Wilkins,[32] in which the court apparently reassessed the property on the basis of new evidence and reduced the valuation from $250,000 to $100,000. That decision, however, may be reconciled with the present case if we assume that the original assessment in the *Henderson* case was so grossly excessive as to imply an intent to overvalue and thus to constitute a violation of the Fourteenth Amendment.

Corporations—Director's Liability—Debts in Excess of Capital Stock—[Oklahoma].—The receiver and creditors of a corporation brought suit against the distributees of a deceased director's estate to enforce the director's liability for authorizing, contrary to statute,[1] the creation of corporate debts in excess of the subscribed capital stock. The specific debts to which he had assented had been paid prior to the dissolution of the corporation, but on dissolution the total debt remained in excess of the capital stock. *Held*, under the statute, the directors of a corporation are liable only for those particular debts to which they assent which, at the time of their creation, produce a total corporate debt in excess of the statutory limit. Moreover, this liability is unenforceable before dissolution and is discharged, as to any particular excessive debt, by payment before dissolution. Recovery denied. *Warren v. Adams*.[2]

The principal case raises two problems: first, what creditors are within the protection of the statute, and second, what circumstances discharge the liability of a director. In disposing of the principal case, the Oklahoma court considered only the latter problem, adopting the rule that a director's liability is discharged by the corporation's payment of the particular excessive debt to which he assented. It is submitted that this question is secondary, and can be answered only by a consideration of the primary problem; for when it is known what creditors the legislature intended to protect, the problem of discharge resolves itself.

The words of the Oklahoma statute seem to indicate clearly the legislative intent. The statute specifies that the liability is "to the creditors .... to the full amount of the .... debt contracted."[3] The recovery, thus, is not confined to one creditor, nor is it specified to be for any particular debt, but only for the amount thereof. The Oklahoma Supreme Court has already held[4] that the quoted words are to be interpreted in accord with the majority rule, holding similarly worded statutes to mean that all creditors are entitled to share in the proceeds of the directors' liability,[5] the claims to be enforced in a single suit in equity.[6] The contrary rule, adopted by

[32] 43 F. (2d) 670 (C.C.A. 4th 1930).

[1] Okla. Stat. (Harlow, 1931) § 9763.

[2] C.C.H. Court Decisions Requisition no. 225065 (Okla. S.Ct. 1939). The case is now pending on second petition for rehearing, the first petition having been denied.

[3] Okla. Stat. (Harlow, 1931) § 9763.

[4] Colcord v. Granzow, 137 Okla. 194, 278 Pac. 654 (1928).

[5] Horner v. Henning, 93 U.S. 228 (1876); Colcord v. Granzow, 137 Okla. 194, 278 Pac. 654 1928); Nat'l Bank of Auburn v. Dillingham, 147 N.Y. 603, 42 N.E. 338 (1895); Woolverton v. Taylor, 132 Ill. 197, 23 N.E. 1007 (1890); Low v. Buchanan, 94 Ill. 76 (1879); Sturgis v. Burton, 8 Ohio St. 215 (1858).

[6] Horner v. Henning, 93 U.S. 228 (1876), is the leading case holding that a remedy at law will not lie in favor of a single creditor. But see the Tennessee cases cited in note 7 infra.

the courts of Tennessee, holds that recovery under such a statute is limited to the specific creditor to whose debt the director assented.[7]

The Tennessee rule may be criticized in that it gives the last creditor, whose debt is in excess of the legal limit, the preference of a double source of payment. This creditor, however, would seem to be, if anything, less deserving of such double protection,[8] for presumably he acted with knowledge of the corporation's credit standing, and assumed a greater risk than creditors within the legal limit. By holding that the recovery must be for the benefit of all creditors, apparently the courts following the majority rule recognize that the legislature believed that debts in excess of the statutory limit injure all creditors alike,[9] and therefore all creditors must be permitted a proportionate share in the recovery.[10]

This interpretation of the statute as protecting all creditors suggests, in fact recognizes, that the underlying legislative theory is that the assets of a corporation, to the extent necessary to cover liabilities and capital stock, are a "trust fund,"[11] with the debt limit being imposed to protect that fund from recklessness and extravagance on the part of the directors.[12] To create a sanction against violation of the debt limit, directors are made personally liable for the excess.[13] In the Oklahoma statute, as in most others,[14] the liability runs to the corporation, and thus becomes an asset of the corporation.[15] The legislative theory seems clear: to augment the trust fund by the addition of this asset in order to compensate corporate creditors for the diminution of assets available for payment of their claims as a result of the creation of the excessive debt. To permit payment of a specific debt to discharge the liability of a director, as is done in the instant case, is to permit a double depletion of the "trust fund;" for not only is an amount of the corporate assets equal to the debt removed from the reach of all other creditors, but at the same time the cause of action against

