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Of the dozen criminal cases decided by the Colorado Supreme Court since September, 1952, including *McBride v. People*,[1] four cases involved confidence game and in three the decision of the lower court was reversed. This ratio shows the importance of confidence game in our criminal law and the uncertainty as to just what is confidence game in Colorado.

The Supreme Court in *Lindsay v. People*,[2] decided in 1949, held that a defendant was not guilty of confidence game who received money on a check on an existing bank in Sterling, Colorado, dated January 8, 1947, when the account had been closed approximately three months prior thereto. The defendant said nothing about whether or not the check was good, and other similar transactions of various small amounts had occurred about the same time at different places.

The Court said, page 253, "to eliminate further doubt and to clear the course of prosecuting officers hereafter this court now says that the making and passing of a check as in the instant case is not within the meaning of the terms false or Bogus checks as set out in Section 222."

The Supreme Court in *Chasse v. People*,[3] decided at the same term of court as the Lindsay case, affirmed a conviction of confidence game where the defendant obtained from the Brown Palace Hotel $20.00 on a check drawn on a non-existing bank in Detroit. The defendant, after arrest, admitted that he had never had an account in any bank in Detroit, and that he had no information at the time he wrote the check that any such bank existed. Although he had given a Detroit address, he did not know whether such street or number existed. The defendant contended that since he had obtained the money solely by the use of a false or bogus check, the judgment could not stand. The court said, at page 163, that the statute is violated "if the money is obtained solely by the use of a false or bogus check." Another check was received in evidence for the same amount to show a scheme or plan.

The Court said, at page 162, the statute may be violated by any one of three methods, i. e., brace faro, bogus check, or confidence game.

In *McBride v. People*,[4] the defendant opened an account on October 29 in a Boulder bank with a deposit of $55.00. On the same day he drew out $35.00 and later drew out small amounts reducing his balance to $12.42 by Nov. 3. He only made the original deposit. On Saturday afternoon, November 3, he cashed a check

[1] 126 Colo. 277, 248 P. 2d 725 ( ).
[2] 119 Colo. 248, 202 P. 2d 951 (1948).
[3] 119 Colo. 160, 201 P. 2d 378 (1948).
[4] Note 1 *Supra*.

for $65.00 at a grocery store. This check, exhibit "A" was the basis of the confidence game charge. He had also given a $40.00 check at this same market on October 30, and it was outstanding. When the defendant cashed the $65.00 check, he was not questioned about his bank account or asked if his check was good, but it was cashed without hesitation. The same Saturday afternoon or evening, he cashed three other checks in the amount of $50.00, $20.00 and $30.00. In cashing all of the checks, he represented that he needed the money to get his wife out of the hospital. He immediately thereafter drove to Boulder, met his wife and went to Kansas City, where he was arrested six weeks later.

The defendant contended that the check was neither false nor bogus, that it was a genuine check drawn on an existing bank in which the defendant actually had an account and that it bore his own and not a fictitious signature.

The Court said at page 284, "A check calling for $65.00 upon a bank wherein the maker knows he has less than $20.00 on deposit and intends to put no more in, is as false and bogus as any check could be."

The Court said at page 285 as to whether the defendant resorted to any fraudulent scheme by which he sought to obtain the confidence of the complaining witness and as to whether the complaining witness reposed any special confidence in the defendant; that

> The giving of the check implied that the maker had funds in the bank upon which it was drawn to cover it. That his signing and tendering the same was as much a representation of its worth as would have been his oral assurance of its payment had he been directly questioned specifically in that regard.

The Court said, at page 286, his representation of need for cash (to obtain his wife's release from the hospital), on this Saturday evening might have prompted granting his request. He probably needed the cash for that purpose, but this was only a half truth. He failed to reveal to his victim that he had insufficient funds in the bank. Neither did he reveal that he contemplated leaving the state immediately without intention of returning or leaving a forwarding address. He put his money raising campaign into operation on Saturday afternoon when the bank was closed. The situation is such that the issue becomes solely one of intent.

