time, and who is now precluded from asserting those rights.[2] Laches connotes the passage of time and a laxness on the part of a party to assert his rights during the time elapsed. The defense of laches, as applied in equity, is a much more restricted doctrine than is apparent in this connotation of the word. The purpose of this note is to show what generally constitutes a defense of laches, and to point out the relationship of this defense to the doctrine of estoppel which may be applied when a party fails to assert his rights in a reasonable length of time.

The defense of laches requires the defendant to show more than a mere passage of time. The West Virginia Supreme Court of Appeals in *Carter v. Price*[3] held that the lapse of time does not bar the claim. The lapse of time must be accompanied by circumstances that place the opposite party at a disadvantage.[4]

Generally, the courts speak of the delay constituting a defense of laches as "unreasonable delay." A study of cases dealing with this type of delay discloses that the court does not mean delay for an "unreasonable length of time." The court deals here with delay that is unreasonable since it puts the opposite party at a disadvantage. The West Virginia court in the case of *Depue v. Miller*[5] stated that the amount of delay necessary depends on the circumstances of the case, holding that in some situations a delay of a few weeks may suffice. The court, in the same case, went on to point out that a long period of delay may not be enough when unaccompanied by evidence that the defendants were put at a disadvantage by the

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[1] Webster defines laches as "laxness, remissness, negligence, neglect". WEBSTER'S NEW INTERNATIONAL DICTIONARY (1929).

[2] Black defines laches as: "omission to assert a right for an unreasonable and unexplained length of time". BLACK LAW DICTIONARY (3d ed. 1933).

[3] 85 W. Va. 744, 102 S.E. 685 (1920).

[4] Currance v. Ralphsnyder, 108 W. Va. 194, 151 S.E. 700 (1929); Depue v. Miller, 65 W. Va. 120, 64 S.E. 740 (1909); Crammer v. McSwords, 24 W. Va. 594 (1884).

[5] 65 W. Va. 120, 64 S.E. 740 (1909).

delay. In an early Virginia case[6] a delay of some seventy days was sufficient to bar the claim. This is to be contrasted with the English case of *Pickering v. Stamford,*[7] wherein a delay of over thirty years was not sufficient to constitute laches since there was an absence of evidence of prejudice to the opposite party.

Since there is no fixed period of time required to show unreasonable delay, it then becomes essential to know what the court means by delay that works a disadvantage[8] to the opposite party. Generally, the courts hold that the defense of laches implies injury to the party pleading the same, this injury having been caused usually by the loss of evidence, the death of some of the original parties, or the intervention of the rights of third parties.[9] It is to be noted that the defense of laches is not concerned with fraud[10] by a party. The defense arises primarily on the ground that the court cannot now obtain an equitable result because the passage of time has rendered it impossible to determine what the true state of affairs was.[11] Clearly, then, the defense of laches (as distinguished from the word "laches"), contemplates any period of delay during which conditions change so that when a party attempts to assert his rights his adversary is now at a disadvantage. It is equally obvious that the change of conditions does not apply to a change of status of the parties, or necessarily the rights involved, but means a change in the circumstances surrounding the action, such as loss of evidence, death of witnesses, or the intervention of the rights of third parties.[12]

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[6] Pindall's Ex'rs v. Northwestern Bank, 7 Leigh 617 (Va. 1836).

[7] 2 Ves. Jun. 581, 30 Eng. Rep. 629 (1793).

[8] It is essential that the reader note that the term "disadvantage" is used. This is not to be construed to include fraud on the other party.

[9] Pownall v. Cearfoss, 129 W. Va. 487, 40 S.E.2d 886 (1946); Roberts v. Crouse 89 W. Va. 15, 108 S.E. 421 (1921); Carter v. Price, 85 W. Va. 744, 102 S.E. 685 (1920).

[10] There have been cases decided in West Virginia and other jurisdictions to the effect that fraud can shorten the time period. See Depue v. Miller, 65 W. Va. 120, 64 S.E. 740 (1909). However, it is submitted that such situations raise an estoppel, which is closely related to the defense of laches.

[11] "If by laches and delay of the plaintiff it has become doubtful whether the adverse party can command the evidence necessary to a fair presentation of the case on their part, or if it appears that they have been deprived of any such advantages they might have had if the claim had been seasonably insisted upon, or before it became antiquated, or if they be subjected to any hardship that might have been avoided by reasonably prompt proceedings, a court of equity will not interfere to give relief". 5 POMEROY, EQUITY JURISPRUDENCE § 21 (4th ed. 1918).

