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).

a determination of the fee simple ownership of the right-of-way and for leave, pending determination of ownership, to sink wells and impound the proceeds. Upon appeal from the bankruptcy court's interlocutory order granting permission to sink the wells, the circuit court of appeals decided the ownership question against the contentions of the trustee.[2] On certiorari to the Supreme Court, *held*, because of ambiguity in the Illinois decisions construing grants similar to that under which the railroad claimed, the trustee should be directed to bring suit in the state court of Illinois. Reversed and remanded. *Thompson v. Magnolia Petroleum Co.*[3]

Like the decision in *Erie R. Co. v. Tompkins*,[4] the holding in the instant case was based upon an issue never raised by counsel in their briefs. Unlike the *Erie* decision, however, the present opinion gives little indication as to the importance which is to be attached to it.

That the instant case marks a departure from the former bankruptcy practice can hardly be doubted. The holding that the bankruptcy court, without ever having been petitioned by one of the parties for leave to institute suit in another court,[5] must relinquish a discretionary[6] jurisdiction in order to permit the controversy to be governed by an as yet undetermined state law, is without precedent.[7] Several considerations

[2] Magnolia Petroleum Co. v. Thompson, 106 F. (2d) 217 (C.C.A. 8th 1939).

[3] 60 S.Ct. 628 (1940). [4] 304 U.S. 64 (1938).

[5] In In re Schulte United, 49 F. (2d) 264 (C.C.A. 2d 1931), it is held that the bankruptcy court should not relinquish jurisdiction unless it has been petitioned for leave to institute suit in another court; cf. Isaacs v. Hobbs Tree & Timber Co., 282 U.S. 734, 739 (1931).

[6] The rationale of the instant case is that the bankruptcy court had jurisdiction, but that, in the circumstances, it was an abuse of discretion not to relinquish such jurisdiction. The cases cited by the court as precedents, however, are not cases wherein the bankruptcy court relinquished a discretionary jurisdiction; they are cases in which the bankruptcy court was entirely without jurisdiction, Steelman v. All Continent Co., 301 U.S. 278 (1937); Scott v. Gillespie, 103 Kan. 745, 176 Pac. 132 (1918).

It might have been possible, however, to decide the instant case on the ground that the bankruptcy court was entirely without jurisdiction. The usual rule is that the bankruptcy court has summary jurisdiction to determine adverse claims to "title" only if the property is in the "possession" of the bankrupt, Taubel Co. v. Fox, 264 U.S. 426, 433, 434 (1924); May v. Henderson, 268 U.S. 111, 115 (1925); Steelman v. All Continent Co., 301 U.S. 278, 286 (1937). (The provision of section 77 of the Bankruptcy Act, 47 Stat. 1474 (1933), 11 U.S.C.A. § 205 (1934), giving the bankruptcy court jurisdiction over "the debtor and its property wherever located," has been interpreted as extending the jurisdiction of the court over property not in the "possession" of the debtor, only in those situations where the debtor has an admitted property interest in the res, In re Prima Co., 98 F. (2d) 952 (C.C.A. 7th 1938)). The nature of oil being such that it cannot be "possessed" until it has actually been taken from the earth, Westmoreland and Cambria Natural Gas Co. v. DeWitt, 130 Pa. St. 235, 18 Atl. 724 (1889); Ohio Oil Co. v. Indiana Oil Co., 177 U.S. 190 (1899); see Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 336 (1936), the circuit court's determination of "title" was made in a situation in which, independently of that determination, it could not be shown that the bankrupt had "possession." The bankruptcy court does have power, however, to determine whether it has "possession," Harris v. Brundage Co., 305 U.S. 160 (1938); consequently it might be argued that the circuit court, in determining "title," was merely exercising its power to determine "possession."

[7] The situations in which courts of bankruptcy have heretofore been required to relinquish a discretionary jurisdiction have been those wherein (1) the bankrupt's lack of an equity in the

indicate, moreover, that the innovation effected by the decision is not to be limited to bankruptcy litigation. The principal ground upon which the decision rests—that a state should be allowed to determine its own law—would be equally valid in any case in the federal courts requiring an application of state law. And, if it be argued that the decision is to be limited to bankruptcy, it is extremely difficult to explain why, in view of the fact that diversity of citizenship exists among the parties, the trustee was directed to bring suit in a *state* court.[8] Finally, recent decisions of the Supreme Court, tending to enlarge the scope of the bankruptcy power, would seem to indicate that the present decision is not to be explained solely on bankruptcy grounds.[9]

