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# Commentaries on the Public Acts of Indiana, 1927 (Part 3): The Cognovit Note Act

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## COMMENTARIES ON THE PUBLIC ACTS OF INDIANA, 1927, III—THE COGNOVIT NOTE ACT.

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Since 1853 it has been the judicially declared public policy of the State of Indiana not to recognize the attempted conference of powers of confession and warrants of attorney in promissory notes and other writings obligatory. The Supreme Court attributed the basis for this policy to legislation requiring that the party making a confession of judgment, should, at the time, make affidavit that the debt is just and owing, and that such confession is not made for the purpose of defrauding his creditors.[1] It was not until the Irose case[2] that explicit judicial pronouncement was made that the public policy of the State was opposed (except as inhibited by the full faith and credit clause of the federal Constitution) to the enforcement of judgments taken in other states without service of process or appearance by defendants; the earlier decisions apparently going off on the construction of the statutes affecting confessions of judgment in the courts of Indiana and not to any prohibition by public policy against such provisions in such instruments.[3] The Irose case, however, settled the law as to the public policy of Indiana on such provisions in clear and unmistakable language, and left

*See biographical note p. 119. This is the third of a series of Commentaries on the Public Acts of Indiana, 1927, contributed to the Indiana Law Journal by Mr. Farabaugh and Mr. Arnold. For previous articles, see III *Indiana Law Journal*, 351-444, and IV *Indiana Law Journal* 112.

[1] Burns R. S. 1926, Sec. 640; *Coonley v. Tracy, et al.* 4 Ind. 137; See also *Ferrand v. McClease*, 1 Ind. 87; *Craig v. Glass*, 1 Ind. 89.

[2] *Irose v. Balla*, 181 Ind. 491 (1912).

[3] *McPheeters et al v. Campbell*, 5 Ind. 107.

nothing to operate in favor of the power given by a cognovit note solvable *in this state,* if action on the instrument itself, or on any judgment perforce such provision, were here commenced, and by three decisions following that case such policy became strongly entrenched and firmly established in the jurisprudence of Indiana.[4]

In 1927 our legislature concluded the public policy needed some further fortification, and carried the taboo against cognovit notes or contracts for payment of money a step further, and made it penal for any person or corporation to

"directly or indirectly procure another, or others, to execute as maker, or to indorse, or assign a cognovit note,"

and, further that

"whoever being the payee, indorsee, or assignee, thereof, shall accept and retain in his possession any such instrument, or whoever shall conspire or confederate with another, or others, for the purpose of procuring the execution, indorsement or assignment of any such instrument, or whoever shall attempt to recover upon or enforce within this state any judgment obtained in any other state or foreign country upon any such instrument, shall be guilty of a misdemeanor and upon conviction shall be fined in any sum not less than fifty dollars and not exceeding five hundred dollars, to which may be added imprisonment for not less than thirty days and not exceeding six months at the Indiana State Farm."[5]

It is the purpose of this article to analyze this statute and suggest conclusions of construction and administration of its provisions.

A proper treatment, study, and discussion of this act naturally suggests a subdivision thereof into five categories:

1—Constitutionality of the act in its entirety.

2—Operation of the act in relation to foreign judgments on such paper rendered before the enactment, and on paper executed antecedent to the law.

3—Operation of the act in relation to paper executed subsequent to its enactment—(a) within the state solvable within the state; (b) within the state solvable without the state; (c) without the state solvable within the state; and (d) without the state solvable without the state.

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[4] *Wieler v. Diver, Admr.,* 78 Ind. App. 26; *Egley v. T. B. Bennett & Co.,* 196 Ind. 50; *Rodenbeck et al v. Crews State Bank* (Ind. App.) 163 N. E. 616.

[5] Acts Indiana 1927, p. 656.

4—Operation of the act in relation to judgments taken on paper made subsequent to its enactment.

5—Incidental considerations having regard to administrative and procedural features.

1. CONSTITUTIONALITY OF THE ACT IN ITS ENTIRETY.

Under this head we shall not consider the full faith and credit clause of the Federal Constitution, as that question, and incidental constitutional questions, naturally fall under a consideration of the act in its effect upon judgments rendered without the state and sought to be enforced in Indiana. Neither is it intended hereunder to treat of the constitutionality of the act in relation to contracts executed or judgments taken prior to the going into effect of the act, as consideration of those questions naturally fall under subsequent categories. We are here primarily concerned with an analysis of the statute as a whole as bearing upon its constitutionality—may it stand or shall it fall as an entirety or as to any subject-matter falling under its obvious scope?

The title to the act seems in compliance with all constitutional requirements effective in Indiana. It contains but one subject and that is "cognovit notes;" while "judgments" on cognovit notes are not specifically mentioned in the title, they appear as "matters connected therewith"—remedies directly related to the execution and procurement of the notes, and having to do with the fulfillment and enforcement of the obligations; and, consequently, logically opened to view by the title. The prohibition against the procurement of cognovit notes is identified in the title and the matter of penalty for violating the statute is likewise indicated.