The Court further said, at page 286, it is true that all short checks are not false and bogus checks within the meaning of the confidence game statute and that it takes more than merely a short check to constitute the offense.[5] Each case must be determined upon the facts presented, and in the Lindsay case it is apparent that no representations were made and nothing by way of inducement said to the taker of the check to cause him to cash it.

[5] People v. Lindsay, 119 Colo. 248, 202 P. 2d 951 (1948).

The Court said further in the McBride case, page 286, the primary issue in prosecution under the statute is the intent of the defendant by deliberate plan, scheme and design and by means of such (known to him to be) worthless, false and bogus check, to trick, cheat and swindle another of his money or property.

In the case of *Graham v. People,*[6] the defendant made a contract with the Trinidad Boys Club to sponsor a donkey show and received money on account of this contract. The Supreme Court said, at page 353-354, that the People make no contention that the newspaper clippings and letters presented by the defendant (as endorsement of his show) were false or bogus, and there is no dispute that the donkey show was in existence. Nothing with reference thereto was false or bogus. The Court said at best the evidence showed a breach of contract due to financial difficulties.

In White *v. People,*[7] the defendant by various false representations and the pawning of a watch obtained a loan of $20. The Court said, page 638, quoting from *People v. Dolph,*[8] there can be no doubt concerning the law in this jurisdiction as to whether a bogus or false instrument, token, or device is essential to establish the guilt of an accused upon a charge based upon the confidence game statute. "We have held repeatedly that mere words are not sufficient to warrant a conviction under that statute. To constitute the offense the money must have been obtained or the attempt thereto made by some false or bogus means, token, symbol or device as distinguished from (words), however false and fraudulent. Here the watch itself was not bogus. The uncontraverted evidence was that it had a retail value of $29.75."

In the case of *Lane v. People,*[9] decided May 11, 1953, the Court said it was not confidence game, but the facts showed the establishment of a debtor and creditor relationship.

The Supreme Court in *People v. Lindsay,*[10] stated that our confidence game statute is identical in its terms with the Illinois statute. The Illinois Statute [11] is as follows:

> Every person who shall obtain or attempt to obtain from any other person or persons money, property or credit 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.
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> (The words brace faro are not in the Illinois Statute.)

Under that statute the supreme court of Illinois holds that the defendant is guilty of confidence game even though he uses no bogus or false instrument, token or device.[12]

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[6] 126 Colo. 351, 248 P. 2d 730 (1952).
[7] 126 Colo. 365, 249 P. 2d 823 (1952).
[8] 124 Colo. 553, 239 P. 2d 312 (1951).
[9] .....Colo....., 257 P. 2d 578 (1953), 1952-53 C.B.A. Adv. Sh. No. 21, p. 331.
[10] 119 Colo. at page 252.
[11] Chap. 48, Illinois Rev. Stat., Sec. 256.
[12] People v. Rogers, 375 Illinois 54, 30 NE 2d 77 (1940).

The Illinois Supreme Court stated in that case that the gist of the crime of confidence game is obtaining the confidence of the victim by some false representation or device. The statute was designed to reach the class of offenders known as confidence men who practice swindling schemes as various as the mind of man is suggestive. It covers any scheme whereby a swindler fraudulently wins the confidence of his victim and then swindles him of his money or property by taking advantage of confidence fraudulently obtained. If the transaction is a swindling operation, it is immaterial that the form assumed is that of a lawful business transaction.[13]

The crime of obtaining money or property by means of confidence game is committed whenever money or property is obtained by a bogus check.[14]

Without undertaking to analyze the various decisions of the Colorado Supreme Court (and they are based on Colorado precedent), it is submitted that the matter should be defined by the legislature so the more desirable construction placed on the similar statute by the Illinois courts will obtain and include that vast field of swindling schemes where no false token is used and also include a bogus check where the account is closed or no account or on a non-existing bank regardless of whether there are any fraudulent verbal representations.

