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itself. If an officer of the court had participated in the perjury, it is possible that the judgment could be set aside. In *Lim Kwock Soon*, though, there was no evidence of such participation. The Fifth Circuit in its latest opinion seemed to indicate that the action of the plaintiffs was fraud upon the court. This view should only be ascribed to loose language by the court, for the cases are consistent in ruling against considering simple perjury as fraud upon the court.

The extraordinary puzzlement of this case arises out of two circumstances. First, it involves an attempt by the Government to have a declaratory judgment (which had declared that plaintiffs were natural-born citizens) set aside by motion under rule 60(b) and not an attempt to have a naturalization order set aside. Secondly, the case presents the situation of parties committing perjury, admitting such perjury, but the other party's being unable to benefit from such admission. If this were an ordinary civil case, and one party admitted perjury, the case could be settled out of court, but as this case involves loss of citizenship, the Government was forced to go into court in an attempt to have the judgment set aside.

T. Neal Combs

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**Finality of Informal Tax Settlements — Estoppel as a Bar to Refund**

In 1955 the Commissioner of Internal Revenue assessed a tax deficiency against Uinta Livestock Corporation. The deficiency arose due to a failure to report an alleged capital gain on a stock transfer for the year 1948.

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80 See notes 62-67 supra.


82 *Ibid.* The Fifth Circuit gave the district court power "to enter such rulings, orders and judgments as to it may appear appropriate to correct the fraud perpetrated upon the courts herein by the plaintiffs..."

83 There is a marked difference between a court decision declaring that a person is a natural-born citizen and the naturalization procedure by which a person becomes a citizen. If a person is a naturalized citizen, this means that he was not, before the judgment, a citizen. However, when a court declares a person to be a natural-born citizen, this means that the person was a citizen before the judgment.

If this had been a case of naturalization, it is possible that rule 60(b) could not be used even if all its requirements were met; for within the naturalization statutes there is a provision for setting aside a naturalization order obtained by fraud. 8 U.S.C. § 1451 (1964). This provision led a court in *Petition of Devlas*, 31 F.R.D. 130 (S.D.N.Y. 1962) to express doubt that rule 60(b) could be used to set aside a naturalization order.

1 In 1948 the Uinta Livestock Corporation was organized, resulting from a paper transfer of stock and assets between the Rees Land and Livestock Corporation and Uinta. The trial court in the instant case found that the exchange was substantially proportionate (based on §§ 113(a) and 112(b)(5) of the 1939 Internal Revenue Code); but the court of appeals found that the exchange was disproportionate and that Uinta's basis for the Rees stock received was the fair market value and not the original cost. Since the exchange of the assets and the stock of Uinta were identical in value, no gain was realized and a refund was therefore allowed for the full amount.
Uinta objected to the deficiency. Following numerous conferences the taxpayer and the Commissioner agreed to a reduced deficiency and signed IRS Form 870 AD.\textsuperscript{2} The taxpayer thereby offered (1) to waive the statutory restrictions concerning time for assessment and (2) not to seek a refund.\textsuperscript{3} Subsequently the Commissioner accepted the offer and Uinta paid the deficiency. In 1952 Uinta, finding that the deficiency had been incorrectly assessed against the corporation, filed for a full refund in the district court.\textsuperscript{4} The government asserted that the agreement was binding on the taxpayer, and, in the alternative, that Uinta was estopped to claim a refund. The district court upheld the government's assertions.\textsuperscript{5} Held, reversed: Form 870 AD is an informal settlement solely for the convenience of the parties, neither party being bound thereby. The agreement is not a valid bar to suit for refund. The taxpayer was not equitably estopped to assert a claim for a refund because the government failed to prove misrepresentation by the taxpayer. \textit{Uinta Livestock Corp. v. United States, 355 F.2d 761 (10th Cir. 1966)}.\textsuperscript{6}

\textsuperscript{2} The pertinent material in the form that Uinta signed is reprinted below:

\textit{Offer of Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Of Acceptance of Overassessment; . . .}

Pursuant to the provisions of section 6213(a) of the Internal Revenue Code of 1954, . . . the undersigned offers to waive the restrictions provided in section 6213(a) of the . . . Code of 1954. . . . and to consent to the assessment and collection of the following deficiencies with interest as provided by law. . . .

This offer is subject to acceptance by or on behalf of the Commissioner. . . . It shall take effect as a waiver of restrictions of the date it is accepted. Unless and until it is accepted, it shall not have force or effect.

If this proposal is accepted by or on behalf of the Commissioner, the case shall not be reopened in the absence of fraud, malfeasance, concealment or misrepresentation of material fact, or an important mistake in mathematical calculation; and no claim for refund shall be filed or prosecuted for the year(s) above stated other than for the amounts of overassessment shown above. The taxpayer also agrees to make payment of the above deficiencies, together with interest, at provided by law, promptly upon receipt of notice and demand from the District Director of the Internal Revenue. . . .

Note.—The execution and filing of this offer will expedite the adjustment of your tax liability. It is not, however, a final closing agreement under section 7121 of the Internal Revenue Code of 1954, nor does it extend the statutory period of limitation for refund, assessment, or collection of the tax.

\textsuperscript{3} \textit{INT. REV. CODE OF 1954, § 6213(a) states:}

(a) Time for Filing Petition and Restriction on Assessment.—Within 90 days, or 150 days . . . after the notice of deficiency authorized in section 6212 is mailed . . ., the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6861 no assessment of a deficiency in respect of any tax imposed . . . shall be made . . . until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final . . .

Section 6213(d) states:

(d) Waiver of Restrictions.—The taxpayer shall at any time (whether or not a notice of deficiency has been issued) have the right, by a signed notice in writing filed with the Secretary or his delegate, to waive the restrictions provided in subsection (a) on the assessment and collection of the whole or any part of the deficiency.

\textsuperscript{4} A stepped-up basis should have been used.