The decision, then, must be taken as affecting the general jurisdiction of federal courts. Denial of federal jurisdiction on the ground that a state has not yet determined its law is not entirely without precedent. In *Gilchrist v. Interborough Rapid Transit Co.*,[10] the Supreme Court denied to the lower federal court the right to issue an injunction against the enforcement of a state regulatory law, on the express ground that the state court had not yet construed the statute.[11] The instant decision might

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property involved in the proposed suit made it appear that no advantage to the bankrupt's estate could be gained by the court's retaining jurisdiction; or (2) the bankruptcy court lacked power to make as complete a determination of the issues as could be made in another court, In re Schulte United, 49 F. (2d) 264 (C.C.A. 2d 1931) (bankrupt lacked equity in property on which mortgage was to be foreclosed); Texas v. Donoghue, 302 U.S. 284 (1937) (forfeiture to state for violation of state law could be enforced only in state court); cf. Foust v. Munson S.S. Lines, 299 U.S. 77 (1936). But see In re Johnson, 127 Fed. 618 (D.C. Nev. 1904) (fact that there was no prospect of an equity for the bankrupt estate after the foreclosure proceedings is controlling factor in the case; statement that it should go to the state court, "where the construction of the state statute properly belongs," is but an additional consideration.) The provision in the instant case for the trustee to sink wells and impound the proceeds may satisfy one of the conditions for relinquishing jurisdiction (that there be no prejudice to the administration of the bankrupt estate); but the affirmative reason for giving up jurisdiction—to allow the state to determine its own law—is almost entirely new.

[8] In previous cases of relinquishment of jurisdiction, it has apparently been the practice to file the new suit in either a state or a federal court, depending upon whether diversity of citizenship existed, In re Johnson, 127 Fed. 618 (D.C. Nev. 1904); In re Schulte United, 50 F. (2d) 243 (D.C. N.Y. 1931); Isaacs v. Hobbs Tree & Timber Co., 76 F. (2d) 209 (C.C.A. 5th (1935).

[9] Pepper v. Litton, 308 U.S. 295 (1939); Continental Illinois Nat'l Bank & Trust Co. v. Chicago, R. I. & P. R. Co., 294 U.S. 648 (1935).

Furthermore, if the present decision were to be limited to bankruptcy, it would seem that the Court would at least have mentioned the doubt as to whether the bankruptcy court had even discretionary jurisdiction. See note 6 supra.

[10] 279 U.S. 159, 211 (1929). See also the dissenting opinion of Black, J., in Gibbs v. Buck, 307 U.S. 66, 79, 80 (1939).

[11] Cf. dissenting opinion of Mr. Justice Frankfurter in Mayo v. Lakeland Highlands Canning Co., 60 S.Ct. 517, 523 (1940) (instead of returning injunction case to three-judge federal court, as majority decided, it should be returned to a single-judge court, "for any proceedings that may be appropriate before a single judge. But compare Gilchrist v. Interborough Rapid Transit Co., 279 U.S. 159." The citation of the Gilchrist case may perhaps be taken to indicate that, in view of the fact that the state of Florida had not yet determined the meaning of its statute, the "appropriate" proceedings will be to dismiss the case); Massachusetts State

be taken simply as an application of the doctrine of the *Gilchrist* case to another situation which has always been considered a peculiarly "local" matter. But if the decision be so explained, it should be noted that it is an extremely significant extension of the doctrine. For in the *Gilchrist* case, the only possible source of federal jurisdiction was that "the state" threatened to act in a manner which would raise a federal question; the denial of federal jurisdiction on the ground that the state had not yet declared how it did in fact intend to act, was not, therefore, directly contrary to any constitutional or statutory provision conferring jurisdiction on the federal courts. In the present case, on the other hand, the fact that there is diversity of citizenship among the parties means that the court, in denying federal jurisdiction, directly contravenes the statute conferring diversity jurisdiction.[12]

It may well be that the Supreme Court does, nevertheless, intend that the present decision should make an inroad upon the diversity jurisdiction.[13] Mr. Justice Frankfurter has expressed his view that the avoidance of local prejudice is no longer a sufficient reason for the existence of diversity jurisdiction.[14] Mr. Justice Black (who wrote the opinion in the instant case) also seems to be inclined to limit the diversity jurisdiction. Concurring specially in *Pullman Co. v. Jenkins*,[15] he objected to the majority's dictum expanding a category of diversity cases removable to the federal courts, saying that ". . . . cases for which Congress has not authorized removal from a state court can be appealed to the state's highest judicial tribunal, thus giving each litigant a final determination of his rights under state laws by the body vested with final authority to interpret those laws." That utterance is in the same vein as the holding in the instant case.