[12] Snyder v. Charleston & Southside Bridge Co., 65 W. Va. 1, 63 S.E. 616 (1909).

The West Virginia court, has in a number of cases,[13] described laches as being such delay that raises a presumption that the party has waived or abandoned his right. Generally it is not too clear as to how the court uses the word "laches." Is the court using it to describe the period of time elapsed and the laxity of the party that raises this presumption of waiver or abandonment; or, is the court using the term to describe the defense of laches and indicating that this can be predicated on delay alone? It is submitted that the court is using the word as descriptive of the passage of time coupled with the party's laxness in asserting his right. This is apparent in other cases[14] dealing with laches wherein the court has stated that mere delay for a long period of time, standing alone, does no more than raise a presumption of an intent to abandon the cause of action. However, it is true that the West Virginia court has used the word "laches" to connote the defense of laches, which requires more than a passage of time. That the court has used the word "laches" to mean both is obvious in its discussion of this presumption in *Pownall v. Cearfoss.*[15] In that case the court held that "any excuse for the delay that takes hold of the conscience of the chancellor, and makes it inequitable to interpose the *defense,* is sufficient." (Italics supplied.) It is submitted that an excuse for the delay may rebut the presumption of abandonment, but it would not necessarily prevent a defense of laches from being asserted.

A conflicting doctrine has been interjected in the defense of laches in West Virginia. The court has included in its definition of laches the defense of abandonment. It has defined the defense of laches as delay that is prejudicial to the other party *or* as delay coupled with some conduct indicating abandonment of the claim.[16] In one of the earlier cases[17] in West Virginia, the court, discussing the defense of laches, stated that mere lapse of time (laches of the party) operates as *evidence* of assent, acquiescence or waiver. The defense

[13] Solins v. White, 128 W. Va. 189, 36 S.E.2d 132 (1945); Caplan v. Shaw, 126 W. Va. 676, 30 S.E.2d 132 (1944); Bank of Marlinton v. McLaughlin, 123 W. Va. 608, 17 S.E.2d 213 (1941).

[14] White v. Bailey, 65 W. Va. 573, 64 S.E. 1019 (1909); Depue v. Miller, Crammer v. McSwords, both *supra* note 4.

[15] 129 W. Va. 487, 40 S.E.2d 886 (1946).

[16] *Ibid.* The cases listing this as an alternative element of the defense are numerous. However, a reading of all the cases citing this as an alternative discloses that none ever turned on this point. In those cases in which the defense was allowed, it was because the lapse of time had placed the opposite party at a disadvantage.

[17] Pusey v. Gardner, 21 W. Va. 469 (1883).

of laches was held applicable in the case because of the loss of evidence and the death of the original parties to the transaction. However, this opened the door and the first indication of this alternative came to light in *Depue v. Miller.* In that case the court, after citing that delay was evidence of assent, acquiescence or waiver, went on to say that "when nothing appears but lapse of time and circumstances not working prejudice or injury to the defendant, . . . the only inquiry is whether . . . the plaintiffs have abandoned or relinquished their right." The court then cited a Virginia case[18] wherein the court had held that laches of a party affords evidence of the abandonment of the right. It is submitted that the Virginia court was referring to the period of delay as evidence of abandonment and was treating the abandonment as a defense available to the defendant. The West Virginia court, rather obviously, was doing the same. This is evidenced in the words of the court: "the only inquiry is whether the plaintiffs have abandoned their right."[19] However, the syllabus of the court, in discussing the defense of laches, coupled the issue of abandonment with the issue of prejudice as an alternative ground for the defense. This case has been cited in recent West Virginia cases for this definition of the defense of laches.

In using this definition, West Virginia has adopted a new and unrelated element into the defense of laches. This is not accepted in other courts. The general rule is that the defense of laches consists of lapse of time as one element, the change of conditions placing the adverse party at a disadvantage being another element. None of the cases in other states lists abandonment as a possible alternative showing in claiming the defense of laches. The United States Supreme Court has held that a party, by reason of another's delay, may have good reason to believe that the right has been abandoned.[20] That court, in the same case, went on to say that the defense could not be asserted because of no change in the conditions between the parties. Generally, the courts have used the word "laches" to describe the period of time elapsed and the negligence of the party in failing to assert his right, and have held that "laches of a party" raises a presumption of acquiescence, waiver or abandonment.

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[18] Bell v. Wood, 94 Va. 677, 27 S.E. 504 (1897).