\textsuperscript{5} \textit{Uinta Livestock Corp. v. United States, 232 F. Supp. 1 (D. Wyo. 1964).}
There are several optional procedures available to a taxpayer involved in a deficiency dispute. First, he may petition the Tax Court for a redetermination of the deficiency. If he does so and loses, he must pay the tax and he is precluded from filing a claim for a refund or credit. Secondly, he may pay the tax and apply for a refund, and sue in the district court if the refund is not allowed.

Two methods for administrative settlement have been established by Congress in sections 7121 (closing agreements) and 7122 (compromises) of the 1954 Code. Normally, after a taxpayer files his return and it is accepted, only the running of the statute of limitations will supply final protection against a re-examination of the tax return. An exception to this rule is found in the use of a closing agreement or a compromise. The government will enter into a closing agreement to fix the taxpayer's liability for a certain item for past or future years or to fix total liability for the past year. The agreement is used in cases such as when a fiduciary desires a final determination of an estate or trust, when creditors demand au-

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\[\text{Notes:}\]

7 A district court has no jurisdiction over suit for refund where the taxpayer has petitioned the Tax Court for redetermination of the deficiency. See Int. Rev. Code of 1954, § 6112(a).
8 Int. Rev. Code of 1954, §§ 7121, 7122:

Section 7121. CLOSING AGREEMENTS:

(a) Authorization.—The Secretary or his delegate is authorized to enter into an agreement in writing with any person relating to the liability of such person (or of the person or estate for whom he acts) in respect of any internal revenue tax for any taxable period.

(b) Finality.—If such agreement is approved by the Secretary or his delegate (within such time as may be stated in such agreement, or later agreed to) such agreement shall be final and conclusive, and, except upon a showing of fraud or malfeasance, or misrepresentation of a material fact—

(1) the case shall not be reopened as to the matters agreed upon or the agreement modified by any officer, . . .

(2) in any suit, or action, or proceeding, such agreement, or any determination, assessment, collection, payment, abatement, refund, or credit made in accordance therewith, shall not be annulled, modified, set aside or disregarded.

Section 7122. COMPROMISES:

(a) Authorization.—The Secretary or his delegate may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense; and the Attorney General or his delegate may compromise any such case after reference to the Department of Justice for prosecution or defense.

(b) Whenever a compromise is made by the Secretary or his delegate in any case, there shall be placed on file in the office of the Secretary or his delegate the opinion of the General Counsel for the Department of the Treasury or his delegate, with his reasons therefor, with a statement of—

(1) the amount of tax assessed,

(2) the amount of interest, . . . imposed by law . . ., and

(3) the amount actually paid in accordance with the terms of the compromise.

Notwithstanding the foregoing provisions of this subsection, no such opinion shall be required with respect to the compromise of any civil case in which the unpaid amount of tax assessed (including interest . . .) is less than $500.

authentic evidence of the taxpayer's tax liability, or when a taxpayer desires to follow a consistent practice of closing his return from year to year. The compromise is used to a greater extent than the closing agreement. The Secretary of the Treasury or his delegate may compromise a case or controversy, civil or criminal, arising under the internal revenue laws. It is the purpose of a compromise to avoid the determination of sharply contested and dubious issues, thus enabling the taxpayer and government to avoid the expense and hazard of litigation. An offer in compromise may be based on either inability to pay or doubt as to liability.\(^\text{10}\) Prior to the 1954 Code the procedure for both types of agreements was burdensome due to the fact that the Secretary of the Treasury had to approve the compromise personally.\(^\text{11}\) The new statutes allow the Secretary to delegate his responsibility concerning these agreements; thus the taxpayer can work directly with the delegate,\(^\text{12}\) eliminating some of the burdensome procedure. But the finality and the cumbersome nature of the agreements leads to extreme caution by officials who must pass on their application.

An even simpler procedure of settling disputes is found in the informal administrative settlement, i.e., form 870 and form 870 AD.\(^\text{13}\) Prior to the 1926 Revenue Act the taxpayer could not waive the statutory restrictions concerning tax deficiencies.\(^\text{14}\) Form 870, now used to settle a tax case when it is in the Audit Division of the District Director's office, is an express, unconditional waiver of statutory restrictions, authorizing immediate assessment and collection of the alleged deficiency. The advantage to the taxpayer of signing form 870 is that the interest, due to the delay in assessment, stops running thirty days after the taxpayer signs the form. The waiver precludes a trial of the issues before the Tax Court, but the right to claim and sue for a refund after payment of the assessed amount is preserved.

If after negotiation the taxpayer and the government agree that a deficiency exists in a different amount than originally alleged, the agreement is reduced to writing in form 870 AD.\(^\text{15}\) The case is settled with the appellate division. By executing form 870 AD, the taxpayer offers to waive the restrictions of section 6213 (a)\(^\text{16}\) and to consent to the assessment and

\(^\text{10}\) See Tres. Reg. § 301.7122-1 (a) (1954). No such liability will be compromised if the liability has been established by a valid judgment or is certain and there is no doubt as to the ability of the government to collect amounts owing in respect to such liability. Tres. Reg. § 301.7122-1 (a) (1954).

\(^\text{11}\) The 1939 Internal Revenue Code, §§ 3760 and 3761 (§§ 7121 and 7122 of the 1954 Code) did not authorize the delegate of the Secretary of the Treasury to make a final closing agreement or compromise. The present code allows the Secretary's delegate to approve the final agreement.

\(^\text{12}\) The Secretary has thus far delegated his authority to the chief of the district director's office and the chief of the appellate branch.

\(^\text{13}\) See note 2 supra.

\(^\text{14}\) See note 3 supra. Section 6213 (d) allows this waiver.

\(^\text{15}\) See note 2 supra.

\(^\text{16}\) See note 3 supra.
collection of the reduced deficiency upon the Commissioner's approval. The taxpayer agrees not to file for a refund, and the government agrees not to seek a further deficiency. The form provides specifically that the case shall not be reopened except for fraud or important mathematical mistakes, and that no claim for refund shall be filed or prosecuted. When the Commissioner accepts the taxpayer's offer, the taxpayer will pay the tax to which the parties have agreed. In most instances both parties make concessions concerning the assessed deficiency so that both are relatively satisfied; consequently, only a small number of agreements are ever litigated.