Dissatisfaction with federal diversity jurisdiction appears to arise in part from the revival of the notion that the Supreme Court should be, not an ordinary appellate tribunal, but rather an arbiter of constitutional conflicts and an interpreter of federal statutes.[16] It may be thought that a requirement that cases in which the state law is "unclear" be sent to the state courts for adjudication would, by relieving the

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Grange v. Benton, 272 U.S. 525, 527 (1926); Rogers v. Guaranty Trust Co., 288 U.S. 123 (1933); Johnson Act of 1934, 48 Stat. 775 (1934), 28 U.S.C.A. § 41 (1) (Supp. 1939) (federal courts may not enjoin enforcement of state administrative order where plain, speedy, and efficient remedy may be had in state courts); an Act of Aug. 21, 1937, 50 Stat. 738 (1937), 28 U.S.C.A. § 41 (1) (Supp. 1939) (federal courts may not enjoin collection of state tax, where plain, speedy, and efficient remedy may be had in state courts.)

[12] 36 Stat. 1091 (1911); 28 U.S.C.A. § 41 (1) (1927).

[13] It might even be argued that the diversity jurisdiction would be considered more readily subject to limitation than the bankruptcy jurisdiction. Since a bankruptcy litigation usually involves a number of controversies, trial of any one of those controveries outside the bankruptcy court retards the remainder of the litigation. But since diversity litigation is apt to involve only a single controversy, trial of that controversy in the state courts does not affect any other litigation in the federal court.

[14] Frankfurter, Distribution of Judicial Power between United States and State Courts, 13 Cornell L.Q. 499, 520–2 (1928). See Friendly, The Historic Basis of Diversity Jurisdiction, 41 Harv. L. Rev. 483 (1928).

[15] 305 U.S. 534, 548 (1939).

[16] Frankfurter, Distribution of Judicial Power between United States and State Courts, 13 Cornell L.Q. 499, 503 (1928).

court of petitions for certiorari based on the ground of improper application of state law,[17] aid in changing the function of the Court. The force of this suggestion depends, of course, upon the degree of finality to be attributed to the lower courts' determinations as to the "clearness" of the state law. The question of whether the state law is "clear" or "unclear" might still arise in every case, just as the question of whether the lower federal court has properly applied the state law may now arise in every case. But in view of the reluctance of the lower federal courts to give up their traditional powers,[18] there would seem to be little need for granting certiorari in those cases where the lower court has decided that the state law is "unclear."[19] Furthermore, it is submitted that even a lower court determination that the state law is "clear" will not present the same need for certiorari as does the question, under existing practice, of whether the lower court has properly applied the state law. It is quite possible, while purporting to recognize conflicting state decisions, to misapply the state law; it is much more difficult, in the face of conflicting decisions, to assert that the state law is "clear."

The limitation of the diversity jurisdiction may, furthermore, be thought necessary to give effect to the doctrine of the *Erie* case. It is true that the *Erie* case has been viewed as restricting the federal courts only in that they would thereafter be bound by state court decisions in situations wherein they had formerly applied their own law, and that there appears to have been no thought that the decision would effect a change in the power of the federal courts to accept cases for adjudication.[20] It is likewise true that in practice[21] there has been no change in the types of cases accepted for adjudication.[22] There are, however, indications that the lower federal courts have failed to apply the *Erie* doctrine, by continuing to make independent determinations of law in situations where there are arguably applicable state court decisions. Thus, in spite of a Supreme Court decision holding that in matters of

[17] The Erie case removed the need for certiorari based on conflicting decisions in the circuit courts of appeal, see Ruhlin v. New York Life Insurance Co., 304 U.S. 202, 205, 206 (1938), but certiorari may still be based on the ground that the state law has been improperly applied, Wichita Royalty Co. v. City Nat'l Bank of Wichita Falls, 306 U.S. 103 (1939).

[18] See notes 22–6 infra, and accompanying text.

[19] Indeed, if, following the rule as to remands, no appeal is allowed from a district court's dismissal, there would seem to be no need at all for certiorari. See note 28 infra, and accompanying text.

[20] The Common Law of the United States, 47 Yale L. J. 1351 (1938); The Demise of Swift v. Tyson, 47 Yale L. J. 1336 (1938); Congress, the Tompkins Case, and the Conflict of Laws, 52 Harv. L. Rev. 1002 (1939).

