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"My keenest interest is excited, not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution or a telephone company, yet which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law."—OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS (1920) 269.

Comments

EXECUTORY LIMITATIONS FOLLOWING POWER OF DISPOSAL

In *Vaughan v. Compton*¹ the Missouri Supreme Court again applied a doctrine which defeats a grantor's or testator's intention. Testator devised his estate to B and his heirs, B having full power to convey inter vivos or by will. In a subsequent paragraph it was provided that if he did not so transfer, C should take what remained. B died intestate without having conveyed any of the property. *Held*, B's

1. 235 S.W. 2d 328 (Mo. 1950).

estate was absolute, the limitation to *C* was void, and *B*'s heir at law took by descent from *B*.

Under general principles, the limitation in the principal case would seem to give *B* a defeasible fee subject to the condition subsequent of his failure to alienate by will or deed. *C* would seem to have a shifting executory interest, liable to shift over from *B* upon *B*'s dying intestate without having disposed of the property during his lifetime. There are a number of variants of this same basic type of limitation. Thus, *A* may convey to *B* and his heirs, but if *B* dies intestate, then the residue over to *C*. Or the gift over to *C* may be conditioned on *B*'s failure to alienate by deed only, or failure to alienate by will only. In such cases the problem is the same—is *C*'s shifting executory interest valid? The usual answer is no; the gift over to *C* is void, and *B*'s interest is indefeasible.

English View

Originating in England, this doctrine evolved gradually through a series of cases beginning with *Gulliver v. Vaux*² and crystallizing finally with *Holmes v. Godson*.³ The theory, as it finally emerged, is that the gift over is a restraint on alienation by intestacy and as such is void. Every estate in fee simple is considered to have three necessary incidents. These are the right to alienate inter vivos, the right to devise and bequeath, and, failing these, the right to have the property pass to heirs upon intestacy. More simply stated, the three incidents are the right to alienate by inter vivos conveyance, by will, or by intestacy. If alienation by any of these three methods is restrained, the restraint is void.

There is little doubt that a restraint on alienation inter vivos or by will interferes with the free use of property and in most types of cases should be declared void. But a restraint on the so-called right to alienate by devolution to heirs upon intestacy, falls in a different category from the other two methods. Holding such restraint void actually *restricts* the free use of property in some cases,⁴ and at best such holding raises many vexing and insoluble problems. The weakness in the English view lies in the premise that every fee must carry with it the three incidents of alienation. If it be granted that free alienation by deed or will is necessary to the free use of *B*'s property, in what respect is alienation by intestacy an integral function of *B*'s estate? *B*, the first taker, has equally free use of his property either with or without the gift over. He can sell it, give it away, or devise it without restriction to whomever he pleases. Surely, should he not choose to dispose of the property he, his heirs, or next of kin must be the last to complain when, upon his doing nothing, the property shifts over to *C* upon *B*'s death.

However, the argument that a restraint on intestacy is no real restraint, meets

2. 8 De G. M. & G. 167, 44 Eng. 353 (1746).

3. 8 De G. M. & G. 152, 44 Eng. Rep. 347 (1856). In the course of developing this rule there were several cases which deviated from the norm. Although subsequently overruled, they are interesting examples of some of the doubts expressed by the English judiciary on the desirability of the rule. These cases are cited and discussed in 2 SIMES, FUTURE INTERESTS § 593 (1935).

4. See *Freer Alienability*, p. 180 *infra*.

with a difficulty where an owner of an interest subject to such restraint wants the property to go to his heirs. The source of the difficulty is the common law doctrine of worthier title. Simply stated, the rule is that when one attempts to devise to his heirs, such devise will not pass title to the heirs by purchase; instead they must take by descent, it being "worthier" to take by descent than by purchase. How, then, can *B* get the property to his heirs if the limitation over upon failure to devise is valid? If *B* does nothing with the property, it will pass to *C* upon *B*'s death intestate. If *B* attempts to devise the property to his heirs, they nevertheless must take by descent rather than by purchase; but the property can not pass by descent because then the condition will have occurred and *C* will take. Thus it appears as though *B*'s heirs can take only by inter vivos conveyance. This dilemma, unless it can be resolved, would be enough in itself to justify holding *C*'s gift invalid, because it would in effect be a forfeiture for alienation by will. But as a practical matter, were the courts inclined to allow such limitation over to *C* in the first place, it would not be difficult to hold that *B*'s devise to his heirs was sufficient appointment to insure the property going to his heirs. As Professor Kales has pointed out,⁵ while it is true that property will go by descent in preference to purchase, yet if it can not go by descent, then it should be allowed to pass by purchase. Seen in its true perspective, though, this problem is plainly subordinate to the more important question of the validity of the limitation over to *C*. Once the latter is established as valid, the problem as to whether *B*'s heirs take by purchase or descent should not be too difficult to solve.

American View

Most American courts declare the limitation to *C* void,⁶ but do so on a different ground. The general view is that because *B*, the first taker, has received the entire fee, any attempted subsequent limitation of that fee is void as repugnant to the estate first granted. Were this statement taken literally, many executory interests could not exist, and, even when viewed with reference to the situation under analysis, the explanation begs the question.

Courts constantly reiterate that a conveyance must be read in its entirety. Hence, even though a fee simple absolute be first given, it can be cut down by subsequent language. For centuries the defeasible fee subject to a condition subsequent has been recognized. It is perfectly valid to convey to *B* in fee simple, but if he fails of admission to the bar, or dies without issue him surviving, etc., then over to *C*. Surely if the condition of intestacy be repugnant then these conditions must also be repugnant; in both instances a prior fee was granted. Further, the condition as to intestacy is not one beyond the control of *B*; he can always arrange not to die intestate. There is no essential difference between the above types of

5. KALES, *FUTURE INTERESTS* § 723, p. 832 (2d ed. 1920); see also 2 SIMES, *FUTURE INTERESTS* § 597, p. 524, (1936); and GRAY, *RESTRAINTS ON ALIENATION* § 59 (2d ed. 1895).

6. Texas and Mississippi uphold the limitation over as valid, though their reasoning is vague. For a listing and annotation of the cases see 17 A.L.R. 2d 7 at 204 (1951).

conditions subsequent, the one generally held void and the others generally held valid. To be consistent, so far as repugnancy is concerned, subjecting a fee to the condition of intestacy should leave it a defeasible fee as is the consequence with other similar conditions.

Freer Alienability

The reason that restraints on alienation are declared void is to promote free alienability of land. Yet by holding valid the limitation over to *C* there is no actual restraint on alienation (*B* can do with the property what he wishes), and in many instances there is greater freedom of alienability than with many limitations which are recognized as valid. For instance, a conveyance to *B* and his heirs, but if he should die without issue him surviving, then over to *C*, is valid as to both interests. This limitation causes *B*'s estate to be completely unmarketable; because of the uncertainty regarding *B*'s issue and their chances of survival, potential purchasers will not buy. But, in the case of a conveyance to *B* and his heirs but if he should die without issue and intestate, then over to *C*, *C*'s interest is void,⁷ because it restrains alienation by intestacy. And yet, even though *C*'s interest were held valid, *B* nevertheless would be free at any time to dispose of the fee simple absolute.⁸ Either a conveyance or a devise would prevent the condition of intestacy from occurring and the buyer or devisee would never need fear *C*'s taking the property. In the first case there is an effective restraint on alienation, and yet the gift over is held valid. In the second situation free alienability is assured, yet the gift over is held invalid *as being a restraint on alienation* (by intestacy). Or, where the reason given is the unsound one of repugnancy, why should the gift over in the first case be valid, and the gift over in the second case be void for repugnancy?⁹

Kent's View

Another theory for declaring invalid the gift over to *C* was apparently originated by Chancellor Kent. Kent said¹⁰ that *C*'s gift must either be an executory limitation or a remainder. It could not be a remainder because it follows a fee. Noting the rule, as stated in *Pells v. Brown*,¹¹ that executory devises are indestructible by any act of the holder of the preceding estate, he reasoned that since *B* could prevent the gift over by arranging not to die intestate, *C*'s limitation *was* destructible and hence was not an executory devise. Then since *C*'s gift over was neither a remainder nor an executory limitation it must be a nullity. Kent, then, in his attempt to apply the rule expressed in *Pells v. Brown*, went beyond that case to express a doctrine which does not necessarily follow from *Pells v. Brown*. This is demonstrated by Professor Gray who writes:

"When the books . . . said that the first taker could not defeat an executory devise, what they meant was that no act of the first taker could

7. 2 SIMES, FUTURE INTERESTS § 597 (1936); also 17 A.L.R. 2d 7 at 114 (1951).

8. KALES, FUTURE INTERESTS §§ 719, 724 (2d ed. 1920).

9. But see RESTATEMENT, PROPERTY § 406, Illustration 12 (1944).

10. 4 KENT'S COMMENTARIES *270 (1830).

11. Cro. Jac. 590, 79 Eng. Rep. 504 (1620).

prevent the contingent event designated from being followed by the vesting of the executory devise; but they never meant that the executory devise was bad because the happening of the contingent event itself was in the control of the first taker."¹²

In other words, *B* could not prevent the gift over to *C* if *B* chose to die intestate. In many cases the holder of a preceding estate can prevent a gift over, e.g., conveyance or devise to *B*, but if he fails of admission to the bar, dies without issue, etc., then over to *C*.¹³ *Pells v. Brown* meant only that once the condition was fulfilled *B* could not prevent the gift over, not that the gift over must be invalid because *B* could prevent the condition from occurring. Even if Kent's rule did have "any bearing on the validity of the gift over, the inference would be, not that the gift over was void, but that the gift over was valid and the power given to the first taker to destroy it by conveying by deed or will would be void."¹⁴

Personality

When the estate involved consists of personality, then the objection arises that *B* may have mixed such personality in with his own property in such a way as to make it impossible to determine how much, if any, is left to go to *C*. But on the other hand, there are many objects of personality which retain their identity—heirlooms, jewelry, automobiles, furniture, etc. Hence it is plain that the objection is not a fundamental one sufficient in itself to render *C*'s gift over void. Instead the question should be one of fact, the court given leeway either to consider the gift valid, or void because of indefiniteness, depending on the nature of the personality involved. And yet the courts, taking cognizance only of fungible and easily expendable personality, declare that *C*'s limitation is void as to all personality; the stock phrase is "void for indefiniteness" with no further regard to whether it is indefinite or not.¹⁵

Creditors

If *B* should die indebted, creditors having relied on his apparent property holdings, then, assuming *B* died intestate, there might exist a cogent reason for disallowing the gift over to *C*. This point was first mentioned in the old English case of *Ross v. Ross*,¹⁶ though it has been ignored by most subsequent opinions. The danger is real, though common to all situations involving a condition subsequent. Perhaps it is the creditor's own fault for his laxity in not determining the extent of his debtor's estate.¹⁷ If the creditor has gone so far as to levy on the

12. GRAY, RESTRAINTS ON ALIENATION § 69, p. 60 (2d ed. 1895).

13. 32 AM. L. REG. (N. S.) 1035 at 1039 (1893).