A problem arises, however, when the taxpayer, after signing the agreement, files for a refund for a part or all of the reduced deficiency. If the taxpayer is allowed to file and collect a refund, the government may lose an additional tax that it could have assessed and collected, due to the complication by the statutes of limitations. The government has three years after the date of filing the return in which to assess a deficiency. The taxpayer has three years after the due date of the return or two years after the payment date, whichever is longer, to file for a refund. The government, where the statute of limitations has run, at best can recoup only the amount for which the taxpayer files.

Settlement Not a Contract  A 1929 Supreme Court case, Botany Worsted Mills v. United States, ruled that a subordinate official of the Internal Revenue Service lacked the authority to bind the government in the making of an informal settlement. The taxpayer had applied for a refund after agreeing to a settlement but not signing a formal settlement agreement. The Court found that an informal settlement agreement did not fulfill the statutory requirements of finality. It used the following language in expressing its opinion as to the particular use of such agreements.

We think that congress intended by the statute to prescribe the exclusive method by which tax cases could be compromised, requiring the concurrence of the commissioner and Secretary, and prescribing the formality with which, as a matter of public concern, it should be intended to intrust the final settlement of such matters to the informal action of subordinate officials.

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18 See note 9 supra.

19 See note 35 infra.

20 278 U.S. 282 (1929). See also, Sherwin v. United States, 320 F.2d 137 (9th Cir. 1963); L. Loewy v. Commissioner, 31 F.2d 612 (2d Cir. 1929); Holmquist v. Blair, 35 F.2d 10 (8th Cir. 1929); Austin v. Commissioner, 35 F.2d 910 (6th Cir.), cert. denied, 281 U.S. 735 (1929); In re White, 98 F. Supp. 891 (S.D. Miss. 1951), aff'd, 194 F.2d 215 (3rd Cir. 1952); Oak Worsted Mills v. United States, 36 F.2d 129 (Ct. Cl. 1929); cf., Woodworth v. Kales, 26 F.2d 178 (6th Cir. 1928).
in the Bureau. When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.21

The settlement in Botany was an informal agreement which did not contain a clause that the taxpayer would not seek a further refund. But the courts, with few exceptions, have applied the above language to the use of form 870 AD and its predecessor.22 Despite Botany and the rulings of the majority of the courts,23 the government continues to assert to taxpayers that the agreement is a binding contract.24 However, in each case the government has admitted in subsequent pleadings that the agreements are binding as a contract only as to sections 6201 and 6213(d), concerning the authority of the government to make assessments and the taxpayer's rights to waive the statutory restrictions, respectively.25 It is interesting to note that a recent Court of Claims case held that a taxpayer who had executed form 870 AD was bound by the agreement. However, the binding effect of the agreement was not based on contract principles, but on the fact that the taxpayer had failed to refute the government's contention that he had executed a section 7122 compromise.26

Act of Settlement Perhaps Estoppel There is conflict among the courts as to whether the execution of form 870 AD, containing an express clause that no refund will be filed or prosecuted, estops the taxpayer to seek a refund.27 The doctrine of equitable estoppel was first used as an affirmative defense in tax cases some twenty years ago. It resulted from efforts of the government to protect itself from the taking of inconsistent positions by the taxpayer. In an early tax case the Supreme Court stated that "no one

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21 278 U.S. 282, 284 (1929).
22 The original form used by the Internal Revenue Service was form 870 TS.
23 United States v. Prince, 348 F.2d 746 (2d Cir. 1965); United States v. Ellis, 264 F.2d 325 (2d Cir. 1959); Cuba Ry. v. United States, 254 F.2d 280 (2d Cir. 1958); Cain v. United States, 255 F.2d 193 (5th Cir. 1958); Daugette v. Patterson, 210 F.2d 753 (5th Cir. 1957); Bennett v. United States, 231 F.2d 465 (7th Cir. 1956); Sanders v. Commissioner, 225 F.2d 629 (10th Cir. 1955); Joyce v. Gentsch, 141 F.2d 891 (6th Cir. 1944); Morris-White Fashions, Inc. v. United States, 176 F. Supp. 760 (S.D.N.Y. 1959).
25 In the Girard case, for example, the court noted that the government did not take, in either their briefs or in the argument, the position that the mere execution and acceptance of form 870 TS agreement constituted a binding contract. Girard v. Gill, 261 F.2d 691, 698 (4th Cir. 1958); and see INT. REV. CODE OF 1954, §§ 6201, 6213(d).
26 Hamilton v. United States, 124 F.2d 960 (Ct. Cl. 1946).
shall be permitted to found any claim upon his own inequity."

Two doctrines of estoppel are presently applied by the courts where the taxpayer has signed an informal settlement: the doctrine of quasi-equitable estoppel and the doctrine of strict equitable estoppel. In jurisdictions adhering to quasi-equitable estoppel the taxpayer is estopped to claim a refund after signing an informal settlement if the government will be prejudiced thereby. The conventional elements of estoppel are not relied upon. The taxpayer is precluded from asserting a position inconsistent with its previous position if the government relied upon the taxpayer’s agreement to its detriment.\(^2\)

In jurisdictions adhering to strict equitable estoppel the courts place a strict burden of proof on the government. To establish an estoppel defense, the government must show that there was false representation or wrongful misleading silence; that an error originated in a statement of fact, not in an opinion of law; that the Commissioner was ignorant of the true facts; and that the government is adversely affected by the taxpayer’s action.\(^2\) This substantial number of courts considering the issue of estoppel have held that the execution of a waiver and the running of the statute of limitations against the government’s right to assert a deficiency does not in itself estop the taxpayer to prosecute a claim for refund.\(^2\)

Generally, as a practical matter, the government will not seek a further deficiency in settlement cases except under unusual circumstances.\(^2\) The assessment of a further deficiency might cause mistrust between the par-

