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."

the common law crime of cheating by means of false tokens.[5] Generally, a false pretense is defined as a designed misrepresentation of an existing condition, made with intent to defraud, so that the party to whom the false misrepresentation is made is induced thereby to part with title to and possession of his property.[6] The Illinois confidence game act,[7] on the other hand, penalizes obtaining property "by use of any false or bogus check or by any other means, instrument or device commonly called a confidence game. . . . ." Though the generality of this wording offers no clear basis for distinguishing the two crimes, Illinois decisions have asserted that the distinction lies in the manner in which the fraud is accomplished.[8] The confidence game is characterized as a "swindling operation in which advantage is taken of the confidence reposed by the victim in the swindler."[9] The difficulty is that this so-called distinguishing feature of the confidence game can apply also to a false pretense; for in a sense, it is only because the victim of the false pretenses has "confidence" in the misrepresentations that he parts with his property.

In several states having statutes which resemble those of Illinois,[10] the crimes have been distinguished on the basis that the confidence game requires, in addition to a false statement, a visible token or object which serves as a medium for effectuating the fraud.[11] Although this distinction may be found in the Illinois cases,[12] it has not been expressly recognized, and there have been confidence game convictions where there had been no acts in addition to an oral or written misrepresentation.[13] Another distinction could be drawn by limiting the confidence game statute to promises or representations of future occurrences, since the false pretense statute has been held to cover only representations as to "past or existing facts."[14] Yet the readiness

[5] False pretense statutes were enacted to cover the "gap" between the crimes of common law cheating and larceny, Clark and Marshall, Crimes § 355 (3d ed. 1927); May, Crimes § 260 (4th ed. 1938).

[6] People v. Cohn, 358 Ill. 326, 193 N.E. 150 (1934); People v. Schneider, 327 Ill. 270, 158 N.E. 448 (1927); 2 Wharton, Criminal Law § 1399 (12th ed. 1932).

[7] Ill. Rev. Stat. (1939) c. 38, § 256.

[8] See People v. Drury, 335 Ill. 539, 167 N.E. 823 (1929); People v. Miller, 278 Ill. 490, 116 N.E. 131 (1917); People v. Gould, 363 Ill. 348, 2 N.E. (2d) 324 (1936).

[9] People v. Gallowich, 283 Ill. 360, 363, 119 N.E. 283, 284 (1918); People v. Warfield, 261 Ill. 293, 103 N.E. 979 (1913); People v. Bimbo, 369 Ill. 618, 17 N.E. (2d) 573 (1938); People v. Schachter, 361 Ill. 573, 198 N.E. 683 (1935).

[10] See, e.g., Colo. Stat. Ann. (Michie, 1935) c. 48, §§ 222 (confidence game), 226 (confidence man defined), 305 (false pretense).

[11] In Davis v. People, 96 Colo. 212, 40 P. (2d) 968 (1935), it was stated that the confidence game "involves the use of some false or bogus means, token, symbol, or device as distinguished from mere words, however false or fraudulent."

[12] Cases cited in note 18 infra.

[13] People v. Angelica, 358 Ill. 621, 193 N.E. 606 (1934) (defendant pretended that he was an officer, obtaining money from the victim as payment for preventing his arrest); People v. Rosenbaum, 312 Ill. 330, 143 N.E. 859 (1924) (defendant obtained money by falsely pretending to be able to "fix" the sentence of victim's brother); People v. Keyes, 269 Ill. 173, 109 N.E. 684 (1915) (defendant obtained money from victim by falsely representing that victim was to become a partner).

[14] See People v. Sullivan, 263 Ill. 34, 1 N.E. (2d) 206 (1936); People v. Cohn, 358 Ill. 326, 193 N.E. 150 (1934); People v. Martin, 372 Ill. 484, 24 N.E. (2d) 380 (1939).

with which the courts have found elements of present representation in cases superficially appearing to involve only promises,[15] together with the rarity of cases in which absolutely no representation of an existing fact is made,[16] renders the distinction of little value.