14. KALES, FUTURE INTERESTS § 723, p. 833 (1920); see also 2 SIMES, FUTURE INTERESTS § 595, p. 525 (1935); and 17 A.L.R. 2d 7 at 18 (1951).

15. SIMES, *Op. cit. supra* n. 14 at 524. The Missouri Supreme Court, in a recent decision, held that the limitation to *C*, consisting entirely of personality, was void and *B* took absolutely. However, the sole basis for the decision was that *C*'s limitation was "repugnant" to the prior bequest in *B*. *Housman v. Lewellen*, 244 S.W. 2d 21 (Mo. 1951).

16. 1 Jac. & W. 154, 37 Eng. Rep. 334 (1819).

17. SIMES, *op. cit. supra* n. 14 at p. 529.

land, and the land has been sold pursuant to the levy, then it could be held that *B*'s power of disposal includes involuntary transfers; hence the creditor's levy and sale would constitute an involuntary conveyance and *C* would be prevented from getting the property.¹⁸ Also, a distinction could be drawn between the case where the instrument is recorded, and the case where *C* has failed to record.

The Real Reason

Since it is apparent that the reasons assigned by modern courts in support of the rule are logically insufficient, one may well inquire what the true reason for the rule is. As with so many other existing tenets of ancient estate law, the rule probably had its basis in the English courts' well known favoritism of heirs.¹⁹ By declaring invalid the gift over to *C*, the heirs of *B* would be assured of obtaining the family estate upon *B*'s death intestate. This in turn prevented the dispersal of large estates, and tended to perpetuate the English system of landed aristocracy. Thus, for centuries the rule was accepted without question, not because of the strength of the reasons therefor, but because of the then desirable results that application of the rule achieved. Today, with the policy behind the rule long since gone, the rule remains. This seems to be the best explanation for a dogma so open to objection and yet so universally followed.

Life Estates With Power

A conveyance to *B* for life, with power to convey or devise in fee, remainder to *C*, is usually construed as creating in *B* a life estate²⁰ with power to consume and a defeasible vested remainder in *C*. The remainder in *C* is generally held to be valid.²¹ The comparison comes immediately to mind, the practical result being identical with that intended in the situation where *B* is given a fee, but if he dies intestate, gift over to *C*. The one type is valid and the other type is void. Why? Because, say the courts, a remainder is not repugnant to the life estate as is the executory limitation to the fee.

Courts strain to find in *B* a life estate with remainder rather than fee with executory interest, because such construction is the only way to give effect to *A*'s intent and save *C*'s interest. This tendency to label *B*'s interest a life estate rather than a fee is followed by many modern American cases and has been adopted by the Restatement of Property²² as a rule of construction. Of course this rationale cannot be used in cases where a fee simple absolute in *B* is so clearly expressed that

18. GRAY, RESTRAINTS ON ALIENATION, § 74g (2d ed. 1895).

19. SIMES, *op. cit. supra* n. 14 at p. 528 and inferred in GRAY, *op. cit. supra* note 17, § 66.

20. Many courts formerly held that since *B* had the power to consume, his life estate was elevated to a fee and hence the remainder to *C* was void for repugnancy. But today the overwhelming weight of authority holds the life estate valid. See 22 VA. L. REV. 833 (1936); 36 W. VA. L. Q. 288 (1930); 5 MO. L. REV. 232 (1940); 18 ST. LOUIS L. REV. 243 (1933); and 36 A.L.R. 1177 at § 12 (1925).

21. SIMES, *op. cit. supra* n. 14, § 598; RESTATEMENT, PROPERTY § 406, Illustration 13 (1944).

22. RESTATEMENT, PROPERTY § 406, Illustration 14 (1944).

there is no room for construction;²³ yet the rule aids a court in carrying out grantors' intentions so far as possible.

In the final analysis, then, there are two ways for a testator or grantor to set up this type of interest—he can create a fee in *B* with executory interest in *C*, or he can create a life estate in *B*, with a remainder over in *C*. The results of both would logically be the same. Yet the one is utterly void and the other valid. The dissent in an early Missouri case then puts this interesting query: “. . . what logic is there in requiring the grantor to express his intention in set or stereotyped language, and in refusing to observe that intention where clearly expressed in equivalent terms?”²⁴

An editor of the *Iowa Law Review* suggests that since executory limitations of this sort must be declared invalid, then for the sake of consistency, the remainder after a life estate with power to consume ought also be declared void.²⁵ But however symmetrical the result, it certainly is not a desirable solution. A far more desirable result would be obtained by recognizing as fully valid both types of limitation. In addition to saving grantors' intentions there would be no need for strained construction of limitations, and much litigation could be avoided.

Missouri View

The Missouri cases, after some uncertainty, finally in *Cornwell v. Wulff*²⁶ adopted the prevailing view, and ever since that case have consistently held that the gift over to *C* is void as being repugnant to the prior fee in *B*. However, following the modern trend, many of the cases have called an interest a life estate which normally would be analyzed as a fee,²⁷ thus saving the grantor's intention and *C*'s interest. Without actually indorsing it, the Missouri cases seem to have adopted the rule of construction announced in the Restatement.

Shortly after the four to three decision in *Cornwell v. Wulff* holding *C*'s executory interest void, Manley O. Hudson pointed out the danger of the way in which the supreme court was turning, and in a spirited article²⁸ sought to pave the way—both by logic and precedent—for a complete abolition of the rule. But his position was not followed and just a year later the court decided the case of *Middleton v. Dudding*,²⁹ a decision in which the court did not take its opportunity to reject the rule, but instead strongly endorsed it. There, testator left all his real estate to

23. “In numerous instances the limitation over has alone been regarded as reducing the estate of the first taker to a life interest.” 17 A.L.R. 2d 7 at 172 (1951). See § 15 for this particular constructional problem.

24. *Cornwell v. Wulff*, 148 Mo. 542, 50 S.W. 439 (1898).

25. 1 IOWA L. BULL. 87 (1915).

26. Note 24, *supra*.

27. See *English v. Ragsdale*, 347 Mo. 431, 147 S.W. 2d 653 (1941); *Payne v. Reece*, 297 Mo. 54, 247 S.W. 1006 (1923); *Bean v. Kenmuir*, 86 Mo. 666 (1885). For many other examples see 2 GILL, REAL PROPERTY IN MISSOURI 918-929 (1949) and also 75 A.L.R. 72 at 88 (1931). In addition, see 17 A.L.R. 2d 7, § 12 (1951).

28. Hudson, *Executory Limitations of Property in Missouri*, 11 U. OF MO. BULL. L. SER. 3, esp. pp. 37-51 (1916).

29. 183 S.W. 443 (Mo. 1916), noted in 12 U. OF MO. BULL. L. SER. 52-55 (1916).

his wife as her absolute property, all property undisposed of by will or deed to go to *C* on the wife's death. The court held that *C* got nothing and the wife's heir at law took all. The facts were so clear and the decision was so unambiguous that in no opinion since then has the rule been questioned. It is significant, though, that of the numerous cases of similar limitations considered by the court between 1916 and 1951, only thrice³⁰ did the court hold that *B* took a fee and *C*'s limitation was void; in all the other cases *B* was held to have taken a life estate only and *C*'s remainder was valid.

As suggested by Professor Hudson,³¹ one undesirable consequence results from construing *B*'s interest to be a life estate rather than a defeasible fee, *viz.*, *B*'s spouse will lose her otherwise rightful dower in the property. Also in such case, *B*'s powers over the property may be somewhat restricted, contrary to the intent of grantor or testator, who usually intends that *B* is to have unrestricted use of the property.³²

Practically, then, the situation in Missouri today is well crystallized. Executory limitations of the type described herein are void per se—if labeled as such by the court. It is so well established that the court rarely even bothers to mention the rule anymore,³³ much less any reasons therefor. Instead the whole controversy is centered around the question of whether a life estate or fee was intended.³⁴ In view of grantors plain intentions, this distinction is highly technical and tends to work an injustice to grantor, whose intentions are thwarted, to *B*, who by his non-action has in effect decided to leave the property to *C*, and to *C*, who will not get property that was intended for him.

The decision in *Vaughan v. Compton*, then, does not bear criticism from the standpoint of precedents. Regrettably, the rule appears to be solidly entrenched. Considering the mass of litigation arising therefrom,³⁵ plus the disappointment of so many grantors and testators, it is hoped that the General Assembly will spend the necessary time and trouble to draft and enact corrective legislation.

THOMAS B. MOORE

30. *Housman v. Lewellen*, 244 S.W. 2d 21 (Mo. 1951); *Vaughan v. Compton*, n. 1, *supra*; *Thornbrough v. Craven*, 184 Mo. 552, 225 S.W. 445 (1920).

31. Hudson, *op cit. supra* n. 28 at p. 51.

32. See 7 ST. LOUIS L. REV. 190 (1922).

33. *English v. Ragsdale*, 347 Mo. 431, 147 S.W. 2d 653 (1941); *Blumer v. Gellespie*, 338 Mo. 1113, 93 S.W. 2d 939 (1936).

34. See 7 A.L.R. 2d 7 (1951). This exhaustive (220 page) annotation deals generally with the problem of construing *B*'s estate as a fee of life interest.

35. "This is . . . a perennial question which has vexed this court for many years, demanding fresh exposition of every new combination of words which the ingenuity of testators has presented." *Thornbrough v. Craven*, 184 Mo. 552, 225 S.W. 445 (1920); and see *Jackson v. Littell*, 213 Mo. 589, 112 S.W. 53 at 55 (1908) in which Judge Gantt observed, "Again we have the old question of whether the will . . . granted a fee simple . . . or whether he gave her merely a life estate."

THE RIGHT OF A PARTNER'S SEPARATE CREDITOR TO SHARE IN
THE DISTRIBUTION OF ASSETS

His Right to Share in the Assets of the Debtor Partner

When the assets of a member of a partnership are before the court for distribution, the prevailing view at common law is that the debts owing to the separate creditors of the partner will be paid in full before anything will be paid to the partnership creditors.¹ Some courts have allowed partnership creditors, having depleted the partnership assets, to share ratably with the separate creditors in the individual assets, the claims of the partnership creditors being reduced by the amount received from the partnership assets.² A third view is that the partnership creditors shall exhaust the partnership assets, the individual creditors taking from the individual assets the same percentage that the partnership creditors have realized from the partnership fund, the remaining portion of the individual assets to be shared ratably among all the creditors.³

Various reasons have been given for adopting the prevailing view: that the joint estate having been augmented by its creditors, and the separate estate having been augmented by the separate creditors, it is only equitable that each should

1. *Murrill v. Neill*, 7 How. 414 (U. S. 1850); *In re Wilcox*, 94 Fed. 84 (D. Mass. 1899); *Weyer v. Thornburgh*, 15 Ind. 124 (1860); *McCulloch v. Dashiell's Adm.*, 1 Har. & Gill 96, 18 Am. Dec. 271 (Md. 1827); *Hawkins v. Mahoney*, 71 Minn. 155, 73 N. W. 720 (1898); *Hundley v. Farris*, 103 Mo. 79, 15 S.W. 312 (1890); *Level v. Farris*, 24 Mo. App. 445 (1887); *Somerset Potter Works v. William Minot*, 10 Cush. 592 (Mass. 1852); *Davis v. Howell*, 33 N. J. Eq. 72 (1880); *In re Stewart*, 4 Abb. Pr. 408 (N. Y. 1857); *Rodgers v. Meranda*, 7 Ohio St. 179 (1857); *Jamison's Estate*, 163 Pa. 143, 29 Atl. 1001 (1894); *Ex parte Crowder*, 2 Vern. 706, 23 Eng. Rep. 1064 (1715); 3 KENT'S COMMENTARIES § 65, p. 75 (11th ed. 1867).