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\(^2\) In Guggenheim v. United States, 77 F. Supp. 186 (Ct. Cl. 1948), cert. denied, 335 U.S. 908 (1948), the court held that the taxpayer was estopped to seek a refund for a tax deficiency because the government had relied on the agreement to its detriment. The government was precluded from seeking a further deficiency because the statute of limitations had run against it. The court found reliance and detriment since the government did not seek a further deficiency during the period in which a deficiency could have been assessed. In Cain v. United States, 255 F.2d 193 (8th Cir. 1958), the court stated, "We think it is sufficient to preclude a taxpayer from claiming a refund, in relation to an executed settlement agreement, that the statute of limitations has run against the right of the Commissioner to deal with the situation further." In Daugette v. Petterson, 250 F.2d 753 (5th Cir. 1957) the court stated, "It would obviously be inequitable to allow the plaintiff to renounce the agreement when the Commissioner cannot be placed in the same position he was when the agreement was executed."

\(^2\) Van Antwerp v. United States, 92 F.2d 871 (9th Cir. 1937). See also, Crosley Corp. v. United States, 229 F.2d 376 (6th Cir. 1956); Robinson v. Commissioner, 100 F.2d 847 (6th Cir.), cert. denied, 308 U.S. 367 (1919); Henry Ginsberg, 24 T.C. 273 (1951); Tide Water Oil Co., 29 B.T.A. 1208 (1934); Howard Sheep Co., 1 B.T.A. 466 (1921).


\(^2\) The Service has announced that its policy is not to reopen cases closed in the district office unless they involve errors that are substantial both in amount and in relation to the taxpayer’s total liability, or unless there is evidence of fraud or collusion. Rev. Rul. 58, 1958-2 CUM. BULL. 470.
ties and thus make the use of informal agreements valueless. Since the government's position is usually final, the advocates of quasi-equitable estoppel emphasize the detriment suffered by the government. However, it is difficult to see how the government may be *justified* in relying on form 870 AD when the Supreme Court has stated that the agreements which do not satisfy the statutory requirements are not binding. In addition the argument concerning detriment is weakened since the government can, in many instances when strict estoppel is required, recoup additional claims if the taxpayer seeks a refund. The doctrine of recoupment allows the government to offset a correct tax, which cannot be assessed against the taxpayer, against the refund of a tax erroneously exacted. It is a case law exception to the statute of limitations where the application of the statute would work an injustice to the government. It is noted that recoupment is aplicable only to situations in which a single transaction constituted the taxable event claimed upon.

II. ANALYSIS OF UINTA LIVESTOCK CORP. v. UNITED STATES

In applying the Botany doctrine the Tenth Circuit has determined that the mere execution of form 870 AD does not itself preclude a taxpayer from filing a claim for refund. The court stated, "We do not sound the death knell on this form of settlement agreement lightly for we recognize the need to effectuate administrative settlement of tax disputes. All we say is that at the present time Congress has specified how tax matters may be settled either by closing agreement or compromise." Following jurisdictions adhering to a strict reading of estoppel elements, the court added that mutual mistakes of law do not give rise to estoppel. Moreover, the government did not point to any action of the taxpayer that was misleading; nor did it show a strong case of reliance and detriment. The court bypassed a discussion of recoupment because there was no barred deficiency that the government could have asserted.

There is no doubt that the Internal Revenue Service's settlement forms are useful and necessary in deficiency proceedings. Form 870 AD is of benefit to both the taxpayer and the government since the agreement offers a

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24 In cases where quasi-equitable estoppel is allowed, recoupment is not discussed. See note 9 supra, and accompanying text.
25 See Bull v. United States, 293 U.S. 247 (1935). It is noted that recoupment does not allow one transaction to be offset against another, but only to permit a transaction which is made subject by a plaintiff to be examined in all its aspects, and judgment to be rendered that will do justice in regard to one transaction as a whole. See also Rothensies v. Electric Battery Co., 329 U.S. 532 (1946); Stone v. White, 301 U.S. 532 (1939); United States v. Bowcut, 287 F.2d 654 (9th Cir. 1961); Note, Recoupment in Federal Taxation: When Does It Apply?, 46 Va. L. Rev. 981 (1958).
26 Uinta Livestock Corp. v. United States, 355 F.2d 761, 765 (10th Cir. 1966).
quick and simple form of settlement. Presently the agreement is not a legally binding contract on either the government or the taxpayer although some courts uphold the agreement on estoppel principles. Congress could make form 870 AD a valid and binding contract, giving it the same effect as a closing agreement or a compromise, but its silence has only contributed to the existing confusion.

Until a decision is handed down by the Supreme Court, either expanding or changing the Botany rule, the remedy lies in the circuit courts. It is accepted that the informal settlement is not a binding contract; however, a taxpayer in one jurisdiction will be able to file and collect his claim while in a few jurisdictions the government will be able to use quasi-equitable estoppel as an affirmative defense thereby defeating the taxpayer's claim. The Tenth Circuit has found form 870 AD to be a legal nullity, and in following a majority of the circuit courts—adhering to a strict estoppel theory—has settled the law in its jurisdiction concerning the problem of informal settlements. It is up to the government to make the proper assessment or it will have to rely on recoupment where its application is proper. Until either statutory reform is legislated or a change is made by the courts, the position of the Tenth Circuit appears logical according to existing statutory and case law.

Perhaps Uinta has not actually "sounded the death knell" of form 870 AD settlements. To be sure, absolute certainty in this area could be attained only by giving a binding effect to informal settlements. The formal compromise, section 7122 of the 1954 Code, and the closing agreement, section 7121, are too burdensome for a great number of the tax settlements. But only in rare instances will a taxpayer breach even an informal agreement. If he seeks a refund, after signing form 870 AD, he runs the risk of increased attention concerning his future tax liability. Finally, perhaps to protect itself from exploitations of the limitations gap, the government may be able to place a waiver of the statute of limitations in form 870 AD.