[21] Seaboard Mut. Casualty Co. v. Profit, 108 F. (2d) 597 (C.C.A. 4th 1940); Cline v. Southern R. Co., 31 F. Supp. 657 (D.C. N.C. 1940). In both cases the state law is said to be unclear; but in neither case is mention made of the possibility of dismissing the cases for adjudication in state courts.

[22] The view seemed a sound one, since there appeared to be nothing in the opinion in the Erie case which would affect those cases over which the federal courts had jurisdiction by reason of the subject matter, and since even the severest critics of Swift v. Tyson, 16 Pet. (U.S.) 1 (1842), had indicated that the avoidance of local prejudice afforded an adequate justification for diversity of citizenship jurisdiction. See Rand, Swift v. Tyson versus Gelpcke v. Dubuque, 8 Harv. L. Rev. 328, 336 (1895); Pepper, The Borderland of State and Federal Decisions 16, 17 (1889).

statutory construction, federal courts are bound by lower state court decisions,[23] lower federal courts have continued to hold themselves bound by only the highest state court decisions.[24] Moreover, these courts have occasionally employed the device of "distinguishing" highest state court decisions, thereby rendering the decisions inapplicable and leaving themselves free to make an independent determination.[25] Even the device of establishing federal jurisdiction by moving to another state solely for that purpose,[26] criticized in the *Erie* case, still exists in substantially its original form.[27] It may well be that the only means of preventing the federal courts from making independent determinations of law is to require that the cases in which no state law is recognized as controlling actually be sent to the state courts for decision.

Judicial limitation of the diversity jurisdiction would, of course, bring with it a great deal of uncertainty and consequent need for litigation. If anything less than the whole of the diversity jurisdiction should be abolished, there would be the necessity of establishing, through a slow process of building up case law, just where the line is to be drawn. And even as to those types of cases where it would be certain that diversity jurisdiction should not be assumed, there would be a number of procedural problems to be solved. There is the problem, for instance, of whether the district courts should retain jurisdiction pending determination of other controversies involving similar issues in the state courts. And there is the question whether, if the district court refuses to accept jursidiction because state litigation is pending, the statute of limitations continues to run. Furthermore, it would have to be decided whether the fact that the state law is unclear is a waivable defect in jurisdiction; that is, whether a defendant may obtain a removal, and later request a dismissal on the ground that the defect in the district court's jurisdiction was not a waivable one. Finally, there is the problem of whether there would be appeal from a district court's dismissal, or whether, following the rule as to remands,[28] no appeal would be permitted.

In any event, it is likely that before the present litigation is concluded, the Court will be required to state whether it intends to limit diversity jurisdiction. Diversity of citizenship exists among the parties to the suit which the trustee in bankruptcy is to bring in Illinois, and the subject matter is apparently such as to make the suit removable.[29] If removal is attempted, it is difficult to see how the Court can avoid a ruling on the question.

[23] Erie R. Co. v. Hilt, 247 U.S. 97 (1918).

[24] See Field v. Fidelity Union Trust Co., 108 F. (2d) 521 (C.C.A. 3d 1939).

[25] City of Newport Richey v. Fidelity & Deposit Co. of Maryland, 105 F. (2d) 348 (C.C.A. 5th 1939); Seaboard Mut. Casualty Co. v. Profit, 108 F. (2d) 597 (C.C.A. 4th 1940); Albert Miller Co. v. Corte, 107 F. (2d) 432 (C.C.A. 5th 1939); cf. Wichita Royalty Co. v. City Nat'l Bank of Wichita Falls, 306 U.S. 103 (1939). Note also that it took a Supreme Court decision to convince the lower courts that the Erie case is applicable to equity proceedings, Ruhlin v. New York Life Insurance Co., 304 U.S. 202 (1938).

[26] Black & White Taxicab Co. v. Brown & Yellow Taxicab Co., 276 U.S. 518 (1928).

[27] Shoaf v. Fitzpatrick, 104 F. (2d) 290 (C.C.A. 6th 1939), cert. den. 308 U.S. 620 (1939).

[28] 25 Stat. 433 (1888), 28 U.S.C.A. § 71 (1927).

[29] Greeley v. Lowe, 155 U.S. 58, 75 (1894): "This court has held in a multitude of cases that where the laws of a particular state gave a remedy in equity, as, for instance, a bill by a party in or out of possession, to quiet title to lands, such remedy would be enforced in the Federal Courts, if it did not infringe upon the constitutional rights of the parties to a trial by jury." Illinois has such a statute giving a remedy in equity, Ill. Rev. Stat. (1939) c. 22, § 50.