2. In repudiating the general rule, it was stated in *Robinson v. Security Co.*, 87 Conn. 268 (1913), that: "This list of exceptions forms a striking commentary upon the soundness of the rule thus sought to be fortified by them"; and partnership obligations have always held a preferential position, and it is inequitable upon insolvency or death of a partner to take from them this advantage. In *Camp v. Grant*, 21 Conn. 41, 54 Am. Dec. 321 (1851), it was stated that the obligation of a partnership is joint and several in equity; and accordingly, in *Freeport Stone Co. v. Carey*, 42 W.Va. 276, 26 S.E. 183 (1896), *Pettyjohn v. Woodruff*, 86 Va. 478 (1890), and *Bardwell v. Perry*, 19 Vt. 292 (1847), it was held that partnership creditors are also individual creditors and should be allowed to share ratably with the individual creditors in the separate assets. The rule applied by these courts seems to be in accord with the law of Scotland as discussed in POLLOCK, LAW OF PARTNERSHIP 137, 138 (14th ed. 1944).

3. In *Northern Bank of Kentucky v. Keizer*, 63 Ky. (2 Duv.) 169 (1865), the Kentucky court in rejecting the above mentioned rules stated: ". . . between these extremists, we are satisfied, that, while one class is altogether wrong, the other class is not altogether right." They retained the priority of partnership creditors to the partnership fund, but only partially retained the priority of the separate creditors to the separate fund by allowing them to realize the same percentage that the partnership creditors have received before allowing the partnership creditors to share *pari passu* with the separate creditors. In *accord*: *Fayette Bank v. Kenney*, 79 Ky. 133, 2 KY. LAW. R. 35 (1880), and by statute, *Johnson v. Gordon*, 102 Ga. 350, 30 S.E. 507 (1897).

look to the estate which it has benefited for reimbursement;⁴ that joint debts have been contracted on the credit of the joint estate, and separate debts on the credit of the separate estate;⁵ that it is a rule of convenience;⁶ that it is supported by the great weight of authority;⁷ that it is a necessary correlative of the rule that partnership creditors have priority as to partnership assets;⁸ that it is a rule of equity that where one creditor has two funds to rely upon, the court will not allow him, neglecting his other funds, to attach himself to one of the funds to the prejudice of those who have a claim on that and no other;⁹ that it is a simple rule, eminently practical, founded upon obvious principles of policy;¹⁰ and Story says:¹¹

"After repeating the doubts which have been expressed upon the subject by the most eminent judges, it is not, perhaps, too much to say that it rests on a foundation as questionable and as unsatisfactory as any rule in the whole system of our jurisprudence. Such as it is, however, it is for the public repose that it should be left undisturbed, as it may not be easy to substitute any other rule which would uniformly work with perfect equality and equity in the mass of intricate transactions connected with commercial operations."

Whatever the merits of the rule may be, it has been adopted by the English Bankruptcy Act,¹² the Federal Bankruptcy Act,¹³ the Uniform Partnership Act,¹⁴ and was the rule in Missouri prior to the adoption of the Uniform Partnership Act.¹⁵

This rule has been subject to several exceptions in England which have had some following in the United States. Foremost among these exceptions is where there are no partnership assets and no living solvent partner.¹⁶ In such a case, partnership creditors have been allowed to share *pari passu* with individual creditors. There are various technicalities which plague the application of this exception. If there is a living solvent partner, the exception will not apply,¹⁷ but if the partner is

4. *McCulloch v. Dashiell's Adm.*, 1 Har. & Gill 96, 18 Am. Dec. 271 (Md. 1827).

5. *Davis v. Howell*, 33 N. J. Eq. 72 (1880).

6. *Bardwell v. Perry*, 19 Vt. 292 (1847); *Ex parte Cook*, 2 P. Wms. 500, 24 Eng. Rep. 834 (1728).

7. *Hundley v. Farris*, 103 Mo. 78, 15 S.W. 312, 12 L.R.A. 254, 23 Am. St. Rep. 863 (1890).

8. *Rodgers v. Meranda*, 7 Ohio St. 179 (1857).

9. *Ibid.*

10. PARSONS OF PARTNERSHIP § 382, p. 477 (4th ed. 1893).

11. STORY ON PARTNERSHIP § 382 (7th ed. 1881).

12. Bankruptcy Act, 1914, § 33, sub.-s.6; POLLOCK, LAW OF PARTNERSHIP 135 (14th ed. 1944).

13. 11 U.S.C. sec. 23 (g).

14. UNIFORM PARTNERSHIP ACT, § 40 (h), (i); MO. REV. STAT. § 358.400 (8), (9) (1949).

15. *Ault v. Bradley*, 191 Mo. 709, 90 S.W. 775 (1905); *Hundley v. Farris*, 103 Mo. 78, 15 S.W. 312, 12 L.R.A. 254, 23 Am. St. Rep. 863 (1890).

16. *Harris v. Peabody*, 73 Me. 263 (1881); *Brock v. Bateman*, 25 Ohio St. 609 (1874); *Ex parte Kensington*, 14 Ves. 447, 33 Eng. Rep. 592 (1808); *Ex parte Hayden*, 1 Bro. C. C. 455, 28 Eng. Rep. 1236 (1785); LINDLEY ON PARTNERSHIP 896 (9th ed. 1924).

17. *Ex parte Kensington*, 14 Ves. 447, 33 Eng. Rep. 592 (1808).

deceased and has a solvent estate, the exception will apply.¹⁸ It is to be noted that solvent partner means one who is not in legal bankruptcy though his assets may not be sufficient to pay his debts.¹⁹ The fact that there is a small sum in the partnership estate will preclude the partnership creditors from sharing in the individual assets,²⁰ and in England it has been held, that though this sum will be expended in the cost of administering the estate, this is enough of a fund to exclude the joint creditors.²¹ However, some courts in the United States have alleviated the severity of this restriction on the joint creditors by requiring distributable assets.²² The courts which recognize this exception apparently do not favor it, as evidenced by the fact its application was denied in a case where an individual creditor purchased a worthless firm claim for the very purpose of keeping the exception from operating,²³ and in one case the court found partnership assets by invoking the doctrine of estoppel.²⁴

A reason given for upholding the exception is that since partnership creditors no longer have two funds to look to for payment, the reason for the rule is gone.²⁵ Some courts, denying the application of the exception, have stated that if the reason for the general rule is that the partnership estate has been augmented by the partnership creditors and the individual estate has been augmented by the individual creditors or that the partnership creditors have extended credit on the basis of partnership assets and the individual creditors have extended credit on the basis of individual assets, there is no reason for any exception to the rule.²⁶ Another reason for denying the exception is that a clear rule of distribution has been set out by statute, and there is no reason for any exception to be engrafted upon the rule by the court.²⁷ In denying the exception a New York Surrogate Court said:²⁸

"To say that the joint creditor may resort to the separate estate, when there is no joint fund and no solvent partner, but can not resort to it if he has happened to realize one mill on the dollar, would appear to establish a distinction more technical than just."

The United States Supreme Court has rejected this exception in bankruptcy administration as being inconsistent with the statutory rules of distribution.²⁹

18. STORY ON PARTNERSHIP § 381 (7th ed. 1881).

19. *Ex parte* Janson, 3 Madd. 229, 56 Eng. Rep. 493 (1818).

20. *In re* Marwick, Fed. Cas. 929, No. 9,181 (D. Me. 1845); *Ex parte* Janson, *supra* n. 19.

21. *Ex parte* Kennedy 2 De. G.M. & G. 228, 42 Eng. Rep. 859 (1952). (In this case the joint fund amounted to £ 13, and though it appeared that this sum would be used in the cost of administration, the joint creditors were excluded from the separate estate.)

22. *Harris v. Peabody*, 73 Me. 262 (1881); STORY ON PARTNERSHIP § 380 (7th ed. 1881).

23. *In re* Marwick, Fed Cas. No. 9,181 (1845).

24. *Thayer v. Humphrey*, 91 Wis. 276, 64 N.W. 1007, 30 L.R.A. 549, 51 Am. St. Rep. 887 (1895)

25. *In re* Marwick, Fed. Cas. No. 9,181 (1845).

26. *Weyer v. Thornburgh*, 15 Ind. 124 (1860).

27. *Somerset Potters Works v. William Minot*, 10 Cush. 592 (Mass. 1852).

28. *In re* Stewart, 4 Abb. Pr. 408 (N. Y. 1857).

29. *Farmers and Mechanics' National Bank of Philadelphia v. Ridge Avenue Bank*, 240 U. S. 498 (1916).

In a Missouri case,³⁰ where there were no partnership assets and no living solvent partner, the partnership creditors were allowed to share ratably with the individual creditors in the distribution of one of the partners' assets. It is not clear that the exception was the basis for the holding in this case, but a subsequent case³¹ by the same court, though not ruling on the point indicated that they would allow the exception.

A second exception is that when a partner has fraudulently transferred partnership property to increase his individual assets, the joint creditors are allowed to share with the individual creditors to the amount of the property so transferred.³² It is submitted that this is proper, since the property which has been fraudulently transferred is rightly partnership property.³³ Also, it has been said that a fraudulent conveyance by the partner gives rise to individual liability on his part, and partnership creditors could then be considered as his individual creditors,³⁴ or in such a case as constructive trust might properly be raised in favor of the joint creditors.³⁵

When a partner has become indebted to the partnership by virtue of his carrying on a distinct trade, a third exception has been recognized in England allowing partnership creditors to share with the individual creditors if the debt arose out of a transaction between trade and trade and is not such as can be considered a loan or advancement from the partnership.³⁶ The wisdom of this exception has been questioned, as its application is fraught with difficulty in determining when the debt has arisen from a distinct trade,³⁷ and because it is based on such nice distinctions as to militate against its acceptance in the United States.³⁸

A fourth and very technical exception allowing a partnership creditor, who is a petitioning creditor in bankruptcy, to share in the individual assets has been said to be based on the theory that a petition in bankruptcy is an action and execution, and that since he no longer has an action at law, it is equitable that he should share with the individual creditors.³⁹ The United States Supreme Court

30. Shackelford's Adm. v. Clark, 78 Mo. 491 (1878).

31. Hundley v. Farris, 103 Mo. 79, 15 S.W. 312 (1890).

32. *In re Hamilton*, 1 Fed. 800 (D. Ky. 1880); *McElroy v. Allfree*, 131 Iowa 518, 108 N.W. 119 (1906); *Rodgers v. Meranda*, 7 Ohio St. 179 (1857); *Read v. Bailey*, L. R. 3 App. Cas. 94 (1877); *Ex parte Harris*, 2 V. & B. 10, 1 Rose 129 (1813); *Ex parte Lodge and Fendal*, 1 Ves. 166, 30 Eng. Rep. 283 (1790); LINDLEY ON PARTNERSHIP 898 (9th ed. 1924); 2 BATES ON PARTNERSHIP § 839 (1st ed. 1888).