Lawrence J. Brannian

Limitations on Union's Right To Discipline Its Members

I.

Two locals of the UAW conducted economic strikes against Allis-Chalmers Manufacturing Company. The collective bargaining agreement at both plants contained union security clauses requiring employees to join the union within thirty days after being hired. During the strikes approximately seventy-five members of the union crossed the picket line

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38 See note 9 supra, and accompanying text.
and returned to work, a clear violation of the constitution and by-laws of the union. Following the strikes, formal charges of conduct unbecoming a union member were filed against each of the offending members, and at a hearing before the proper union committee, they were assessed fines ranging from $20 to $100. An action to collect the fine was brought against one union member in the Wisconsin state court, and a judgment was rendered for the union. Allis-Chalmers then filed charges with the National Labor Relations Board, asserting that the union's actions abridged its members' rights to refrain from engaging in concerted activities and thus violated section 8(b)(1)(A) of the NLRA. The Board found that no unfair labor practice existed, and Allis-Chalmers appealed to the Court of Appeals for the Seventh Circuit. On original hearing before a three-judge panel the Board's finding was affirmed. On rehearing en banc, Held, reversed and remanded: Imposition of a fine on a union member for refusal to participate in an authorized strike action does not relate solely to the internal affairs of the union and coerces employees in the exercise of their individual rights to refrain from engaging in concerted activity; hence it violates 8(b)(1)(A). Allis-Chalmers Mfg. Co. v. NLRB, 358 F.2d 656 (7th Cir.), cert. granted, 385 U.S. 810 (1966).

II.

Originally the National Labor Relations Acts protected certain rights of employees from infringement by employers. It became evident, however, that similar protection from union abridgment was also needed. The Taft-Hartley amendments satisfied that need by making the union liable for certain unfair labor practices. Prominent among the amendments is section 8(b)(1)(A) which provides that it is an unfair labor practice for a union: "to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 of this title; provided, that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein, . . ." Section 7 vests in employees the rights of self-organization and collective bargaining and the right to engage in other concerted activities or to refrain from engaging in such activities.

The language of 8(b)(1)(A) creates ambiguities which have "plunged the Board into a dismal swamp of uncertainty." A particularly perplex-

1 The union's constitution and by-laws provided that such conduct constituted conduct unbecoming a union member and violators might be subjected to as much as $100 per day for each day's violation. 149 N.L.R.B. 67, 75 (1964).
3 149 N.L.R.B. 67 (1964).
ing problem arises when a right expressly guaranteed by the primary clause (viz., the right to refrain from concerted activities) directly conflicts with the reservation in the proviso of the union's right to prescribe its own rules. In resolving this problem, the Board generally looks primarily to the means of enforcement of the union rule rather than the activity which the rule attempts to prescribe. Violence, physical harm and threats are means of enforcement which have consistently been declared unlawful. A union attempt to directly affect the members' employment status is similarly prohibited. Thus the union may not cause or threaten to cause discharge or otherwise interfere with an individual's employment rights and benefits as a means of enforcing internal discipline.

On the other hand, enforcement of rules through expulsion or suspension from the union—or threats thereof—is not considered a violation. This means of enforcement, although coercive, appears to be expressly within the language, "acquisition or retention of membership" of the proviso. The Board has consistently allowed such action as long as the union does not utilize it as a device to affect the member's employment status.

Considerable uncertainty surrounds the consequences of a union implementing its rules through judicially enforced fines. Such conduct is admittedly coercive by its very nature, but in most situations the Board has refused to consider the conduct as violative of 8(b)(1)(A). In

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5 See Perry Norvell Co., 80 N.L.R.B. 225 (1948). "By Section 8(b)(1)(A), Congress sought to fix the rules of the game, to insure that strikes and other organizational activities of employees were conducted peaceably by persuasion and propaganda and not by physical force, or threats of force, or of economic reprisal. In that Section Congress was aiming at means, not at ends."

6 United Steelworkers of America, 133 N.L.R.B. No. 143 (1965); United Sugar Workers, 146 N.L.R.B. 114 (1964); Painters' District Council, 97 N.L.R.B. 654 (1951), enforced, 202 F.2d 917 (6th Cir. 1952), cert. denied, 345 U.S. 995 (1953).

7 Amalgamated Clothing Workers, 111 N.L.R.B. 515 (1961) (wage connected benefits); Majestic Molded Prods., Inc., 143 N.L.R.B. 71 (1963), enforced, 330 F.2d 601 (2d Cir. 1964) (threatened discharge); Theo Hamm Brewing Co., 115 N.L.R.B. 1157 (1956) (seniority rights); NLRB v. International Bhd. of Teamsters, 225 F.2d 343 (8th Cir. 1955); Pacific Mountain Express Co., 107 N.L.R.B. 837 (1954) (job rights). An exception to this rule is carved out by section 8(b)(2) (29 U.S.C. § 158 (1965)) which provides that when a union security clause exists the union may seek a discharge for failure to pay uniform initiation fees and periodic dues. Discharge is limited to those causes, however. Therefore, union disciplinary fines not being periodic dues, the union can not enforce them by threatening to infringe upon their members' employment rights. See Radio Officers Union v. NLRB, 347 U.S. 17 (1954) (late payment of dues); NLRB v. International Ass'n of Machinists, 203 F.2d 173 (9th Cir. 1953) (dual-unionism); NLRB v. Electric Auto-Lite Co., 196 F.2d 100 (6th Cir. 1952) (failure to attend meetings); NLRB v. Eclipse Lumber Co., 195 F.2d 684 (9th Cir. 1952) (refusal to take loyalty oath). A union still may restrict membership for reasons other than failure to pay uniform fees and dues but they cannot make his non-member status a basis for dismissal from his job in union security situations.

8 See note 4 supra.

9 Electric Auto-Lite Co., 92 N.L.R.B. 1073 (1940); Union Starch & Refining Co., 87 N.L.R.B. 779 (1940).

10 See note 4 supra.

11 Fines enforceable only through expulsion or suspension from the union fall within the express language of the proviso to § 8(b)(1)(A) and therefore would not constitute an unfair labor practice. See text accompanying note 10 supra.