[7] The Tennessee cases are based upon Allison v. Coal Creek & N.R. Coal Co., 87 Tenn. 60, 9 S.W. 226 (1888), and Tradesman Publishing Co. v. Knoxville Car Wheel Co., 95 Tenn. 634, 32 S.W. 1097 (1895). The authority of the Allison case is weakened somewhat by Moulton v. Connell-Hall-McLester Co., 93 Tenn. 377, 27 S.W. 672 (1894), which is in accord with the majority rule.

[8] Buchanan v. Bartow Iron Co., 3 Ill. App. 191 (1878).

[9] Colcord v. Granzow, 137 Okla. 194, 278 Pac. 654 (1928); J. L. Mott Iron Works v. Arnold, 35 R.I. 456, 87 Atl. 17 (1913); Margarge & Green Co. v. Ziegler, 9 Pa. Super. Ct. 438 (1899); Nat'l Bank of Auburn v. Dillingham, 147 N.Y. 603, 42 N.E. 338 (1895); Roth v. Playford, 25 Pa. Co. Ct. 345 (1900); Buchanan v. Bartow Iron Co., 3 Ill. App. 191 (1878); Tallmadge v. Fishkill Iron Co., 4 Barb. (N.Y.) 382 (1848).

[10] Horner v. Henning, 93 U.S. 228 (1876); Stone v. Chisolm, 113 U.S. 302 (1885).

[11] Low v. Buchanan, 94 Ill. 76 (1879).

[12] Colcord v. Granzow, 137 Okla. 194, 278 Pac. 654 (1928); Tallmadge v. Fishkill Iron Co., 4 Barb. (N.Y.) 382 (1848); see Moore v. Lent, 81 Cal. 502, 22 Pac. 875 (1889); cf. Frank Kumin Co. v. Marean, 283 Mass. 332, 186 N.E. 780 (1933); Patterson v. Stewart, 41 Minn. 84, 42 N.W. 926 (1889).

[13] Since the liability is imposed as a consequence of avoidable action, it operates in effect to prevent such action, Freund, Legislative Regulation 60 (1932).

[14] Harper, Liability of Directors for Creating Excessive Indebtedness, 9 Cornell L.Q. 269 (1924), quotes all the statutes in force at that time, and discusses their application.

[15] Tallmadge v. Fishkill Iron Co., 4 Barb. (N.Y.) 382 (1848).

the directors for this amount is discharged. If, contrary to the holding in the principal case, the cause of action is not discharged, other creditors have not been injured unless the directors are insolvent.

The soundness of the trust fund principle as applied to the problem of discharge of directors' liability has been demonstrated in the cases in which, after insolvency, the excessive debt was paid off entirely by application of the corporate assets. In this situation, if there are not sufficient assets remaining to pay the other creditors, directors are held not to be relieved from liability,[16] even under a statute which provides for the discharge of the liability by the reduction of the corporate debt to within the legal limit.[17] The rule here is, as it should be in the principal case, that only a payment made without impairing the "trust fund" can discharge the directors' liability. By permitting the cause of action against the directors to remain in full force, the protection from impairment is accomplished.

The Tennessee rule has been rejected by the Oklahoma courts when the question of to what creditors the liability should run was squarely before the court.[18] Moreover, the Tennessee cases are distinguishable in that they do not purport to decide the problem of what payment discharges the directors' liability. But if the holding of the instant case is not reversed on rehearing, Oklahoma will stand committed either to the inconsistent position that the statutory liability of directors extends in favor of all creditors and can be discharged by payment of the excessive debt by the application of the corporate assets; or to the consistent but unsound position that the directors' liability runs only to the particular creditor whose debt is above the legal limit and may be discharged by payment with corporate funds, despite the injury to other creditors.