33. LINDLEY ON PARTNERSHIP 898 (9th ed. 1924).

34. *McElroy v. Allfree*, 131 Iowa 518, 108 N.W. 119 (1906).

35. *In re Hamilton*, 1 Fed. 800 (D. Ky. 1880).

36. *Ex parte St. Barbe*, 11 Ves. 414, 32 Eng. Rep. 1147 (1805); GILMORE ON PARTNERSHIP § 147, p. 442 (1911); LINDLEY ON PARTNERSHIP 900 (9th ed. 1924).

37. *Ex parte Sillitoe*, 7 Glyn & J. Rep. 374 (1824).

38. *In re Lane*, 14 Fed. Cas. 1070, No. 8,044 (D. Mass. 1874); *Somerset Potters Works v. Minot*, 10 Cush. 592 (Mass. 1852); GILMORE ON PARTNERSHIP 442 (1911).

39. *Ex parte Hall*, 9 Ves. 349, 32 Eng. Rep. 637 (1804); *Ex parte Elton*, 3 Ves. 238, 30 Eng. Rep. 988 (1796); LINDLEY ON PARTNERSHIP 896 (9th ed. 1924); STORY ON PARTNERSHIP § 379 (7th ed. 1881).

in *Murrill v. Neill*⁴⁰ finds this exception difficult to reconcile with the equity of the general rule and doubts its application in the United States. Parsons has said:⁴¹

"This rule has not been recognized in practice in this country, so far as we know nor does it seem to us to be supported by any substantial reasons or principles derivable from the law of bankruptcy in relation to partnership."

And a fifth exception, where there are no separate debts, or where the partnership creditors have paid the separate debts, allows the joint creditors to share *pari passu* with the separate creditors.⁴² The reason for this exception in the English bankruptcy proceedings seems to have been that by paying the separate debts the partnership creditors could avoid waiting for distribution of the separate assets to the separate creditors before receiving dividends.⁴³ Unless this is the reason, it would appear to be no exception at all, since partnership creditors have always been entitled to the surplus of the separate estate.⁴⁴

The Uniform Partnership Act, which Missouri adopted in 1949, incorporates in it the general rule as to the distribution of the assets of a partner.⁴⁵ Since Missouri followed this rule prior to the adoption of the Uniform Partnership Act,⁴⁶ there should be no change in the basic rule for the distribution of assets in Missouri. But, it remains to be determined whether or not the adoption of the Uniform Act had any effect on the exceptions.

In determining the effect of the Act on the exceptions, the question to be answered is: Are the exceptions so authoritatively established that they were adopted by the legislature as a part of the rule, or can a legislative intent to exclude them be found in their omission?

The English Court in construing Section 40 of the Bankruptcy Act,⁴⁷ which

40. 7 How. 414 (U. S. 1850).

41. PARSONS ON PARTNERSHIP § 384, p. 478 (4th ed. 1893).

42. *Ex parte* Taylor, 18 Ves. 283, 34 Eng. Rep. 323 (1811); *Ex parte* Jones, 18 Ves. 283, 34 Eng. Rep. 324 (1810); *Ex parte* Chandler, 9 Ves. 35, 32 Eng. Rep. 513 (1803); STORY ON PARTNERSHIP § 381 (7th ed. 1881).

43. STORY ON PARTNERSHIP § 381, p. 587 (7th ed. 1881).

44. *Ibid.*, n. 1.

45. UNIFORM PARTNERSHIP Act § 40 (h), (i); Mo. REV. STAT. § 358.400 (8), (9) (1949):

"(8) When partnership property and the individual properties of the partners are in possession of a court for distribution, partnership creditors shall have priority on partnership property and separate creditors on individual property, saving the rights of lien or secured creditors as heretofore;

"(9) Where a partner has become bankrupt or his estate is insolvent the claims against his separate property shall rank in the following order:

(a) Those owing to separate creditors

(b) Those owing to partnership creditors;

(c) Those owing to partners by way of contribution."

46. *Ault v. Bradley*, 191 Mo. 709, 90 S.W. 775, (1905); *Hundley v. Farris*, 103 Mo. 78, 15 S.W. 312, 12 L.R.A. 254, 23 Am. St. Rep. 863 (1890).

47. Bankruptcy Act, 1883, sec. 40, sub-s. 3: "In the case of partners the joint estate shall be applicable in the first instance in payment of their joint debts, and the separate estate of each partner shall be applicable in the first instance in payment of his separate debts. If there is a surplus of the separate estate it shall be

is substantially the same as the rule laid down by the Uniform Partnership Act and the Federal Bankruptcy Act,⁴⁸ has held that the exception allowing partnership creditors to share *pari passu* with the individual creditors, where there is no joint estate and no living solvent partner was settled by a long course of authority and that it is still in force.⁴⁹

The United States Supreme Court in construing Section 5 (f) of the Bankruptcy Act⁵⁰ of 1898 held that the exception, where there was no joint estate and no living solvent partner, was incompatible with the declaration of Congress. It was contended that Congress in enacting an established rule had at the same time by implication enacted therewith the exceptions to the rule. The court called attention to the great diversity of opinion on this exception in the United States, decided that it was not authoritatively established, and that Congress had intended that the exception be excluded by this negative implication.⁵¹ This same court in an earlier case said that the eccentric English exceptions did not seem to have been accepted in this country.⁵²

The Massachusetts Court found the whole doctrine of exceptions very questionable, and in declining to recognize the distinct trade and no joint assets exceptions, which would vary the clear and simple rule of distribution proclaimed by the legislature, said:⁵³

“We are strongly inclined to the opinion that our rule of distribution of the assets of insolvent debtors, being a statute provision, is to be carried into effect according to its terms. The legislature has created the rule, but has not appended to it the exceptions.”

dealt with as part of the joint estate. If there is a surplus of the joint estate it shall be dealt with as part of the respective separate estates in proportion to the right and interest of each partner in the joint estate.”

48. 11 U.S.C. Ch. 3, § 23 (g) (1947).

49. *Re Budgett, Cooper v. Adams*, 2 Ch. 555, 63 L.J. Ch. 847 (1894); POLLOCK, LAW OF PARTNERSHIP 139-140 (14th ed. 1944).

50. Bankruptcy Act of 1898, 30 Stat. 544, 547, § 5 (f) as amended in 11 U.S.C. Ch. 3, § 23 (g) (1947): “The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts and the net proceeds of the individual estate of each general partner to the payment of his individual debts. Should any surplus remain of the property of any general partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be distributed among the individual partners, general or limited, or added to the estate of the general partners, as the case may be, in the proportion of their respective interests in the partnership and in the order of distribution provided by the laws of the State applicable thereto.”

51. *Farmers and Mechanics' National Bank of Philadelphia v. Ridge Avenue Bank*, 240 U. S. 498 (1916).

52. *Murrill v. Neill*, 7 How. 414 (U. S. 1850).

53. Stat. of 1838, c. 163, § 21 provides that the net proceeds of the joint stock of an insolvent firm must be first appropriated to pay the creditors of the company, and the net proceeds of the separate estate of each partner must be first appropriated to pay his separate creditors. Construed in *Somerset Potter Works v. Minot*, 10 Cush. 592 (Mass. 1852).

In a bankruptcy case⁵⁴ the Sixth Circuit Court of Appeals could find no inconsistency between Section 40 of the Uniform Partnership Act and the federal equity rule as announced by the United States Supreme Court in *Farmers and Mechanics' National Bank v. Ridge Avenue Bank*.⁵⁵

The exception relating to the petitioning creditor has had no application in this country,⁵⁶ therefore, it cannot be said to be so established as to be a part of the general rule.⁵⁷

As to the exception of no separate debts, this is no exception at all.⁵⁸

It would seem unnecessary to make an exception to the general rule of distribution of assets when a partner fraudulently converts partnership property to his separate estate, since the same result could be reached by applying the rules as to fraudulent conveyances.⁵⁹

The courts in this country have been reluctant to admit the distinct trade exception.⁶⁰

Missouri apparently recognized the exception which allows the joint creditor to share *pari passu* with the separate creditors, when there are no joint assets and no living solvent partners, in *Shackleford's Adm. v. Clark*.⁶¹ It is manifest, however, that this exception has not met with general approval in the United States, and therefore, is not so authoritatively established as to be a part of the general rule.⁶²

The Uniform Partnership Act states in Section 4⁶³

"(1) The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this act."

"(4) This act shall be so interpreted and construed as to effect its general purpose to make uniform the law of those states which enact it."

It is submitted that since the statute commands that the rules of strict construction shall not apply to the Uniform Partnership Act, and it appears to be virtually impossible, in view of the great conflict of opinion on these exceptions, to make uniform the law of those states which have enacted the Uniform Partnership Act without excluding the exceptions, the construction given by the United

54. *Titus v. Maxwell*, 218 Fed. 433 (6th Cir. 1922).

55. 240 U. S. 498 (1916).

56. PARSONS ON PARTNERSHIP § 384, p. 478 (4th ed. 1893).

57. See note 52, *supra*.

58. STORY ON PARTNERSHIP § 381, p. 587, n. 1 (7th ed. 1881).

59. MO. REV. STAT. Ch. 428 (1949); *Ryan v. Cavanagh*, 238 Fed. 604, (S. D. Iowa 1916); *Lyons v. Murray*, 95 Mo. 23, 8 S.W. 170 (1888); CRANE ON PARTNERSHIP § 94, p. 422 (1938).

60. *Somerset Potter Works v. William Minot*, 10 Cush. 592 (Mass. 1852); GILMORE ON PARTNERSHIP §147, p. 442 (1911).

61. 78 Mo. 491 (1878).

62. *Farmers and Mechanics' National Bank v. Ridge Avenue Bank*, 240 U. S. 498 (1916); *In re Wilcox*, 94 Fed. 84 (D. Mass. 1899); *McCulloch v. Dashiell*, 1 Har. & Gill 96, 18 Am. Dec. 271 (Md. 1827).