Wisconsin Motor Corp. a union rule was designed to limit its members' piece work production by imposing production ceilings, enforceable by fines. Fines for violation of the rule were imposed by the union which brought suit in the state court to enforce them. The Board relied upon legislative history to support its conclusion that union imposition of judicially enforceable fines was simply not that type of conduct which section 8(b)(1)(A) was designed to prevent. The imposition of the fine affected the individual as a member of the union but not necessarily as an employee. The Board feels that although virtually all union rules affect a member's employment relationship to some degree, it is only empowered by Congress to police instances in which that relationship is affected by the enforcement of the union rule. By this reasoning, as long as the method adopted to enforce the rules does not affect the members' employment tenure or opportunities, the union's action is permissible. The fact that strict observance of the rule by members might incidentally affect employment status, is not considered relevant.

In Charles Skura, however, the Board equivocated its seemingly absolute prior position. There, the union's action in imposing and collecting fines, for filing unfair labor practice charges against the union without first exhausting internal remedies, was held a violation of section 8(b)(1)(A). The Board recognized a strong overriding public interest in guaranteeing individual union members access to Board processes. This policy is such that it is beyond the competence of the union to adopt and enforce a rule which contravenes it. Thus, the Board seemingly admitted that (at least in certain situations) the objective of the union rule and

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15 Previously, the Board's position on union disciplinary measures short of violence or job discrimination seemed so well established that the General Counsel refused to prosecute such charges. See NLRB Gen. Counsel Admin. Rul., Case No. 1059 (1954); NLRB Gen. Counsel Admin. Rul., Case No. K-103 (1955).
16 Skura has been relied upon and followed in later decisions: Lathers Union, Local 238 (B. C. Carroll Constr. Co.), 119 N.L.R.B. No. 115 (1966); International Union of Operating Eng'rs, Local 428, 154 N.L.R.B. 907 (1965). See also Millwrights Union, 152 N.L.R.B. 1174 (1965); Bricklayers Union, 111 N.L.R.B. 160 (1965); H. B. Roberts, 148 N.L.R.B. 674 (1964) where the Skura reasoning was utilized.
not merely the means by which it is enforced may be a controlling consideration.  

III.

Proper application of section 8(b)(1)(A) when a union seeks to enforce a rule which would limit the employee's rights has been brought to a head in the Allis-Chalmers case. The Allis-Chalmers litigation has experienced split tribunals reflecting a wide range of divergent views toward its central issue.

Board Action The Board found that, since the enforcement of the rule involved only the status of a union member as a member (as distinguished from an employee), section 8(b)(1)(A) had not been violated. Once again the theory was propounded that although virtually all union rules affect the employment relationship, no violation occurs when the enforcement of the rule is restricted to an area involving solely the individual's membership status. An attempt was made to distinguish Charles Skura on the underlying policies behind the rules sought to be enforced. Seemingly the Board would value the union's right to maintain internal discipline through imposition of fines as superior to the right of the individual member to cross a picket line and return to work but subservient to the member's right to seek Board redress for alleged unfair labor practices.

Member Jenkins expressed another theory for determining the issue in his concurring opinion. When an employee becomes a member of the union he subjects himself to certain duties and obligations. Thus, although the act protects the right of an employee to support or refuse to support a lawful picket line, it does not protect him from all union-established consequences flowing from that choice.

Member Leedom based his dissent squarely on the effect of the union rule upon the employment relationship. In his opinion, the rule in question

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20 Certain dictum in Tawas Tube Prods. Inc., 151 N.L.R.B. 46 (1965) adds further confusion. Here, the union expelled certain members for filing a decertification petition. Relying upon Skura, the Regional Director found that an unfair labor practice had been committed. The Board reversed on the basis that even a narrow reading of the proviso to § 8(b)(1)(A) would allow a union to expel its members as a form of discipline. It then went on to note in further distinguishing Skura, that union disciplinary action aimed at preventing the filing of a decertification petition should be distinguished from action designed to prevent a member from exercising his right to file unfair labor practice charges. Thus, once more the Board appeared to be considering the type of activity sought to be restricted by the union instead of purely the means of enforcement.


22 See note 16 supra, and accompanying text.

23 As one writer points out, however, adherence to this standard, would seem to indicate that any union action falling short of a § 8(b)(2) violation is permissible activity, thus rendering the language of § 8(b)(1)(A) totally without effect. See Comment, Union Disciplinary Power and Section 8(b)(1)(A) of the National Labor Relations Act: Limitations of the Immunity Doctrine, 41 N.Y.U.L. Rev. 584 (1966).

24 Notes 17-20 supra, and accompanying text.

25 149 N.L.R.B. at 70, 71.
clearly restrains the members in the exercise of their section 7 right to refrain from engaging in concerted activities and thus falls within the scope of 8(b)(1)(A). Moreover, the rule in question does not come within the exception of the proviso since it does not relate solely to the acquisition and retention of membership. In his view, since the rule is calculated to preclude "the gainful employment of members who were willing to work," it is inconceivable that any rule could more directly affect the employment relationship.\footnote{1967 N.L.R.B. at 72, 73.}