The principal case, while not in conformance with the usual interpretation accorded similar statutes, seems to be consistent with the recent trend of the courts toward limiting liability of directors through strict interpretation of statutes. The trend may be explainable on the basis that the courts feel that if too strict liability were imposed upon directors, it would be difficult to get capable men to accept directorships.[19]

Evidence of the same attitude toward directors' liability is to be found in the more recent corporation laws, in which the attempt has been to "harmonize the law with the desires of the business community"[20] and also to obtain less stringent provisions which will be more attractive to corporate promoters and which will prevent local businesses from going to other states to incorporate.[21] Debt limit statutes were in harmony with the conception of the corporation as a static enterprise, a conception which prevailed during the nineteenth century.[22] The more modern idea of a corpora-

[16] Arron v. Hewitt, 60 S.D. 280, 244 N.W. 380 (1932); Margarge & Green Co. v. Ziegler, 9 Pa. Super. Ct. 438 (1899); Nat'l Bank of Auburn v. Dillingham, 147 N.Y. 603, 42 N.E. 338 (1895); Roth v. Playford, 25 Pa. Co. Ct. 345 (1900). But see Flint v. Boston Woven Hose & Rubber Co., 183 Mass. 114, 66 N.E. 592 (1903) (statute providing specifically that the debt must be in excess at the time of bringing suit).

[17] J. L. Mott Iron Works v. Arnold, 35 R.I. 456, 87 Atl. 17 (1913).

[18] Note 4 supra.

[19] In re Forest of Dean Coal Mining Co., 10 Ch. Div. 450 (1878); The Statutory Responsibility of Directors for Payment of Dividends out of Capital, 35 Yale L.J. 870, 875 (1926).

[20] Dodd, Statutory Business Corporation Law, 50 Harv. L. Rev. 27, 42 (1936).

[21] Ibid., at 34.

[22] Ibid., at 38.

tion as a going concern with the potential power of expansion has led to the elimination of the arbitrary limitations on debts based on the paper value of the capital stock.

That the modern trend is not entirely away from debt limit restrictions seems to be indicated in a recent SEC decision,[23] suggesting that the approach to the problem should be made, not in terms of an arbitrary limit, but in terms of preserving certain ratios between debts and capital stock. In that case, the commission denied an application for permission to issue bonds, partially on the basis that the proposed indebtedness of the corporation would result in a ratio of debts to common stock which would exceed the prevailing ratio in the particular industry in which the applicant was operating. The commission held that the issue was not appropriate to the economical and efficient operation of the corporation. The motivating factor, however, was not the effect which the issue would have upon the present financial condition of the corporation, but the effect that possible future financial reverses would have upon a corporation with an outstanding debt proportionately greater than that of other similar corporations. Under an analogous approach, limitations of corporate indebtedness, enforced by director's liability statutes, might prove to be a stabilizing factor in the modern economy.

Criminal Law—Obtaining Property by False Pretenses—Confidence Game—[Illinois].—The defendant on several occasions obtained goods from the prosecuting witness by falsely stating that the goods were being secured for the defendant's employer, each purchase being paid for when the immediately succeeding one was made. At the time of the final purchase, the defendant said he would return the following day to pay for the two unpaid purchases, but he neither returned nor made payment. On writ of error from a judgment holding the defendant guilty of obtaining property by means of the confidence game, *held*, that although the defendant may have been guilty of obtaining property by false pretenses,[1] the evidence was insufficient to sustain a confidence game conviction.[2] Judgment reversed. *People v. Martin.*[3]

The reversal in the instant case results from the difficulty in distinguishing between the related statutory crimes of obtaining property by false pretenses and by means of a confidence game.[4] False pretense statutes are essentially an extension of

[23] In the Matter of Consumers Power Co., Holding Co. Act Rel. 1854 (1939), noted in 7 Univ. Chi. L. Rev. 735 (1940).

[1] Ill. Rev. Stat. (1939) c. 38, § 253: "Whoever, with intent to cheat or defraud another, designedly by color of any false token or writing, or by any false pretense, obtains . . . . property . . . . shall be fined in any sum not exceeding $2,000, and imprisoned not exceeding one year. . . . ."

[2] Ill. Rev. Stat. (1939) c. 38, § 256: "Every person who shall obtain . . . . property . . . . by means or by use of any false or bogus check or by any other means, instrument or device commonly called the confidence game shall be imprisoned in the penitentiary not less than one year nor more than ten years."

[3] 372 Ill. 484, 24 N.E. (2d) 380 (1939).

[4] In People v. Gould, 363 Ill. 348, 352, 2 N.E. (2d) 324, 326 (1936), the court impliedly acknowledged the difficulty in distinguishing the crimes, stating: "the term 'confidence game' can hardly be defined in a manner that will cover and segregate all cases of that nature from those constituting the offense of obtaining money or property by false pretenses. Obviously, false pretenses of some sort are employed in a confidence game."