63. MO. REV. STAT. § 358.040 (1949).

States Supreme Court⁶⁴ to Section 5 (f) of the Federal Bankruptcy Act should be given great weight in construing Section 40 (h), (i) of the Uniform Partnership Act.⁶⁵

*His Right to Share in the Partnership Assets When the Debtor Partner
is a Creditor of the Partnership.*

It might be contended that the separate creditors should be allowed to share *pari passu* with partnership creditors in the distribution of partnership assets by being subrogated to the partner's rights as a creditor where he has loaned money to the partnership or paid its debts out of his separate assets. This contention was upheld in an early English case,⁶⁶ but the doctrine was short lived in England,⁶⁷ and was never accepted in the United States.⁶⁸

A partner to whom a partnership debt is owing must be deferred in the distribution of the assets of the partnership estate until all the other joint creditors are paid.⁶⁹ To allow the partner to share *pari passu* with the other partnership creditors would be permitting him to compete with his own creditors.⁷⁰ The separate creditors of a partner, being subrogated to his rights, can, of course, claim no greater rights than the partner himself.⁷¹

To this general rule there are exceptions. Where the partnership has become indebted to the partner by virtue of his property having been fraudulently dealt with as property of the firm, a partner or his separate creditor claiming through him has been permitted to share *pari passu* with the partnership creditors.⁷² This appears to be the converse of the exception allowing partnership creditors to share *pari passu* with the separate creditors where there has been a fraudulent transfer by the partner, and the same reasoning would apply. In England, a second exception has been allowed where a partner carries on a trade distinct from that of the partnership and the firm has become indebted to him in relation thereto,⁷³ but this exception seems never to have been accepted in this country.⁷⁴ Where a partner's liability for the joint debts has been discharged by operation of law, he or his creditor claiming through him has been allowed to share ratably with the part-

64. *Farmers and Mechanics' National Bank v. Ridge Avenue Bank*, 240 U. S. 498 (1916).

65. CRANE ON PARTNERSHIP § 94, p. 421, n. 82 (1938).

66. *Ex parte Hunter*, 1 Atk. 223 (1742).

67. See *Ex parte Harris*, 1 Rose 437 (1813).

68. *In re Telfer*, 106 C.C.A. 366, 184 Fed. 224 (6th Cir. 1910); *In re Rice*, 164 Fed. 509 (E. D. Pa. 1908); *White Cloud Milling and Elevator Co. v. Thompson*, 264 Mo. 595, 175 S.W. 897 (1894); *Lyons v. Murray*, 95 Mo. 23, 8 S.W. 170 (1888); *Funk v. Seehorn*, 99 Mo. App. 587, 74 S.W. 445 (1903); *Edison Illuminating Co. v. De Mott*, 51 N. J. Eq. 16, 25 Atl. 952 (1893); *Rodgers v Meranda*, 7 Ohio St. 179 (1857); *McCrudden v. Jonas*, 173 Pa. 507 (1896).

69. See note 68, *supra*.

70. *Ibid.*

71. *Lyons v. Murray*, *supra*; LINDLEY ON PARTNERSHIP 885 (9th ed. 1924).

72. LINDLEY ON PARTNERSHIP 888 (9th ed. 1924) and see cases in note 32 *supra*.

73. *Ex parte St. Barbe*, 11 Ves. 414, 32 Eng. Rep. 1147 (1805); LINDLEY ON PARTNERSHIP 889 (9th ed. 1924).

74. See note 60, *supra*.

nership creditors.⁷⁵ If a partner is no longer liable for the partnership debts, by his having been discharged in bankruptcy or the statute of limitations having barred his liability, he is no longer a debtor of the partnership creditors and does not fall within the rule which precludes a person from competing with his own creditors.

Prior to the adoption of the Uniform Partnership Act, Missouri followed the general rule that neither a partner nor his separate creditor claiming through him can share *pari passu* with the other partnership creditors in the distribution of the partnership assets where the partnership is indebted to the partner.⁷⁶ It does not appear that the Missouri Court has had occasion to rule on any of the exceptions.

Section 40 (b) of the Uniform Partnership Act⁷⁷ has restated the general rule but is silent as to the exceptions. The exception pertaining to fraudulent transfers might properly be said to have been adopted by the legislature as a part of the general rule on the basis of public policy, although it seems that the creditors' rights could be protected by the general rules pertaining to fraudulent conveyances.⁷⁸ The distinct trade exception, not having been authoritatively established in this country,⁷⁹ can be said to have been excluded from the general rule by the silence of the legislature. Where by operation of law a partner has been discharged from liability for the partnership obligations, it appears that he would not be competing with his own creditors, and therefore, would be outside the reason for the rule.⁸⁰ It might be contended that a discharge in bankruptcy or the barring of the partner's liability by the running of the statute of limitations would not extinguish the partnership creditors' rights against the discharged partner, but merely extinguish the remedy; therefore, he would fall within the spirit of the statute. A court has answered this contention by saying that the right does not exist independent of a remedy, and has upheld the exception.⁸¹

It appears, therefore, that the rights of the individual creditors in the distribution of assets have not been substantially changed by Section 40 (b), (h), and (i) of the Uniform Partnership Act.

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THE SUPREME COURT, COMMUNISM, AND CLEAR AND PRESENT DANGER—
A STEP BACKWARD?

Abraham Lincoln once posed the problem: "Must a government of necessity be too strong for the liberties of its people, or too weak to maintain its own existence?"¹ Most people would agree that a weak government cannot long maintain

75. *Ex parte* Smith, 14 Q.B.D. 394 (1884); LINDLEY ON PARTNERSHIP 889 (9th ed. 1924).

76. *Lyons v. Murray*, 95 Mo. 23, 8 S.W. 170 (1888).

77. Mo. REV. STAT. § 358.400 (2) (1949).

78. See note 59, *supra*.

79. See note 60, *supra*.

80. LINDLEY ON PARTNERSHIP 889 (9th ed. 1924).

81. *Ex parte* Smith, 14 Q.B.D. 394 (1884).

1. Message to Congress in Special Session, July 4, 1861; 6 LINCOLN, COMPLETE WORKS, 297-325 (1894).

its own existence; further, most people would agree that a government which is too strong for the liberties of its own people is one which has lost sight of the very reason for its existence as a government. But one must look far to find many people who would agree on just when a government has become too strong for the liberties of its people or when it has become too weak to maintain its own existence.

In the field of First Amendment rights, Justice Holmes often offered his ideas as to when a proper balance had been attained between a too weak and a too strong government. A government which is unable to preserve and protect its own existence would, of course, be too weak; but a government which is so solicitous over its own self-preservation as to needlessly trample on the freedoms of its people would be too strong. His classic words in the *Schenck* case² would allow the government to protect itself when "the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."³

But, Lincoln's dilemma in turn became the dilemma of those Justices who had to decide like cases following the *Schenck* case. The bone of contention often bitterly fought over became the problem of what facts or circumstances would justify the Court in holding that there was presented a clear and present danger. This, then, was the problem facing the Supreme Court when the case of the eleven Communist leaders came before them in the October term of 1950.⁴

The trial of these eleven top Communists was a lengthy and expensive one, often charged with tension and ill-will on both sides.⁵ The indictment⁶ charged that the Communist leaders "unlawfully, wilfully, and knowingly, did conspire with each other, to organize as the Communist Party of the United States of America a society . . . of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence, and knowingly and wilfully to advocate and teach the duty and necessity of overthrowing and destroying the Government of the United States by force and violence, which said acts are prohibited by Section 2 of the Act of June 28, 1940, Section 10, Title 18, U.S.C.A. (now Section 2385) commonly known as the Smith Act."⁷

Section 2 of the Smith Act makes it unlawful to advocate or teach the overthrow of the government by force or violence, or to organize or help to organize a group of persons so teaching and advocating. Section 3 of the act prohibits a conspiracy to violate Section 2 of the Act.

One of the sore spots at the trial was the jury, the lawyers for the Communists charging that the New York "blue-ribbon" jury did not allow trial by a fair cross-

2. *Schenck v. United States*, 249 U. S. 47 (1919).

3. *Id.* at 51.

4. *Dennis v. United States*, 341 U. S. 494 (1951).

5. See contempt citation by Judge Medina of certain of the attorneys who pleaded the communists' case. *United States v. Sacher*, 9 F.R.D. 394 (1949).

6. For full scope of the indictment, see *United States v. Foster*, 9 F.R.D. 367, 374-5 (1949).

7. Smith Act, Section 11, Title 18, U.S.C. (1946 ed.) [1948 Revised Criminal Code, 18 U.S.C.A. § 2385].

section of the community.⁸ Further, one of the members of the jury allowed to remain there over the objections of defense counsel was a man who had recently made a vituperative public speech against the Communist Party.⁹ There was much arguing over the character of the evidence admitted to show that the Communist Party did advocate overthrow of the government by force and violence.¹⁰ The question of clear and present danger was withdrawn from the jury, Judge Medina stating: "If you are satisfied that the evidence establishes beyond a reasonable doubt that the defendants . . . are guilty of a violation of the statute, as I have interpreted it to you, I find that as a matter of law there is sufficient danger of a substantive evil that the Congress has a right to prevent to justify the application of the statute under the First Amendment of the Constitution."¹¹

If the jury was at all confused when it received the case, Judge Medina attempted to dispell such in his instructions by saying: "Let me repeat that the crime is a conspiracy. The crime charged is not that these defendants personally advocated or taught the duty or necessity of overthrowing and destroying the Government . . . by force and violence; nor is the charge that the Communist Party as such advocates or teaches such violent overthrow or destruction. The charge is that these defendants conspired with each other . . . knowingly and wilfully to advocate and teach the duty or necessity of such overthrow and destruction and, in this connection, to organize the Communist Party as a society, group, or assembly of persons who teach or advocate such overthrow and destruction."¹²

On appeal of the conviction of the Communist leaders to the United States Court of Appeals, Second Circuit,¹³ the decision of the trial court was affirmed.¹⁴ Chief Judge Hand stated the problem as he saw it by rhetorically asking "whether it is a crime to form a conspiracy to advocate or teach the duty and necessity of overthrowing the government by violence, and to organize the Communist Party as a group so to teach and to advocate."¹⁵

As to the clear and present danger test, Judge Hand cited with approval from Mr. Justice Cardozo's dissenting opinion in *Herndon v. State of Georgia*¹⁶ that "the effect of all this," *i.e.*, the later cases on clear and present danger, "was to leave the question open whether in cases . . . where the unlawful quality of words is to be determined not upon their face in relation to their consequences, the opinion in *Schenck v. United States* supplies the operative rule."¹⁷ To this, Judge Hand said: "We read this as meaning that the rule of 'clear and present danger' might be properly

8. *United States v. Dennis*, 183 F. 2d 201, 216 (2d Cir. 1950).

9. *Id.* at 228, 229.

10. *Id.* at 224.

11. 9 F.R.D. 367, 392 (1949).