7th Circuit—Original Hearing On review before the Seventh Circuit, a three-man panel of judges affirmed the Board's decision.\footnote{The opinion is unreported in the West system but may be found at 60 L.R.R.M. 2097 (1967).} The court virtually ignored the basis for the Board's holding, i.e., whether the enforcement of the rule infringed on the employment relationship. Instead, it looked to legislative history\footnote{Legislative history does not clearly reveal congressional intent toward this problem. The Supreme Court has interpreted congressional debate to indicate that the purpose of § 8(b)(1)(A) was "the elimination of the use of repressive tactics bordering on violence or involving particularized threats of economic reprisal." NLRB v. Drivers, Local No. 639, 162 U.S. 274, 286-87 (1960). See also, Legislative History of the Labor Management Relations Act, 1949, 178-79, 204, 342-43 (1948). Nowhere, however, is there an indication that the imposition of fines was intended to be approved or disapproved by Congress on adopting this section. Nor is the legislative history of the Landrum-Griffin Act particularly enlightening. Landrum-Griffin was aimed at protecting the rights of individual union members, yet includes no provision restricting the union's conduct at issue in Allis-Chalmers. Absence of such provision, however, could merely indicate that Congress considered the conduct already proscribed by § 8(b)(1)(A). Section 101(a)(2) does contain a proviso that the union's right to adopt and enforce rules regulating the responsibility of a member toward the union should not be impaired by that section. This particular section, however, deals only with protecting the individual's rights to meet together and express their views concerning the union and the provision's language should be limited to this context. On the other hand, section 609 places criminal sanctions on denial of rights guaranteed by other portions of Landrum-Griffin through union discipline, including fining of members. In introducing this portion of the bill before the House, Mr. Griffin, the act's co-sponsor stated, "the conduct prohibited by this section is generally comparable to conduct described as an unfair labor practice by the Taft-Hartley Act." Legislative History of the Labor Management Relations Act, 1522 (1959). Detailed analysis of legislative history has resulted in conflicting results. For the conclusion that the history indicates that § 8(b)(1)(A) was not designed to limit the unions right to fine, see Note, 54 Ill. B.J. 832 (1966). For an analysis reaching the opposite conclusion, see Comment, 8(b)(1)(A) Limitation upon the Right of a Union To Fine Its Members, 115 U. Pa. L. Rev. 47 (1966).} as indicating that section 8(b)(1)(A) was not intended to immunize a union member from discipline imposed for defiance of a decision of the majority to strike. According to the court's interpretation, Congress aimed the section at the specific evils of force, violence, and threats thereof and economic reprisals. In construing "economic reprisal" the court followed the Board's interpretation that economic reprisal occurs only when economic loss is caused by discharge from employment.\footnote{See Tellepsen Constr. Co., 122 N.L.R.B. 564 (1958); Marlin Rockwell Corp., 114 N.L.R.B. 553 (1955); International Assoc. of Bridge Workers, 112 N.L.R.B. 1019 (1955).}

The court then turned to other considerations supporting its decision.
Rights and duties of a union member were analogized to those of a citizen in a democratic society. A member should not be allowed to take advantage of the benefits arising out of his membership in the union without recognizing the duties and obligations which accompany it. In addition, the principle that the union has the right to expel a member for violating the rule is inconsistent with a challenge of the "lesser" disciplinary power to fine. In the court's view, "this would mean that a union would be faced with the dilemma of either permitting anarchy and dissention within its ranks or depleting its strength by expulsion of the offending members."  

**Rehearing**  
On a rehearing en banc, the earlier opinion was withdrawn and a contrary result reached. After pointing out several factors indicating that the legislative history does not necessarily compel the earlier decision, the court brushed aside this basis for its prior holding. Since it interpreted the pertinent statute as presenting no ambiguity whatsoever, legislative history was considered unnecessary. The court appeared to be more concerned with the overall congressional and judicial policy emphasizing the protection of the rights of the individual employee-union member than the intent behind this specific section. The fact that a union security clause was in effect at the Allis-Chalmers plant seemed particularly disturbing to the court. Since union membership is not necessarily a result of voluntary choice when continued employment is dependent upon tendering initiation fees and periodic dues to the union, the need for protection of the individual member is more acute.  

Finally, the court considered a theory it propounded in a prior decision to be controlling. *Allen Bradley Co. v. NLRB* had held that the employer could properly insist upon consideration of bargaining proposals limiting the union's right to fine or discipline members refusing to join a strike since they constituted a mandatory subject of bargaining. It then went on to say that fines for crossing picket lines imposed a sanction upon the ex-

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20 The court reasoned that a fine might be a lesser penalty than expulsion in view of the attendant loss of such union benefits as insurance and pensions.  
21 50 L.R.R.M. at 2100.  
22 The court expressly set out their reasons for granting rehearing:  
(1) The national significance of the decision to both labor and management alike as well as to other courts;  
(2) An asserted conflict with a prior ruling (Allen Bradley Co. v. NLRB, note 35 infra);  
(3) Re-evaluation by members of the panel of their original positions;  
(4) A desire "to maintain the historical liberty of the American working man to remain free to work without coercion from employers or from unions; and to preserve the traditional character of American labor organizations."  
35 8 F.2d 656, 658 (7th Cir. 1966).  
33 518 F.2d 656 (7th Cir. 1966). Interestingly enough, two of the judges who found a violation of § 8(b)(1)(A) in the original hearing, changed their minds and joined with the majority on rehearing.  
34 See note 28 supra.  
35 286 F.2d 442 (7th Cir. 1961).
exercise of the right to work guaranteed by the act. Thus such fines do not
relate solely to the internal affairs of the union, and therefore the main pro-
vision of section 8(b)(1)(A) is applicable. In the original Allis-Chalmers
decision this latter statement had been considered mere dictum and there-
fore not controlling. It would seem that whether the pertinent statement
was dictum should not make any difference. The court's holding that the
union's right to fine members for refusing to join a strike is a mandatory
subject of bargaining would clearly indicate that exercise of this right af-
fected the employer-employee relationship. Therefore, it cannot be consid-
ered a purely internal rule unless the Board's test of viewing solely the
means of enforcing the rule is used. This view, however, has not found
acceptance by the Seventh Circuit, and thus the internal rule proviso of
the section will seemingly not save the action from violating 8(b)(1)(A).