[19] Abandonment is a defense requiring more than a lapse of time; it generally requires a showing of intent to abandon. Smith v. Root, 66 W. Va. 633, 66 S.E. 1005 (1910); Mitchell v. Carder, 21 W. Va. 277 (1883).

[20] Penn Mut. L. Ins. Co. v. Austin, 168 U.S. 685 (1897).

Up to this point we have considered two elements of the defense of laches, namely delay and that a change of conditions have placed the defendant at a disadvantage. We now turn to another requisite of this defense. This element must have been present during the period of delay. It is possible that from this comes the confusing issue of abandonment. It must be shown that, during the period of delay, the party knew of his right and then failed to do anything.[21] The courts recognize this knowledge plus a failure to do anything over a period of time as evidence that the party has acquiesced in the invasion of his right. It is in this sense that the courts have held that this delay raises a presumption of acquiescence, waiver or abandonment.[22] Pomeroy states the rule as follows:

> "when a party with full knowledge, or notice or means of knowledge of his rights, recognizes the action, or fails to repudiate it for a considerable length of time, *so that the other party is thereby reasonably induced to suppose that it is recognized, there is* acquiescence."[23]

In effect then, the court requires knowledge of the condition complained of by the complainant during the delay, plus a lack of action on his part *which would lead the defendant* to believe that the complaining party has acquiesced, waived or abandoned the right. It is to be emphasized that here the court is looking for inaction by the party now asserting the right which has led the opposite party to presume acquiescence. It is submitted that the court is not requiring evidence of abandonment as a defense, but is saying that a passage of time plus a failure to assert a known right has led the defendant to presume acquiescence or abandonment of the right. Knowledge of the right can be imputed to the party now claiming the right. The West Virginia court has held that one who would repel the imputation of knowledge by showing ignorance of his rights must be without fault in remaining in ignorance of those rights.[24] Such notice and a delay in asserting a right is often referred to as "laches of the party" which in actuality only raises a presumption of acquiescence, waiver or abandonment. Again this is only one element of the defense of laches.

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[21] Gieseler v. Remke, 117 W. Va. 430, 185 S.E. 847 (1936); Bryant v. Groves, 42 W. Va. 10, 24 S.E. 605 (1896).

[22] Reynolds v. Gore, 102 W. Va. 652, 136 S.E. 184 (1926).

[23] 5 POMEROY, EQUITY JURISPRUDENCE § 965 (italics supplied).

[24] Plant v. Humphries, 66 W. Va. 88, 66 S.E. 94 (1909).

West Virginia has been cited as having an unusual restriction on the defense of laches. In *Plant v. Humphries*[25] the court said that laches will not run against a party asserting title in real estate which he has had in possession during the period of delay. It is submitted that this was a dictum in the *Humphries* case as the decision rested on another point. True, the court discussed this rule in an earlier case,[26] but in that case the defense of laches was not allowed because of the relationship of the parties. Again it was merely a dictum. However, there the court cited the rule as having been adopted in the case of *State v. Sponagle*.[27] The *Sponagle* case was an action by the state to sell lands claimed by forfeiture for failure to list the property on the land books seventeen years prior to this litigation. Twenty-two years prior to the suit the land had been transferred under a tax deed to one of the defendants. This defendant attempted to apply the defense of laches to the state. The court held that the defense of laches was inapplicable as no possession was held by the defendant under the tax deed, and since the tax deed was only a cloud on the title, there was no need for the state to sue.[28] It is to be emphasized that neither party was in possession. In effect, the court held that the state had no reason to act until it became apparent that this defendant had an adverse claim. The rule as cited in the later case was not laid down in the *Sponagle* case. There is no other authority for such a rule and in actuality it has not been applied.[29] It is submitted that apparently the rule that laches will not run against a party in possession developed erroneously from an application of that element of the defense of laches requiring that the plaintiff have knowledge of the transgression during the period of delay. That such a rule is inapplicable becomes apparent when one realizes that the party in possession would have a better knowledge of his rights and of any transgressions thereof.

The defense of laches can be pleaded only to equitable claims.[30] Where the claim set out is one involving legal title and the statute

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[25] *Ibid.*

[26] Mullins v. Shrewsberry, 60 W. Va. 694, 55 S.E. 736 (1906).

[27] 45 W. Va. 415, 32 S.E. 283 (1898).

[28] *Id.* at 431, 32 S.E. at 290.

[29] In Waldron v. Harvey, 54 W. Va. 608, 46 S.E. 603 (1904), the court discussed this rule, citing the *Sponagle* case as authority for it. However, the case was one concerning a legal title and the statute of limitations had not run. It was held that the defense of laches was not applicable under this set of facts. See also Smith v. Owens, 63 W. Va. 60, 59 S.E. 762 (1907) which was decided on the point that the party in possession had no knowledge of any transgression, although he was in possession of the property.