12. *Id.* at 376.

13. The judges sitting were Judges L. Hand, Swan and Chase, with Judge L. Hand writing the opinion. A separate opinion by Judge Chase would have conviction on *Gitlow v. New York*.

14. *United States v. Dennis*, 183 F. 2d 201 (2d Cir. 1950).

15. *Id.* at 206.

16. 295 U. S. 441 (1935).

17. *Id.* at 451.

limited to situations in which the words were not themselves those of direct instigation."¹⁸

Judge Hand then proceeds to give his opinion of the clear and present danger test and how he feels the problem should be approached. ". . . no longer can there be any doubt, if indeed there was before, that the phrase, 'clear and present danger,' is not a slogan or a shibboleth to be applied as though it carried its own meaning; but that it involves in every case a comparison between interests which are to be appraised qualitatively. . . . In each case they must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."¹⁹ The Supreme Court accepted this as the correct interpretation of the phrase 'clear and present danger,' Chief Justice Vinson stating that "it is as succinct and inclusive as any other we might devise at this time."²⁰

Whether or not Chief Judge Hand by this interpretation meant to overthrow the thirty-year growth of the clear and present danger doctrine is debatable. It is clear that such an interpretation will allow room for more governmental restriction of freedom of speech and press, with all its ramifications, than that laid down by Justices such as Holmes, Brandeis, and Hughes. It would seem that a clear danger which is not present but may be probable would be enough to convict a defendant under Judge Hand's test. The difference between this approach and the traditional one is more clearly brought out when compared with Justice Black's language in *Bridges v. California*,²¹ Mr. Justice Black speaking for the majority:²² "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."²³

The appeal to the Supreme Court was simplified somewhat by the limiting of the writ of certiorari to two questions: "(1) Whether either Section 2 or Section 3 of the Smith Act,²⁴ inherently or as construed and applied in the instant case, violates the First Amendment and other provisions of the Bill of Rights; (2) whether either Section 2 or Section 3 of the Act, inherently or as construed and applied in the instant case, violates the First and Fifth Amendments because of indefiniteness."²⁵

The majority opinion, written by Chief Justice Vinson and joined in by Justices Reed, Burton, and Minton refused to go into the sufficiency of the evidence on which the defendants were convicted, but accepted the Court of Appeals finding that the defendants did conspire to form a group which would advocate the overthrow of the government by force and violence.²⁶ The defendants denied this, main-

18. *Supra* n. 14, at 209.

19. *Supra*. n. 14, at 212.

20. 341 U. S. 494, 510 (1951).

21. *Bridges v. California*, 314 U.S. 252 (1941).

22. *Id.* at 263.

23. For a more detailed analysis of the Court of Appeals records, see 5 RUTGERS L. REV. 413 (1951).

24. *Supra*. n. 7.

25. 341 U. S. 494, 495-6 (1951).

26. *Id.* at 497-8.

taining that any force and violence would be necessary only because the ruling classes of the state would never permit the transformation to a Communist society to be accomplished peacefully, but would themselves use force and violence to defeat any peaceful political and economic gain the Communists could achieve.²⁷

The Court further held that under Section 2 of the Smith Act and under the conspiracy Section 3, a specific intent to do the prohibited acts must be proved. And this despite the fact that this would mean delving into the existence of a certain mental state, since "the existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence."²⁸

The problem, as construed in the majority opinion, is not whether Congress has the power to prohibit acts intended to overthrow the government by force and violence. This power, Congress surely has. But do the means, *i.e.*, the Smith Act, by which the power has been asserted conflict with the First and Fifth Amendments to the Constitution?

The Court distinguished the situation presented here from that presented in such cases as *Thornhill v. Alabama*,²⁹ *Herndon v. Lowry*,³⁰ or *De Jonge v. Oregon*,³¹ for there a state court had given an interpretation to a state statute which was inconsistent with the federal constitution. Here says the Court, it is a federal statute.³² It is submitted, however, that the problem would be the same in either case; whether it be a state statute or a federal statute, whether the Fourteenth Amendment or the First and Fifth Amendments, if the statute, inherently or as construed and applied, conflicts with the federal constitution, as interpreted, either the statute or the conviction under it must fall.

Under traditional clear and present danger doctrine as it had developed down through the years, requiring as it did not only a clear danger but also a present danger, upholding of the conviction would have been difficult. A brief review of some of the clear and present danger cases will show why this is so.

Justice Reed, speaking for the majority in *Pennekamp v. Florida*,³³ cited with approval from *Bridges v. California*³⁴ that "The evil consequences of comment must be 'extremely serious and the degrees of imminence extremely high before utterances can be punished'.³⁵ And Justice Reed went on to say: ". . . we are compelled to examine for ourselves the statements in issue and the circumstances under which they were made to see whether or not they do carry a threat of clear and present danger to the impartiality and good order of the courts or whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protects."³⁶

27. *Ibid.*

28. *Id.* at 500.

29. 310 U. S. 88 (1940).

30. 301 U. S. 242 (1937).

31. 299 U. S. 353 (1937).

32. 241 U. S. 494, 502 (1951).

33. 328 U. S. 331 (1946).

34. 314 U. S. 252, 263 (1941).

35. 328 U. S. at 334.

36. *Id.* at 335.

In *Bridges v. Wixon*,³⁷ Mr. Justice Murphy, concurring, said: "Proof that the Communist Party advocates the theoretical or ultimate overthrow of the Government by force was demonstrated by resort to some rather ancient party documents, certain other general Communist literature and oral corroborating testimony of Government witnesses. Not the slightest evidence was introduced to show that either Bridges or the Communist Party seriously or imminently threatens to uproot the Government by force or violence. . . . Congress has ample power to protect the United States from internal revolution and anarchy without abandoning the ideals of freedom and tolerance. . . . The strength of this nation is weakened more by those who suppress the freedom of others than by those who are allowed freely to think and act as their consciences dictate."³⁸

In *Thomas v. Collins*,³⁹ Mr. Justice Rutledge, speaking for the majority, said: "The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins . . . any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. . . ."⁴⁰

And in *Whitney v. California*,⁴¹ Mr. Justice Brandeis, concurring, said: "Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom."⁴²

It can hardly be said that in the years 1945 to 1948, the indictment period, there was any present danger of the Communist Party of America overthrowing our government either by bullet or ballot. As a reason for his adopting Judge Hand's interpretation of the doctrine, Chief Justice Vinson states that neither Justice Holmes nor Justice Brandeis intended that the clear and present danger rule should be "crystallized into a rigid rule to be applied inflexibly without regard to the circumstances of each case."⁴³ This is undoubtedly true, for to apply the doctrine one must first look at the circumstances of each case to determine whether or not there is that clear and present danger. But this is not to say that both parts of the formula should not be given meaning; the danger must not only be clear, it must also be present.

37. 326 U. S. 135 (1945).

38. *Id.* at 165.

39. 323 U.S. 516 (1945).

40. *Id.* at 529-530.

41. 274 U. S. 357 (1927).

42. *Id.* at 377.

43. 341 U. S. 494, 508 (1951).

True, there is no particular magic in the term "clear and present danger." In the final analysis, it is the men interpreting the phrase and not the phrase itself which is important. But the phrase has been a red light in the path of a sometimes over-zealous judiciary. It has given us decisions such as *Thomas v. Collins*,⁴⁴ *Hartzel v. United States*,⁴⁵ *Bridges v. Wixon*,⁴⁶ *Schneidermann v. United States*,⁴⁷ and many others, cases which have called for a high degree of judicial objectivity, cases of which we as a nation believing in the fundamental rights of the individual over the state can well be proud. The adoption by the Supreme Court of Judge L. Hand's rationale may well mark the beginning of a period of less governmental tolerance for the beliefs of its people.

The majority opinion decided that the question of clear and present danger was for the court, and not the jury, to decide, saying: "The doctrine that there must be a clear and present danger of a substantive evil that Congress has a right to prevent is a judicial rule to be applied as a matter of law by the courts."⁴⁸ It would seem, however, that the existence of a clear and present danger from the defendants conspiring to form a group which would advocate violent overthrow of the government is just as much a matter of fact to be determined by the jury as the existence of the conspiracy itself.

It has been hinted in at least two earlier cases that the question of clear and present danger was for the jury to determine,⁴⁹ and Chester James Antieau, in his exhaustive and penetrating analysis of the clear and present danger doctrine, states: "It is submitted that a proper application of the clear and present danger concept demands a charge that to convict under these statutes the jury must find that the membership of the accused in the party constitutes a clear and present danger to the security of the government."⁵⁰

The issue of whether the statute, as interpreted, was too vague so as to be in conflict with either the First or Fifth Amendments was decided against the defendants.⁵¹ There would seem to be nothing vague about the Smith Act. If the defendants have conspired to form a group which would advocate violent overthrow of

44. 323 U. S. 516 (1944) (reversing a conviction under a Texas statute requiring labor representatives to obtain organizers card before soliciting members).

45. 322 U. S. 680 (1944) (reversing a conviction obtained under the Espionage Act of 1917).

46. 326 U. S. 135 (1945) (reversing an order for deportation of Harry Bridges, said order having been issued on "proof" Bridges was a Communist and thus an undesirable alien).

47. 320 U. S. 118 (1943) (Supreme Court refused to go along with attempt to denaturalize U. S. Citizen—admitted member of Communist Party—some 12 years after his citizenship was granted. Query as to future like attempts after the decision in the Dennis case).

48. 341 U. S. 494, 513 (1951).

49. *Whitney v. California*, 274 U. S. 357 at 379 (1927); *Pierce v. United States*, 252 U. S. 239 at 250 (1920).

50. Antieau, *The Rule of Clear and Present Danger: Scope of Its Applicability*, 48 MICH. L. REV. 811 at 818 (1950); Antieau, *Clear and Present Danger—Its Meaning and Significance*, 25 NOTRE DAME LAW. 603 (1950).

51. 341 U. S. 494, 515 (1951).

the government, as the trial court found that they did, then they have obviously violated the provisions of the act. And further, down to this case, at least, there was not much, if any, vagueness as to what was meant by clear and present danger. Thus, as far as the usual concept of the void for vagueness rule is concerned, it would seem that the defendants were rightly overruled on this argument.