In spite of the apparent coincidence of the two crimes, an analysis of the Illinois cases reveals three criteria, the presence of which may indicate a proper confidence game prosecution: (1) the employment of one or more accomplices;[17] (2) the use of some visible token, in addition to verbal misrepresentations;[18] and (3) the necessity for numerous transactions to consummate the swindle.[19] Applying the suggested criteria to the instant case, the reversal seems justifiable. The defendant accomplished his fraud unaided by confederates, he employed no false tokens, and he arguably resorted to merely one fraudulent act to effect the swindle, since he had paid for all former purchases.

While the suggested criteria may be readily applicable to the instant case, there are numerous cases upholding confidence game convictions lacking one or more of the tests.[20] Furthermore, several false pretense convictions have been founded on fact

[15] See People v. Sullivan, 263 Ill. 34, 1 N.E. (2d) 206 (1936) (defendant convicted of obtaining by false pretenses, having failed to deliver specific furniture as promised); People v. Cohn, 358 Ill. 326, 193 N.E. 150 (1934) (defendant convicted of obtaining by false pretenses, having falsely promised to obtain civil service positions for the payment of money). But see People v. Austin, 63 Ill. App. 303 (1896).

[16] In People v. Austin, 63 Ill. App. 303 (1896), the defendant, though grossly exaggerating the capacities of a restaurant in which he purported to sell an interest, was held not guilty of obtaining by false pretenses, there being no representation of an existing or past fact, but only as to future capabilities. It would seem unlikely that the defendant could have been successfully prosecuted under the confidence game statute, since, in addition to the reason stated, the court could have based its decision on the lack of proof of intent to defraud.

[17] In the following cases, one or more accomplices were employed: People v. Shepard, 358 Ill. 338, 193 N.E. 447 (1934); People v. Harrington, 310 Ill. 613, 142 N.E. 246 (1924); People v. Miller, 278 Ill. 490, 116 N.E. 131 (1900); People v. Brady, 272 Ill. 401, 112 N.E. 126 (1916); People v. Poindexter, 243 Ill. 61, 90 N.E. 261 (1909); Hughs v. People, 223 Ill. 417, 79 N.E. 137 (1906); Chilson v. People, 224 Ill. 535, 79 N.E. 934 (1906); DuBois v. People, 200 Ill. 157, 65 N.E. 658 (1902); People v. Van Eyck, 178 Ill. 199, 52 N.E. 852 (1899); Maxwell v. People, 158 Ill. 248, 41 N.E. 995 (1895).

[18] People v. Bimbo, 369 Ill. 618, 17 N.E. (2d) 573 (1938) (gipsy costume and crystal ball); People v. Shepard, 358 Ill. 338, 193 N.E. 447 (1934) (cards); People v. Poindexter, 243 Ill. 68, 90 N.E. 261 (1909) (false telegrams, letters); People v. De Pew, 237 Ill. 574, 86 N.E. 1090 (1908) (samples of trinkets); People v. Van Eyck, 178 Ill. 199, 52 N.E. 852 (1899) (dice); Maxwell v. People, 158 Ill. 248, 41 N.E. 995 (1895) (fake cards).

[19] Cases cited in note 20 infra. See also People v. Bimbo, 369 Ill. 618, 17 N.E. (2d) 573 (1938); People v. De Pew, 237 Ill. 574, 86 N.E. 1090 (1908). It has been said that when the confidence reposed in the accused has been built during a series of previous honest transactions, as in the instant case, then the confidence game act is not applicable if a subsequent swindle is perpetrated, People v. Gould, 363 Ill. 348, 2 N.E. (2d) 324 (1936), and cases therein cited. But see People v. Brady, 272 Ill. 401, 112 N.E. 126 (1916); People v. Lager, 288 Ill. 113, 123 N.E. 327 (1919); People v. Harrington, 310 Ill. 613, 142 N.E. 246 (1924).

