The basis of that decision was that since the stronger roads have no constitutional right to receive more than a fair return, and since they would receive more than a fair return under uniform rates set to provide the weaker roads with a fair return, it was competent for Congress to declare that half of the income above a fair return should be held in trust, and to appropriate it to serve the public interest. In the principal case the Court reasoned that the privilege of a consolidation lease was like the privilege of receiving more than a fair return, and that the order conditioning award of the privilege upon payment of dismissal compensation did not infringe substantive due process.

Corporations—Laches and Acquiescence as a Bar to Relief of Minority Stockholder from Destruction of His Rights to Arrearages on Preferred Stock—[Delaware].—
A Delaware corporation, pursuant to the requisite vote of its stockholders, purported to amend its charter to provide for the conversion of each share of its preferred stock, on which there were accrued arrearages of $21.25 per share, into five shares of common stock. The exchange was to be effected without discharge of the unpaid dividends on the preferred. A dissenting stockholder sought and obtained a judgment that the amendment did not foreclose his rights to accrued dividends. After learning of a compromise and preparation for dismissal of this suit, the plaintiff, who had caused his stock to be voted against the amendment, attempted to intervene and to be substituted as party plaintiff. When his motion to intervene was denied without prejudice, the plaintiff brought a separate action. The corporation defended on the ground that the plaintiff was barred by laches and acquiescence in that he had delayed institution of the action, and had accepted dividends after consummation of the purported amendment of the charter. The dividends were on the common shares which the plaintiff had refused to accept in exchange for his preferred stock. The court sustained the defendant's plea, and dismissed the suit. Frank v. Wilson & Co.

Although many rights of dissenting stockholders have been held subject to destruction by charter amendment, the courts have frowned upon the elimination of accrued cumulative dividend arrearages. When attempted elimination of arrearages is held to

\* Keller v. Wilson & Co., 194 Atl. 45 (Del. Ch. 1937). The court pointed out that the plaintiff's bill was drawn to permit intervention by all parties in the same position as the plaintiff, but that the intervenor was not in the plaintiff's position.

\* Keller v. Wilson & Co., 190 Atl. 115 (Del. 1936); Johnson v. Consolidated Film Industries, 197 Atl. 489 (Del. 1937). That the Wilson & Co. charter amendment and others like it were invalid as to dissenting stockholders was established in Keller v. Wilson & Co., 190 Atl. 115 (Del. 1936), and similar plans were abandoned by other corporations contemplating the elimination of arrearages on preferred stock. 28 Time, No. 21 at 85 (November 23, 1936).

be unauthorized by the statute, several forms of relief are available to a dissenting stockholder. The most drastic in its effect, the setting aside of the attempted charter amendment, will not normally be granted, since the objecting stockholder not only is in no way injured by the conduct of those preferred stockholders who relinquish their rights, but probably is benefited by his advance in priority. Relief might better be given to the plaintiff in the form of an injunction forbidding the corporation to pay dividends on any stock junior to that owned by the plaintiff until after the payment of all the arrearages on the plaintiff’s stock. Certainly such relief is no more than the plaintiff contracted for when he purchased his preferred stock.

A third possibility for relief, in a case such as the principal one, might take the form of a judgment for a cash dividend. This relief might be based on the theory that a corporation may not declare a dividend upon common stock until it has paid all the arrearages on its cumulative preferred, and that declaration of dividends on the common confers upon preferred stockholders an immediate right to arrearages. A judgment for a cash dividend might also be secured upon the ground that dividends may not be declared in favor of those preferred stockholders who had exchanged their stock for common unless a dividend is also declared in favor of other preferred stockholders. Judgment for a cash dividend would not seem to be a necessary remedy, however, since the dissenter otherwise would retain his right to full payment of arrearages before dividend payments on common stock were permissible.

Even though readjustment is authorized by statute a further remedy for abridgment of rights is afforded dissenters in many states by statute. A dissenter is entitled to an appraisal of his stock and purchase by the corporation at the appraised value. A preferred stockholder who dissents to an attempted destruction of his arrearages does not have an unqualified right to relief. His claim may be barred by acquiescence, by laches, or by the statute of limitations. Acquiescence may take the form of quiescence under such circumstances that assent may reasonably be inferred, or of affirmative action inconsistent with disapproval. Affirmative acts of dissenters that have been held indicative of acquiescence include exchange of shares on the basis provided by the amendment, or, as in the present case, receipt and retention of dividends paid on the stock to which the stockholder is entitled under the terms of the amendment, but which he did not accept. Voting in favor of the amendment would seem to be either the strongest form of acquiescence, or something even more than acquiescence—a participation.

Acquiescence will bar the stockholder’s cause of action without proof of actual detrimental reliance thereon. The rule finds basis in the necessity of securing finality in

6 13 Fletcher, Cyc. Corp. § 5823 (perm. ed. 1932).
9 13 Fletcher, Cyc. Corp. § 5891 (perm. ed. 1932); SEC, op. cit. supra note 5, app. B, pt. IV.
11 13 Fletcher, Cyc. Corp. § 5823 (perm. ed. 1932).
matters affecting the intricate relationships of the corporation with its stockholders and in the desire to protect third persons, for example those purchasing stock from the corporation after the reduction of arrearages.

In addition to acquiescence, courts utilize the doctrine of laches in order to achieve the desired result. Courts sometimes employ the terms laches and acquiescence concurrently without specifying which defense is relied upon as a basis for the decision. A possible explanation of this is that inaction may be an evidence of acquiescence. The two terms, however, are not coextensive.