There is, however, an interesting aspect to the case which seems to fit in at this point. To begin with a clear statute, the Smith Act, has its application limited by the provisions of the First Amendment. The First Amendment, in turn, has been interpreted in this field as meaning that speech can be punished when there has been created a clear and present danger from that speech. In effect, then, and as brought out by Chief Justice Vinson, the clear and present danger test must be read in as part of the Smith Act.⁵²

Two cases, among many others,⁵³ serve best to bring out this fact. The first of these is *Schneiderman v. United States*.⁵⁴ There, the naturalization of petitioner was sought to be set aside on the grounds of fraud some twelve years after it had been granted. The theory was that the petitioner having been a member of the Communist Party since and at the time he took his oath to support the Constitution of the United States, he could not have sworn truly. Mr. Justice Murphy, speaking for the majority, stated: "There is a material difference between agitation and exhortation calling for present violent action which creates a clear and present danger of public disorder or other substantive evil, and mere doctrinal justification or prediction of the use of force under hypothetical conditions at some indefinite future time—prediction that is not calculated or intended to be presently acted upon, thus leaving opportunity for general discussion and the calm processes of thought and reason. . . ."⁵⁵

And in their dissent in *Abrams v. United States*,⁵⁶ a conspiracy proceeding under the Espionage Act of 1917,⁵⁷ Justice Holmes and Brandies, in pointing out that the United States form of government is an experiment, said: "While that experiment is part of our system I think we should be eternally vigilant against attempts to check the expression of opinion that we loath and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. . . . Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the

52. *Ibid.*

53. See: *Terminiello v. City of Chicago*, 337 U. S. 1 (1949); *Winters v. New York*, 333 U. S. 507 (1948); *Craig v. Harvey*, 331 U. S. 367 (1947); *Pennekamp v. Florida*, 328 U. S. 331 (1946); *Bridges v. Wixon*, 326 U. S. 135 (1945); *Hartzel v. United States*, 322 U. S. 680 (1944); *Thomas v. Collins*, 323 U. S. 516 (1944).

54. 320 U. S. 118 (1942).

55. *Id.* at 157-158.

56. 250 U. S. 616 (1919).

57. Espionage Act of June 15, 1917, c. 30, tit. 1, § 3, 40 STAT. 219, as amended by the Act of May 16, 1918, c. 75, § 1, 40 STAT. 553. (Comp. St. 1918, § 10212c).

sweeping command, 'Congress shall make no law abridging the freedom of speech'.⁵⁸

Under the Dennis interpretation of the clear and present danger test, *i.e.*, that in each case, the court "must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger,"⁵⁹ a formerly clear constitutional doctrine has assumed a fair degree of ambiguity. Can anyone now say with any degree of certainty just what the phrase "clear and present danger" means or how it will be interpreted in the future? The "present" of "clear and present" would seem to have been eliminated by this decision, but it will take at least one more decision before we can be sure. Can it not be said, then, that by the majority's decision, a hitherto clear statute has been rendered vague to the same extent that the doctrine of constitutional applicability of the statute has been rendered vague?

If the clear and present danger doctrine had to be watered down or entirely discarded, few tears will be shed over the fact that it was the Communist Party of America which first felt the brunt of the discard. It is difficult to feel much sympathy for the eleven convicted defendants, for from their conduct at the trial they appeared to be asking for the opportunity to appear as martyrs.⁶⁰ Further, the Communist philosophy itself, directly opposed, as it is, to American ideals of the dignity of the individual and the rights of the individual as against the State, commands little sympathy or fear in one convinced of the superiority of democratic capitalism. But, when one stops to think, that the high degree of tolerance for an individual's freedom of conscience—whoever that individual may be—exhibited by the clear and present danger doctrine and the many cases decided thereunder may now well be at an end, there is at least some cause for alarm.⁶¹

Mr. Justice Frankfurter concurred in the affirmance of the conviction. The fact that speech is in issue here, a fact disputed by Mr. Justice Jackson, is brought out when Justice Frankfurter says: "On the basis of the instructions, the jury found . . . that the advocacy which the defendant conspired to promote was to be a rule of action, by language reasonably calculated to incite persons to such action, and was intended to overthrow of the Government by force and violence as soon as circumstances permit."⁶²

Long opposed to what he felt was an indiscriminate application of the clear and present danger doctrine,⁶³ the present opinion is a continuation of Justice Frank-

58. 250 U. S. 616, 630 (1919), quoting U. S. CONST. AMEND. I.

59. 183 F.2d 201, 212 (2d Cir. 1950).

60. 9 F.R.D. 367 (1949).

61. For a brilliant analysis of the free speech problem, read: CHAFEE, *FREE SPEECH IN THE UNITED STATES* (1941).

62. 341 U.S. 494, 518 (1951).

63. See his majority opinion. *Minersville School District v. Gobitis*, 310 U. S. 586 (1940); *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U. S. 287 (1941); dissenting opinion: *Bridges v. California*, 314 U. S. 252 (1941); *West Va. State Board of Education v. Barnette*, 319 U. S. 624 (1943); *Bridges v. Wixon*, 326 U. S. 135 (1945); concurring opinion; *Pennekamp v. Florida*, 328 U. S. 331 (1946); *Kovacs v. Cooper*, 336 U. S. 77 (1949).

furter's opposition. He recognizes that both the Smith Act and this conviction under it act as a restriction on freedom of speech and assembly,⁶⁴ and further that "reinterpreting the Court's frequent use of 'clear' and 'present' to mean an intertainable 'probability'"⁶⁵ does not answer the defendants arguments. Justice Frankfurter maintains that the cases dealing with freedom of speech and assembly should be examined as a whole, rather than taking just isolated cases, and that the convictions of the defendants should stand or fall on the basis of principles derived from these cases.⁶⁶

The conflicts between speech and competing interests are broken down by Justice Frankfurter into six different types of cases: (1) those involving a conflict between free expression of opinions in public places and the interest of public peace and primary use of streets and parks;⁶⁷ (2) cases involving picketing;⁶⁸ (3) cases involving exclusion, deportation, or denaturalization of aliens (and citizens) because of their advocacy of their belief;⁶⁹ (4) cases involving freedom of the press;⁷⁰ (5) cases involving the Taft-Hartley Act;⁷¹ (6) and cases involving statutes prohibiting speech because of its tendency to lead to crime.⁷²

The following conclusions are drawn from this over-all look at the cases: (1) "Free speech cases are not an exception to the principle that we are not legislators, that direct policymaking is not our province";⁷³ (2) ". . . the results which we have reached are on the whole those that would ensue from careful weighing of conflict-

64. 341 U. S. 494, 521 (1951).

65. *Id.* at 527.

66. *Id.* at 528.

67. *Niemotko v. Maryland*, 340 U. S. 268 (1951).

68. *Thornhill v. Alabama*, 310 U. S. 88 (1940); *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U. S. 287 (1941); *Carpenters and Joiners Union of America v. Ritters Cafe*, 315 U.S. 722 (1947); *Bakery and Pastry Drivers and Helpers, I.B.T. v. Wahl*, 312 U. S. 769 (1941); *Gibony v. Empire Storage and Ice Co.*, 336 U. S. 490 (1949); *International Brotherhood of Teamsters, C. W. & H. Union v. Hanke*, 339 U. S. 470 (1950); *Hughes v. Superior Court of California*, 339 U. S. 460 (1950); *American Federation of Labor v. Swing*, 312 U. S. 321 (1941); *Cafeteria Employees Union v. Angelos*, 320 U. S. 293 (1943).

69. *U. S. ex. rel. Turner v. Williams*, 194 U. S. 279 (1904); *Schneiderman v. United States*, 320 U. S. 118 (1943); *Bridges v. Wixon*, 326 U. S. 135 (1945).

70. *Grosjean v. American Press Co.* 297 U. S. 233 (1936); *Near v. Minnesota*, 283 U. S. 697 (1931); *Pennekamp v. Florida*, 328 U. S. 331 (1946); *Bridges v. California*, 314 U. S. 252 (1941); *Patterson v. Colorado*, 205 U. S. 454 (1907); *Craig v. Harvey*, 331 U. S. 367 (1947).

71. *American Communications Assoc. C.I.O. v. Douds*, 339 U. S. 382 (1950).

72. *Fox v. Washington*, 236 U. S. 273 (1915); *Schenck v. United States*, 249 U. S. 47 (1919); *Frowerck v. United States*, 249 U. S. 204 (1919); *Debs v. United States*, 249 U. S. 211 (1919); *Abrams v. United States*, 250 U. S. 616 (1919); *Schaefer v. United States*, 251 U. S. 466 (1920); *Pierce v. United States*, 252 U. S. 239 (1920); *Gitlow v. New York*, 268 U. S. 652 (1925); *Whitney v. California*, 274 U. S. 357 (1927); *Hartzel v. United States*, 322 U. S. 680 (1944); *Fiske v. Kansas*, 274 U. S. 380 (1927); *Herndon v. Lowry*, 301 U. S. 242 (1937); *DeJonge v. Oregon*, 299 U. S. 353 (1937); *Taylor v. Mississippi*, 319 U. S. 583 (1943).

73. 341 U. S. 494, 540 (1951).

ing interests";⁷⁴ (3) "Not every type of speech occupies the same position on the scale of values."⁷⁵

The two competing interests are, first, the interest of the Nation in security from internal revolt, and, second, the interest in freedom of speech. The boring-from-within technique of the Communist Party is recognized. But, on the other side, it is acknowledged that: "Suppressing advocates of overthrow inevitably will also silence critics who do not advocate overthrow but fear that their criticism may be so construed. . . . It is a sobering fact that in sustaining the conviction before us we can hardly escape restriction on the interchange of ideas."⁷⁶

Justice Frankfurter goes on to say: "The history of civilization is in considerable measure the displacement of error which once held sway as official truth by beliefs which in turn have yielded to other truths. Therefore the liberty of man to search for truth ought not to be fettered, no matter what orthodoxies he may challenge. Liberty of thought soon shrivels without freedom of expression. Nor can truth be pursued in an atmosphere hostile to the endeavor or under dangers which are hazarded only by heroes."⁷⁷

After such stirring words, one might well wonder what Justice Frankfurter is doing on the side of the majority. Once again, however, his fear of usurping legislative functions forces him to say: "It is not for us to decide how we would adjust the clash of interests which this case presents were the primary responsibility for reconciling it ours."⁷⁸

There have been those on the Supreme Court, however, who have felt that the Legislature should not have the final say as to the constitutionality of a particular piece of legislation. The reasoning of Mr. Justice Roberts in *Herndon v. Lowry*⁷⁹ would seem to be the applicable rule whether dealing with a state or a federal statute: "The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government. The judgment of the legislature is not unfettered."⁸⁰

Justice Frankfurter has balanced the conflicting interests of national security and free speech, and, in the particular fact situation before him, the scales apparently tipped in favor of freedom of speech. Yet he was unable to dissent from the majority, for "Congress has determined that the danger created by advocacy of overthrow justifies the ensuing restriction of freedom of speech."⁸¹ It is submitted that such judicial abdication and indulgence in the whims of the majorities detracts from the Court's position as the judicial conscience of the people.

74. *Id.* at 542.

75. *Id.* at 544.

76. *Id.* at 549.

77. *Id.* at 550.

78. *Ibid.*

79. 301 U. S. 242 (1937).

80. *Id.* at 258.

81. 341 U. S. 494, 550 (1951).