The case of *Wesner v. People*[15] involved the taking of indecent liberties with a seven year old child. The Court held that even though the court did not sufficiently examine the child to determine competency prior to permitting her to testify, if the testimony disclosed on the whole that she was qualified no prejudice occurred.

The Court also held that it was proper to show that the same defendant with the same seven year old girl engaged in the same offense five or six days after the crime was committed. The Court said at page 405, where the facts of the subsequent similar offense point to intent, scheme, design and plan, and are not too remote, such evidence is admissible.

The Court also said, page 405, in sexual criminal offense, such as we have before us, it is not so much the matter of revealing the plan, scheme or design and intent of the normal mind with criminal tendencies as it is to establish the unfortunate sexual perversions of the person charged.

In *Hahn v. People*[16] the defendant was charged and convicted of receiving stolen goods. He was also charged with being an habitual criminal. After conviction he pleaded guilty to the habitual counts. He waived pre-sentence investigation. No motion for new trial was filed, but a petition was filed to vacate the sentence im-

[13] People v. Martin, 372 Illinois 484, 24 N.E. 2d 380 (1939).
[14] People v. Cathony, 376 Illinois 260, 33 N.E. 2d 473 (1941).
[15] 126 Colo. 400, 250 P. 2d 124 (1952).
[16] 126 Colo. 451, 251 P. 2d 316 (1952).

posed on the defendant. He contended that the counts mentioned in the habitual criminal charge were not proved to be felonies. The Supreme Court held that where the counts alleged that the counts committed in other jurisdiction were felonies a plea of guilty waived proof as to the averments in the counts and need not be proved.

In the case of *Eckhardt v. People* [17] a prosecution witness refreshed his memory by reference to a memorandum. It was prejudicial error for the court to refuse defendant counsel the opportunity of inspecting the memorandum for the purpose of cross-examination. The Court said that was the first time that point had been before the Court.

In the case of *Heinze v. People,*[18] the defendant was charged in one count with driving while under the influence of intoxicating liquor and with having been previously convicted of a similar offense. The defendant pleaded not guilty and then made a motion to quash because of improper joinder. The lower court overruled the motion. The Supreme Court held that while the motion was untimely, it was the duty of the court to require that the matter of the former conviction be stated in a separate count, and the court held that it was prejudicial error to establish the former conviction before any proof as to the substantive offense. The fact that the defendant took the witness stand and invited cross-examination as to prior convictions did not cure the error of charging the former convictions in the same count and proceeding immediately to the proof of the former conviction.

The Court said that the accepted procedure in other jurisdictions was to withhold consideration of the additional counts until disposition had been made of the substantive count, as is done in habitual criminal procedure.

Shore v. District Court [19] held two informations where different defendants were accused of distinct crimes cannot be consolidated for trial over the objection of any defendant, even though the evidence to be produced would show that the charges were based on the same set of circumstances. The Court said also in this case that a writ of prohibition was the correct procedure.

In *Ridley v. Young* [20] the defendant in an interrogatory before trial admitted he was driving the automobile. At the trial, the defendant did not appear, but his answer to interrogatory was introduced in evidence, and the Court ruled that this interrogatory could be contradicted. The Supreme Court held that under the rule any matter that is testified to may be contradicted by evidence. The court said that there were two kinds of admissions—judicial admissions and otherwise. Judicial admission is conclusive but another admission is not conclusive, and evidence may be introduced to contradict.

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[17] 126 Colo. 458, 250 P. 2d 1009 (1952).
[18] .....Colo....., 253 P. 2d 596 (1953), 1952-53 C.B.A. Adv. Sh. No. 12, p. 167.
[19] .....Colo....., 1952-53 C.B.A. Adv. Sh. No. 22, p. 340.
[20] .....Colo....., 253 P. 2d 433, 1952-53 C.B.A. Adv. Sh. No. 12, p. 164.