[30] Waldron v. Harvey, 54 W. Va. 608, 46 S.E. 603 (1904).

of limitations applies, a court of equity will not apply the defense of laches against a party vested with legal title.[31] This has long been an accepted axiom of equity.[32] Our court, in such cases where a party in possession attempts to plead a defense of laches against the party asserting legal title, holds that the statute of limitations applies, not the defense of laches.[33] However, it is to be noted that in the same cases the court speaks of the laches of the party as raising a presumption of acquiescence, waiver or abandonment. As pointed out heretofore, this presumption is easily rebutted. In many of these cases the defendant has claimed the action is barred by the laches of the complainant. It is submitted that, where a legal right is involved, to claim an action is barred by laches is, in effect, to plead abandonment. Yet abandonment as a defense requires more than a mere passage of time.

Summarily, laches as used by the courts can be said to describe two different things. First, the courts speak of a complainant's laches. By this is meant a period of delay during which the party has known of his rights but has negligently failed to assert same. Secondly, the court uses the word "laches" to describe the defense of laches. The defense of laches is best defined as delay of the complaining party that has put the other party at a disadvantage due to a change of conditions such as loss of evidence, death of a witness or the intervention of the rights of third parties. The defense of laches should not be defined as being delay coupled with evidence of abandonment, as abandonment requires a different showing and should not be confused with the defense of laches. The court has held that laches on the part of a party raises only a presumption of acquiescence, waiver or abandonment, but such presumption is easily rebutted by any excuse that takes hold of the chancellor's conscience.

Leaving the defense of laches, we turn now to a defense available in equity known as equitable estoppel.[34] Equitable estoppel

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[31] *Ibid;* Allen v. LaFollette, 94 W. Va. 700, 120 S.E. 176 (1923).

[32] For a discussion on the application of the statute of limitations in equity, see 40 W. VA. L.Q. 851.

[33] Waldron v. Harvey, 54 W. Va. 608, 46 S.E. 603 (1904).

[34] The term "equitable estoppel" is used rather than estoppel in pais. Historically, estoppel in pais dealt with technical estoppels which arose from the acts of a party. Coke described estoppel in pais as operating to enforce some technical rule of law, as estoppel arising from livery, entry, partition or acceptance of rent. 2 COKE ON LITTLETON 352a. However, today the terms are used interchangeably, and seemingly have the same meaning. It is not meant to indicate that the defense of estoppel is restricted to equity, as is the defense of laches. Estoppel is available as a defense at law and in equity.

and the defense of laches have much in common. In fact, the two doctrines are so alike that the court has confused one with the other.[35] Whereas the defense of laches consists of delay that places another at a disadvantage due to a change of conditions, equitable estoppel consists of acts or delay that would lead to a fraud on the defendant if the complainant is allowed to assert his rights. The Virginia court has described estoppel of this character as arising from the conduct of the complainant using the word conduct in its broadest sense; and meaning acts or silence when there is a duty to speak.[36] The similarity is apparent; the grounds of confusion obvious. An estoppel situation may arise from a delay and failure of a party to act just as the defense of laches may arise from delay and failure to act. The West Virginia court has held that the law of estoppel does not require an affirmative act, saying that, where a party has remained inactive for a considerable time thereby inducing another to incur expenses, that party is estopped from now asserting his rights.[37] Some tendency to confuse the two doctrines arises from the fact that the court often refers to the period of delay as laches of the party.[38] Again the court is speaking of the delay coupled with the laxity of the party and is not referring to the defense of laches as outlined herein.

While there is a similarity between this type of estoppel and the defense of laches in that either may arise from delay in assertion of a right, the likeness ends there. As discussed heretofore, the defense of laches is predicated on the one party's being placed at a disadvantage due to a change of conditions. Estoppel is predicated on the ground that to allow the guilty party to assert the right would result in a fraud on the other party. It is not necessary to show fraud in the conduct of the party, but only to show that the complainant has delayed in asserting his right and that the opposite party in reliance on this apparent acquiescence has changed his position to a point that it would now be a fraud upon him to allow the complainant to assert his right.[39] It is to be noted that equitable estoppel when arising from the inaction of a party requires a change of position on the part of the defendant. This is not an element of the defense of laches.

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[35] Lafferty v. Lafferty, 42 W. Va. 783, 26 S.E. 262 (1896).