There is a potent argument on Justice Frankfurter's side, however, one advanced by those who do not believe that the courts should constitute the first line of defense where civil liberties are concerned.⁸² The argument for this side was once admirably advanced by Judge L. Hand, who, in speaking about what would happen to the "fundamental principles of equity and fairplay which our constitutions enshrine"⁸³ if the courts did not affirmatively assert the doctrine of judicial review, said:

"What will be left of these principles? I do not know whether they will serve only as counsels; but this much I think I do know—that a society so given that the spirit of moderation is gone, no court *can* save; that a society where the spirit flourishes, no court *need* save; that in a society which evades its responsibility by thrusting upon courts the nurture of that spirit, that spirit in the end will perish. What is the spirit of moderation? It is the temper which does not press a partisan advantage to its bitter end, which can understand and will respect the other side, which feels a unity between all citizens—real and not the fictitious production of propaganda—which recognizes their common fate and their common aspirations—in a word, which has faith in the sacredness of the individual. If you ask me how such a faith and such a temper are bred and fostered, I cannot answer. They are the last flowers of civilization, delicate and easily overrun by the weeds of our sinful human nature; we may even now be witnessing their uprooting and disappearance until in the progress of the ages their seeds can once more find some friendly soil. But I am satisfied that they must have the vigor within themselves to withstand the winds and weather of an indifferent and ruthless world; and that it is idle to seek shelter for them in a courtroom. Men must take that temper and that faith with them into the field, into the market-place, into the factory, into the council-room, into their homes; they cannot be imposed; they must be lived."⁸⁴

This attitude denies the power of the courts to encourage and foster a feeling of tolerance among the people of the nation through the tolerance of their own decisions. This power exists and has been asserted in the past. If it is not asserted in the future vigorously, then it is useless to think that the minority groups in the United States, whoever they may be at any particular time, will have their rights protected. The courts are the last hope of a democratic nation; they are the last stop before total decadence; the courts, above all other governmental group in the country, must foster and protect a love of democratic tolerance, else there is little hope that such will long last.

Mr. Justice Jackson, concurring, maintains that the clear and present danger doctrine is one ill-suited to cope with the Communist menace, for "Force or violence, as they would resort to it, may never be necessary, because infiltration and decep-

82. Richardson, *Freedom of Expression and the Functions of Courts*, 65 HARV. L. REV. 1, 52 (1951).

83. L. Hand, *The Contribution of an Independent Judiciary to Civilization in THE SUPREME COURT OF MASSACHUSETTS 1692-1942*, 59, 66 (Mass. Bar Ass'n. 1942).

84. *Ibid.* And see, Bernard, *Avoidance of Constitutional Issues in the United States Supreme Court: Liberties of the First Amendment*, 50 MICH. L. REV. 261 (1951).

tion may be enough."⁸⁵ He would save the clear and present danger test for cases not involving Communists.⁸⁶

The main point of Justice Jackson's opinion is his contention that "What really is under review here is a conviction of conspiracy, after a trial for conspiracy, on an indictment charging conspiracy, brought under a statute outlawing conspiracy. With due respect to my colleagues, they seem to me to discuss anything under the sun except the law of conspiracy."⁸⁷ Conspiracy is a crime in and of itself independent of any further criminal act the conspiracy may lead to.⁸⁸ No overt act, other than the conspiracy itself is or need be required to support conviction. "Having held that a conspiracy alone is a crime and its consummation is another, it would be weird legal reasoning to hold that Congress could punish the one only if there was 'clear and present danger' of the second."⁸⁹

This may all be very true once the constitutionality of the statute on which the conspiracy conviction is based has been proved, but as Justice Frankfurter pointed out, the Smith Act restricts freedom of speech.⁹⁰ In such instances in cases prior to this one, and including several dealing with Communists, the clear and present danger test has been applied. Thus, the question raised and which should have been answered by this case was whether a prosecution and conviction for conspiracy based upon the Smith Act, with clear and present danger doctrine read into it, is constitutional in view of the First and Fifth Amendments.

The answer to this question was dodged by Justice Jackson by his refusal to apply clear and present danger tests to the Communists, by his assuming the constitutionality of the Smith Act, and by then proceeding on strict common law conspiracy theory.

It may well be that Justice Jackson's approach was at least more realistic than that used by the majority. It has the virtue of simplicity. There are no delicate balancings of competing societal interests as the majority's and Justice Frankfurter's opinions. The statute being assumed constitutional, the defendant being a Communist, a Communist advocating overthrow of the government by force and violence, ipso facto, a conviction. In effect, the Communist Party is thus outlawed, and any person belonging to it, or who is proved to belong to it, or who is proved to be associated with it and thus must subscribe to its views, is then subject to prosecution.

Mr. Justice Black's dissent is a short one. He maintains that Section 3 of the Smith Act is void on its face as "a virulent form of prior censorship of speech and press . . .";⁹¹ that the only way to sustain this conviction is to repudiate the established clear and present danger doctrine;⁹² that Judge Medina's determining as a matter of law the fact of clear and present danger "sanctions the determination of

85. 341 U. S. 494, 565 (1951).

86. *Id.* at 567-570.

87. *Id.* at 572.

88. *Id.* at 573.

89. *Id.* at 577.

90. 341 U. S. 494, 521 (1951).

91. *Id.* at 579.

92. *Id.* at 580.

a crucial issue of fact by the judge rather than the jury";⁹³ and objection is made to the limited grant of certiorari because of the discriminatory selection of the jury panel, *i.e.*, the "blue-ribbon jury," and because "the record shows that one member of the trial jury was violently hostile to petitioners before and during the trial."⁹⁴

Justice Black's approach to the problem is the orthodox one under clear and present danger doctrine. There is no reason to suspect that he does not realize as well as the six Justices on the side of the majority the nature of the danger posed by the Communist Party. Yet, he was able to deplore the manner in which the present conviction was obtained. "Public opinion being what it now is, few will protest the conviction of these Communist petitioners. There is hope, however, that in calmer times, when present pressures, passions and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society."⁹⁵

Mr. Justice Douglas's dissent points out that there was no evidence introduced at the trial to show that these petitioners were teaching terroristic methods.⁹⁶ The petitioners, so far as the record was concerned, organized people to teach and themselves to teach Marxist-Leninist doctrine contained chiefly in four books.⁹⁷ They were not charged with a conspiracy to overthrow the government, but with a conspiracy to teach and advocate its overthrow by force and violence.⁹⁸ Since the books used by petitioners are not outlawed, why should their use in a classroom be made a crime? Since the Act requires the element of intent to convict,⁹⁹ "The crime then depends not on what is taught but on who the teacher is. That is to make freedom of speech turn not on *what is said*, but on the intent with which it is said. Once we start down that road we enter territory dangerous to the liberties of every citizen."¹⁰⁰

The law of conspiracy plays no part in this case, Justice Douglas goes on to say. "The doctrine of conspiracy has served divers and oppressive purposes and in its broad reach can be made to do great evil. But never until today has anyone seriously thought that the ancient law of conspiracy could constitutionally be used to turn speech into seditious conduct."¹⁰¹

Citing from Mr. Justice Pitney's decision in *Pierce v. United States*,¹⁰² Justice Douglas maintains that the question of clear and present danger was for the jury to determine: "Whether the statements contained in the pamphlet had a natural

93. *Ibid.*

94. *Id.* at 581.

95. *Ibid.*

96. *Ibid.*

97. STALIN, FOUNDATIONS OF LENINISM (1924); MARX & ENGELS, THE COMMUNIST MANIFESTO (1848); LENIN, STATE & REVOLUTION (1917); HISTORY OF THE COMMUNIST PARTY OF THE SOVIET UNION (B) (1939).

98. 341 U. S. 494, 582 (1951).

99. *Id.* at 583.

100. *Ibid.*

101. *Id.* at 584.

102. 252 U. S. 239 (1920).

tendency to produce the forbidden consequences, as alleged, was a question to be determined not upon demurrer but by the jury at the trial."¹⁰³

Above all, Justice Douglas remains unconvinced that the Communist Party of America presents any such clear and present danger to the internal security of the Nation as to warrant such an abridgement of petitioners right of free speech. As a political party, they are of little consequence.¹⁰⁴ As for their infiltrating tactics, over which the majority were so alarmed, no evidence was introduced at the trial to show how or where or if this infiltrating has endangered the nation. "I could not so hold unless I were willing to conclude that the activities of recent years of committees of Congress, of the Attorney General, of labor unions, of state legislatures, and of Loyalty Boards were so futile as to leave the country an [on?] the edge of grave peril."¹⁰⁵

"Free speech—the glory of our system of government—should not be sacrificed on anything less than plain and objective proof of danger that the evil advocated is imminent. On this record no one can say that petitioners and their converts are in such a strategic position as to have even the slightest chance of achieving their aims."¹⁰⁶

Quoting from Vishinsky that in the Soviet state there can be no freedom of speech and press for the foes of socialism, Justice Douglas warns against accepting any such standard in the United States.¹⁰⁷

An over-all look at this case and the five opinions rendered leave unanswered many questions. Has the United States grown so big that we have outgrown the ideals set forth in the First Amendment to our Constitution? Do the people of the Nation have a right to believe in the philosophic idea that they can free themselves by force just so long as they have not used force to injure people? Why this all-embracing fear of Communism? Why this lack of faith that democratic principles in a free encounter with the warped theories of Communism will not emerge triumphant?

These are all questions which should have played a part in the decision to restrict the clear and present danger doctrine in the manner which the majority did. There are those who cheer the overthrow of the clear and present danger test, but who, in their cheer, have failed to see that the decision in the *Dennis* case is one on the side of intolerance. One commentator recently said:¹⁰⁸ "Recent decisions of the courts, affirming the 'right' of Congress to abridge political freedom, have given added strength to the growing conviction that the Holmesian 'test' of 'clear and present danger' is both unintelligible in practice and baseless in theory." "The First Amendment expresses, without qualification, the most fundamental principle of government which human wisdom has devised. The formula which qualifies it

103. *Id.* at 244.

104. 341 U. S. 494, 588 (1951).

105. *Id.* at 589.

106. *Id.* at 590.

107. *Id.* at 591.

108. Meiklejohn, *The First Amendment and Evils that Congress Has a Right to Prevent*, 26 IND. L. REV 477 (1951).

has done damage enough. The time has come when unqualified political freedom should be firmly established."¹⁰⁹

There may be a day when we in America will recognize and do homage to our birthright of unqualified political freedom. But until that day comes, and until people in the highest and lowest strata of society are imbued with the spirit of tolerant respect for the rights of others, we should think twice before we so easily give up the one test which has so often protected minority rights as against self-righteous majorities—and clear and present danger test.

This idea has never been so clearly stated as it was by Judge C. W. Pound in his dissent in *People v. Gilow*:¹¹⁰ "Although the defendant may be the worst of men; although Left Wing Socialism is a menace to organized government; the rights of the best of men are secured only as the rights of the vilest and most abhorrent are protected."¹¹¹

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109. *Id.* at 493.

110. 234 N. Y. 132, 136 N.E. 317 (1922).

111. 136 N.E. 317, 327 (1922).