Three strong individual dissents were filed. Although basically the dis-
sents restate the previous approaches and theories suggested in the opinions
of the Board and the original three-man panel, an additional theory is
developed. An analogy is attempted to be established between this re-
stricted action and wildcat strikes. Section 7 does not create an absolute
right to enter or refrain from entering concerted activities—only "pro-
tected" activity is included within the meaning of the section. Unauthorized
wildcat strikes are considered unprotected activity and as such are
subject to internal union discipline. The reasoning follows that there
should be no distinction made between strikebreakers and wildcat strikers
as far as union discipline is concerned. This approach overlooks the fact,
however, that wildcat strikes were specifically intended to be excluded
from protected activities by Congress in enacting section 7, while a sim-
ilar intent to exclude a refusal to participate in an authorized strike from
protected activities apparently was not within the intent of Congress.

Some limitations of the Allis-Chalmers decision should be recognized.
The court's approach to the problem would indicate that judicial enforce-
ment of fines imposed for violating union rule proscribing activities such
as dual unionism, failure to attend union meetings and other activities re-
lating solely to the union member would be outside the scope of section
8(b)(1)(A). Restriction of the above activities does not affect the em-
ployment relationship and hence constitutes strictly internal union rules.

It does not follow from the decision that use of expulsion as the sole
means of enforcing union fines which restrict participation in protected
activities will be a violation of section 8(b)(1)(A). Although this action

36 Mandatory subjects of bargaining have been derived judicially from the language of § 8(d)
[29 U.S.C. § 158(d) (1965)] of the NLRA which requires the parties to bargain with respect to
"wages, hours, and other terms and conditions of employment."
27 358 F.2d 656 (7th Cir. 1968).
is undoubtedly coercive, it appears to fall literally within the language of
the excepting proviso. Moreover, aside from the act itself, judicial restric-
tion of this action would infringe upon a basic right of the union, the free-
dom of association guaranteed by the Constitution.

The existence of this valid means of enforcing fines suggests the question
of the legal consequences of fines which attempt to restrict the exercise
of rights guaranteed by section 7 when the means by which the union
might enforce the fine are unclear. When judicial enforcement of these
fines is never attempted, does the mere existence of such penalty itself
constitute a section 8(b)(1)(A) violation? This question might be re-
solved through a determination of the union’s intent as to means of en-
forcing the fine. The better view, however, would seem to be that if the
union members could reasonably believe that the fines would be enforced
through judicial processes the situation would fall within the scope of the
Allis-Chalmers rule.

A similar result might not necessarily occur when the Allis-Chalmers
situation arises in a non-union shop context. In this situation, the em-
ployee’s decision to join the union can more realistically be viewed as vol-
untary. This fact would certainly fortify the argument that one who
voluntarily accepts the benefits of union membership must also accept
the burdens. Should the problem ultimately be resolved by a balancing of
the interests, this voluntariness factor may well be controlling.

IV. CONCLUSION

The task of unravelling the intricate complexities of the Allis-Chalmers
problem now passes to the Supreme Court. Its determination will likely
be based not upon a strict literal reading of section 8(b)(1)(A) or a
strict interpretation of the section’s legislative history, but upon a balanc-
ing of the underlying policy considerations. This will require a careful
weighing of varying interests represented by the employees, the employer,
the union, and the public. Balancing the interests is certainly not a new
approach towards resolving the issue. The Board has reflected this approach
in deciding Charles Skura as has the Seventh Circuit’s opinions in Allis-
Chalmers. Balancing the interests will be an acutely delicate task in this sit-
uation for there are strong policy arguments on both sides, as evidenced
by the theories set forth in the earlier opinions.

A central concept of the national labor policy is that matters affecting
the employment relationship should be dealt with by bilateral bargaining
of labor and management, not by unilateral dictates. Despite the distinc-

39 Certiorari was granted by the Supreme Court, 385 U.S. 810 (1966).
40 See note 17 infra, and accompanying text.
tion which the Board attempts to maintain, unilateral proscription by the
union of the individual member's right to refrain from engaging in a
strike spills over into the employer-employee relationship. The Board's
distinction appears somewhat artificial since it looks only to the means
chosen to enforce the rule. A more reasonable test would seem to be
whether the activity proscribed is not only protected by section 7 but also
within the employer-employee context. The imposition of fines in these
instances threatens to destroy the very existence of the employer-employee
relationship since the economic striker is faced with the possibility of being
permanently replaced.

An even stronger consideration and one more likely to appeal to the
Court involves protection of the individual union member's rights. The
right to work when he pleases, the right to insure continuance of an ex-
isting employment relationship and the right to refrain from concerted
activities are valuable fundamental rights which are not to be lightly dele-
gated to restrictive union action. Protection of these rights is a primary
concern of the national labor policy. Need for protection is particularly
acute in union security situations where membership more closely ap-
proaches assigned status than a voluntary choice.

Favoring the imposition and judicial enforcement of such rules is the
proposition that since the member has voluntarily chosen to associate him-
self with the union, he should therefore be bound by the action which the
majority chooses to adopt. The economic realities of the situation dem-
onstrate that the underlying assumption that the choice to associate is a
purely voluntary one is not necessarily valid. In the usual situation in
which a union security clause exists, the employee must tender initiation
fees and periodic dues as a condition of continued employment. Although
in a formalistic sense, his employment does not depend upon membership
in the union, realistically, one who is faced with meeting the fees and dues
anyway will most assuredly accept membership. It is submitted, that in
the typical situation the individual employee is not even aware that he
may pay the equivalent of initiation fees and periodic dues and not be-
come a member.

The strongest policy argument pressed on behalf of the union is that if
the union is not given some degree of internal discipline and control over

41 Union shops are applicable to about 75% of all workers covered by collective bargaining
42 The principle that union security clauses do not compel membership arose primarily as pro-
tection to the union. Thus they could lawfully exclude employees who were objectionable to them,
but who met their dues obligations. See Radio Officers Union v. NLRB, 347 U.S. 17 (1954);
Union Starch & Ref. Co. v. NLRB, 186 F.2d 1008 (7th Cir.), cert. denied, 342 U.S. 815 (1951).
This principle is expressed as an employee right only in situations in which an employee has re-
ligious or ethical beliefs which forbid such membership. (Usually on the grounds that such mem-
bership involves the taking of oaths.)