[36] Thomassen v. Walker, 168 Va. 247, 190 S.E. 309 (1937).

[37] Tallman v. Cunningham, 111 W. Va. 231, 161 S.E. 22 (1931).

[38] See note 35 *supra.*

[39] 2 POMEROY, EQUITY JURISPRUDENCE § 802.

In regard to an estoppel situation arising from the failure of a complainant to enforce his right, our court requires certain elements to be present.[40] Summarily these elements are: (1) the silence must amount to a concealment of material facts; (2) these facts be known, or the circumstances be such that the knowledge can be imputed, to him during the period of delay; (3) the opposite party must have no knowledge of the truth concerning the facts; (4) the conduct must be with the expectation of reliance thereon or under circumstances that would indicate it would be relied upon; (5) the opposite party must have relied on the conduct and acted on it; and (6) he must have so acted that he would now suffer a loss if the complaining party is not estopped. There is one further consideration. An estoppel is applicable to a legal right and can, when the above elements are present, be asserted although the statute of limitations has not run.[41] Clearly, the doctrine of estoppel and the defense of laches are separate and distinct defenses. Although they both may rest on the same type of delay, the so-called laches of the complainant, the other elements necessary to each are different.

This brings us to a consideration of a recent case decided by the West Virginia court.[42] In this case *C* sought an injunction to order *D* to remove water from *C*'s land. The water had backed up on *C*'s land as a result of *D*'s raising the height of a dam on *D*'s property from sixteen feet to twenty feet. The lake thus created was part of a real estate development planned and owned by *C*'s husband *(H)* nineteen years prior to the suit and seven years prior to *C* and *H*'s marriage. *H*'s plan had been to construct the dam to a height of twenty feet; however, the Public Service Commission only gave him permission to go to sixteen feet until a road was relocated at the rear of the project. All lots sold by *H* were sold with the understanding that the dam would be raised to twenty feet. *H* had originally owned the property which *C* now owned; however, he had conveyed that portion of the tract to a third party six years prior to his marriage to *C*. *C* had purchased this portion after marrying *H*. *H*, one year prior to his marriage to *C*, had lost his title to the balance of the subdivision. *D* took title to this part of the subdivision and had continued to sell lots in the subdivision with the understanding that the dam would be raised to twenty feet (the lots were worthless

[40] Norfolk & W. Ry. v. Perdue, 40 W. Va. 442, 21 S.E. 755 (1895).

[41] *Ibid.*

[42] Stewart v. Lake Washington Realty Corp., 92 S.E.2d 891 (W. Va. 1956).

otherwise). During this period *H* served as *D*'s agent in selling these lots. One year after *C* acquired the property, *C* notified *D* that she would protest the impounding of the water on her land by *D*'s raising the dam to a height of twenty feet. After *D* raised the dam, *C* served notice to remove the water from her land. *C* brought the action five years after acquiring the land.

Clearly the defense of laches, as discussed herein, did not apply as the delay was not of the prejudicial type that is required. *D* by claiming *C* was barred by laches was, in effect, pleading abandonment, that the unreasonable delay of *C* in bringing the action indicated she intended to abandon her right. Here *C*'s actions in protesting the intended invasion and, later, the actual invasion of her right negated any intent of abandonment.[43] Also, *C* was in possession of the property which would negate an intent to abandon. This portion of the case illustrates the importance of distinguishing the expression "laches of a party" from the doctrine known as the "defense of laches".

At first glance the estoppel raises a more difficult question. There is no doubt that *C*'s early inaction in claiming her right led *D* to sell lots under the representation that the dam would be raised to a height of twenty feet. Also, it was beyond doubt that *C* knew that *D* was selling the property with this in mind as *H* was acting as his agent. However, an element of the doctrine of equitable estoppel was lacking; that element, as cited in *Norfolk & W. Ry. v. Perdue*,[44] is that the defendant who claims to have been misled by the complainant's inaction must show that he had no knowledge of the truth concerning the facts. In the case under discussion *D* knew or should have known that he had no right to inundate *C*'s land. Any representations he made were based on his own beliefs and not on any rights he had. True, the case reaches a hard result; however, it is submitted that under the law of West Virginia it is a just result. Property owners still have the right to presume that the law will protect them from an arbitrary encroachment on their land unless they mislead a party, who is ignorant of the truth, through inaction or actual misrepresentation.

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[43] *Ibid.* The court so held, saying "Even long delay does not bar a claim if his intent to abandon is negatived by his conduct . . .", at 901.

[44] 40 W. Va. 442, 21 S.E. 755 (1895).