[20] In People v. Westrup, 372 Ill. 517, 25 N.E. (2d) 16 (1940), the defendant, without accomplices, obtained money from the victim, simply by promising that the money was to be used to purchase real estate to be resold at a profit, which was then to be divided between the defendant and the victim. Several transactions, however, were necessary to consummate the

situations which would, under the above analysis, support confidence game convictions.[21] The statutory particularization in Illinois of the false pretense crime, into false pretense and confidence game crimes, may not be an attempt to punish conduct which in the absence of the confidence game statute would go unpunished, but may be an effort to punish more severely a certain type of conduct which might be characterized as an "aggravated" false pretense. Thus, the confidence game is punishable as a felony,[22] whereas obtaining by false pretenses is punishable as a misdemeanor.[23] Such a statutory distinction in "degree" may be criticized because it produces an inability in many cases to distinguish the two crimes, and as a result, (1) the accused, as in the instant case, temporarily at least, secures his freedom;[24] (2) the new proceeding necessitated by the improper indictment increases the expense of prosecution; and (3) the criminal may be prosecuted under the false pretense statute because there is greater likelihood of obtaining a conviction. These undesired effects could largely be avoided by discarding the attempted particularization and by employing the indeterminate sentence procedure as a means of providing more severe penalties for conduct felt to be socially more reprehensible.[25] It is submitted that this approach is the better one because of the difficulty in distinguishing the two crimes in Illinois.[26]

Federal Jurisdiction—Effect of Undetermined State Law—[Federal].—Oil having been discovered near the right-of-way of a railroad undergoing reorganization under section 77 of the Bankruptcy Act,[1] the trustee in bankruptcy petitioned the court for

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swindle. See also People v. Angelica, 258 Ill. 621, 134 N.E. 606 (1934), where the single defendant, through use of several transactions, extracted money from the victim by falsely stating that he was an officer of the law and that he would prevent the victim's arrest from an alleged crime. See also People v. Epstein, 338 Ill. 631, 170 N.E. 678 (1930).

[21] In Och v. People, 124 Ill. 349, 16 N.E. 662 (1888), several city commissioners, engaging in numerous transactions, extracted "commissions" from those contracting with the city, the contractors reimbursing themselves by "padding" the bills (false tokens) which were then approved by the commissioners. It seems that a confidence game conviction could have been sustained; cf. People v. Gruber, 362 Ill. 278, 200 N.E. 483 (1936); People v. Pouchot and Boyle, 174 Ill. App. 1 (1912).

[22] Ill. Rev. Stat. (1939) c. 38, § 256. [23] Ill. Rev. Stat. (1939) c. 38, § 253.

[24] People v. Gould, 363 Ill. 348, 2 N.E. (2d) 324 (1936); People v. Snyder, 327 Ill. 402, 158 N.E. 677 (1927); People v. Schneider, 327 Ill. 270, 158 N.E. 448 (1927); People v. Friedlander, 328 Ill. 35, 159 N.E. 187 (1927).

[25] Compare the Illinois statute regarding mayhem, Ill. Rev. Stat. (1939) c. 38, § 448, providing as a penalty imprisonment in the penitentiary from one to twenty years. "It shall be deemed and taken as a part of every such sentence . . . . that the term of such imprisonment or commitment may be terminated earlier than the maximum by the Department of Public Welfare. . . . ," Indeterminate Sentence Act, Ill. Rev. Stat. (1939) c. 38, § 802.

[26] That such a variable penalty will be more desirable appears from the successful results which Illinois has experienced under its homicide statute, which defines only two broad crimes: murder, Ill. Rev. Stat. (1939) c. 38, § 358, and manslaughter, Ill. Rev. Stat. (1939) c. 38, § 361. Contrast the complexity of the Minnesota statute, which provides for three grades of murder, Minn. Stat. (Mason, 1927) §§ 10067–68, 10070, and manslaughter of the first and second degree, Minn. Stat. (Mason, 1927) §§ 1077–78. See Cardozo, Law and Literature 99–101 (1931): "I think the distinction is much too vague to be continued in our law. . . . I am not at all sure that I understand it myself after trying to apply it for many years. . . . ."

[1] 47 Stat. 1474 (1933), 11 U.S.C.A. § 205 (1934).