Acquiescence implies active assent, while laches, it is said, imports passive assent characterized by a delay working detriment to another because of his change of position in reliance upon the presumption that silence indicates acceptance of the validity of an action which might be challenged. The process involved in a finding of laches constitutes a balancing of the prejudice to another caused by the complainant’s delay, against the reasons given by the complainant in explanation. An instance of the prejudice to the corporation may be the considerable trouble and expense attendant upon effecting the exchange and reclassification of shares, some or all of which might possibly have been prevented if the dissenter had brought suit seasonably. Furthermore, since the issue of the new stock may be followed by active trading in the shares detriment to third parties whose rights had intervened because of the complainant’s delay may result should the complainant be granted relief.

So in the presence of laches courts find ready and understandable support for a denial of relief to dilatory stockholders in the harm to other parties which would result from the stockholder’s delay, were his suit successful. But since the defense of laches is equitable, if the delay in attacking the act was induced not by mere inaction, but by ignorance, caused possibly by non-disclosure or fraud of the directors, the defense of laches will not bar the stockholder’s suit, although passage of time, with conse-

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14 Romer v. Porcelain Products Co., 2 A. (2d) 75 (Del. Ch. 1938).
15 The Chancellor in the Frank case did not specify whether his decision was based on laches or acquiescence, but he indicated that there was a difference between the two defenses.
16 Lux v. Haggin, 69 Cal. 255, 10 Pac. 674 (1886).
18 Rodick v. Pineo, 120 Me. 160, 113 Atl. 45 (1921).
22 Romer v. Porcelain Products Co., 2 A. (2d) 75 (Del. Ch. 1938).
25 2 Fletcher, Cyc. Corp. § 756 (perm. ed. 1931).
quent acts in reliance, may necessitate modification of the remedy granted.\textsuperscript{27} Since knowledge of rights is an essential element of laches,\textsuperscript{28} the delay alleged to be laches will be measured only from the time when the stockholder became or could reasonably have become aware of the true state of affairs.\textsuperscript{29}

Apart from other factors the court may employ the statute of limitations to defeat the claims of a stockholder, although usually in a case such as the principal one\textsuperscript{30} a claim so barred would also be barred by laches, which is independent of the statute.\textsuperscript{31} The statute of limitations is often applied in equity by statutory enactment or by analogy.\textsuperscript{32} Where it is not applied, courts often use the statute to determine what constitutes a reasonable time with respect to application of the laches doctrine,\textsuperscript{33} but if a strict view is maintained, it would seem that this analogy is not well taken, for the only consideration of importance in deciding whether the defense of laches is to prevail is the damage caused to the defendant or third parties by the plaintiff's delay.

\begin{center}\	extbf{Injunctions—Restitution and Damages as Remedies for Wrongful Issuance of Injunction—[Federal].—}\end{center}

After final dismissal\textsuperscript{4} of a suit maintained by a power company to enjoin the making of a PWA loan to a county for the purpose of building a competing power plant, the county brought suit against the power company for restitution of the profits gained by the company at the expense of the county by reason of the delay in putting the proposed plant into operation.\textsuperscript{2} On appeal from the decree of the district court dismissing the suit, held, the relief could not be granted as damages arising

\textsuperscript{27} Int'l & G.N.R. Co. v. Bremond, 53 Tex. 96 (1880) (plaintiff permitted personal recovery, although right to enjoin corporate action was lost by laches).


\textsuperscript{29} Wills v. Nehalem Coal Co., 52 Ore. 70, 96 Pac. 528 (1908); Kessler & Co. v. Ensley & Co., 129 Fed. 397 (C.C. Ala. 1904); Taylor v. S. N. Alabama R. Co., 13 Fed. 152 (C.C. Ala. 1883). 13 Fletcher, Cyc. Corp. § 5876 (perm. ed. 1932). Cases other than those concerned with lack of knowledge concerning corporate transactions which state the same rule are Waters v. Waters, 155 Md. 146, 142 Atl. 397 (1928); Briggs v. Buzzell, 164 Minn. 116, 204 N.W. 548 (1925).


\textsuperscript{31} Smalley v. Queen City Bank, 94 S.W. (2d) 954 (Mo. App. 1936); see Peabody v. Carr, 313 Pa. 325, 169 Atl. 126 (1933).

\textsuperscript{32} 1 Pomeroy, op. cit. supra note 4, at § 479.

\textsuperscript{33} Gillons v. Shell Co. of California, 86 F. (2d) 660 (C.C.A. 9th 1936); White v. Harby, 176 S.C. 36, 179 S.E. 671 (1935).

\textsuperscript{4} For an account of the litigation in this suit, see Greenwood County v. Duke Power Co., 107 F. (2d) 484 (C.C.A. 4th 1939).

\textsuperscript{2} After the first decree had been vacated in accordance with the mandate of the Supreme Court in 299 U.S. 259 (1936), the power company obtained a preliminary injunction upon posting of the bond required for preliminary injunction under the statute, 38 Stat. 738 (1914), 28 U.S.C.A. § 382 (1928). The county also sought damages on this bond in the instant case, but was refused on the ground that the court has discretion as to the prosecution of the bond, Russell v. Farley, 105 U.S. 433 (1881); cf. Houghton v. Meyer, 208 U.S. 149 (1907). At the date of the decision in Russell v. Farley there was no federal bond statute; and it may well be