A defect, which construction will obviate, does appear on the score of sufficiency of the title to "express" the subject of "other written contract to pay money."[6] If these words be construed *ejusdem generis* to the subject-matter mentioned in the title, i.e., "notes," and have application to, say, bills of exchange, bonds, promissory notes, sight and other drafts, trade acceptances, etc., etc., the words "other written contract to pay money" appear there in harmony with the Constitution; but if it was intended by such words to render the statute applicable to "all other writ-

[6] Constitution of Indiana, Art. 4, Sec. 19.

ten contracts containing a promise to pay money," whether assimilable to a "note" or not, then, it is suggested, such "other written contracts" would be without the pale of the title. Surely, the legislature has no right to disregard the Constitution by the expedient of definition! If it could, then

"An Act defining draught animals, providing for their care, and prescribing penalties,"

would be a sufficient title (by defining "draught animals" to include "horses, cows, dogs, sheep and chickens") to embrace a provision that all cows shall be watered three times each day. Or, by a title relating to and "defining" *cemeteries,* the legislature might legislate on the subject of golf grounds, by the simple expedient of providing that

"For the purposes expressed in this act, 'cemeteries' shall include all places of sepulchre for the dead and all grounds given over to the general public for the purpose of playing recreational games on holidays".

Such an evasion of the Constitution by the legislative authority will not, of course, be assumed when there is present the means of escape from such assumption by reasonable construction.

As noted heretofore, it has been held quite consistently, by our courts of review, that the public policy of Indiana, established prior to the enactment of the statute, forbids the enforcement—according to their tenor—of cognovit notes executed within the state to be performed within the state or executed without the state to be performed within the state; consequently, as the subject-matter has relationship to fraud and oppression, it must be conceded as being within the police-power province of the legislature to enact a statute which forbids the procurement within the state of cognovit notes, or *their* enforcement by the courts of this state *according to their tenor.*

### 2. Operation of Judgments Rendered and Paper Executed Prior to the Act.

Any interpretation of the act, other than granting to it purely prospective operation, would clearly render the whole act null and void under Section 24 of the Bill of Rights of the Constitution of the State of Indiana, and Article I Section 10 of the federal Constitution. As such a construction is always to be avoided, and the act itself is susceptible to a construction rendering its operation prospective solely, it can be laid down as a

postulate, not arguable, that the statute has only a prospective operation, because a construction otherwise would render it null. It is, therefore, to be assumed that as to all notes executed prior to the effective date of the act and all judgments based on "such instruments", the law as exposited in the Irose and Egley cases, *supra,* will continue to govern.

By analogy, the provision in the act prohibiting the retention of

"possession of any such instrument, the assignment thereof, the conspiring or confederating with another, or others, for the purpose of procuring, * * * the assignment of *any such* instrument, or the attempt to recover upon or enforce within this state any judgment obtained in any other state based on 'such instrument.'"

has reference only to "such instrument" executed subsequent to the going into effect of the Act.

With the foregoing conclusions admitted, the field of analysis is narrowed to the following four classes of instruments and judgments:

Cognovit notes executed and judgments rendered on "such instruments" *subsequent to the taking effect of the act* in the following circumstances, respectively:

(a) Cognovit notes executed within the state solvable within the state; and foreign judgments thereon.

(b) Cognovit notes executed without the state solvable within the state; and foreign judgments thereon.

(c) Cognovit notes executed without the state solvable without the state; and foreign judgments thereon.

(d) Cognovit notes executed within and solvable without the state of Indiana, and foreign judgments rendered thereon.

### 3 AND 4. OPERATION OF THE ACT IN RELATION TO PAPER EXECUTED AND FOREIGN JUDGMENTS THEREON SUBSEQUENT TO THE ENACTMENT.

(a) *Executed within the State solvable within the State.* The whole force and vigor of the statute, it appears to us, is applicable to "such instruments" which are specifically denounced. The penal provisions of the statute are operative and the whole instrument is clearly void, and no other state in the Union will enforce or recognize as valid such contracts regardless of its own public policy, provided the public policy of Indiana, as declared by the act, is specially pleaded in such state; and in event a judgment should be procured in a foreign state

on "such an instrument" without personal service of process upon, or voluntary appearance of, the defendant, so as to give the court jurisdiction over his person, on any such judgment being brought to this state, for enforcement, on proper plea, the judgment would be held a nullity in our courts and subject plaintiff, and any attorney seeking to enforce the judgment here, who is advised of the basis of the judgment, to the penalties fixed by the act.

(b) *Cognovit Notes executed Outside of the State Solvable within the state and foreign judgments thereon.* Naturally, the decisions of the Supreme and Appellate Courts, enouncing the public policy of this state as it existed prior to the enactment of the law under review, are in no manner diminished in effect with reference to instruments falling in this category. The Irose case, *supra,*—holding that the validity of a promissory note, payable within this state, must be determined by the laws of this state, and that courts here have the right to go behind a judgment taken thereon under a warrant of attorney, to determine the jurisdiction of the court rendering the judgment by reason of invalidity of the warrant—will, of course, continue a rule of decision on such instruments. However, it was never held that "such instruments" could not constitute the foundation for a judgment either in a foreign state, or in this state, when the cognovit and warrant of attorney portion of the note was disregarded—ignored as if it did not exist, and issuance of and service on, or personal appearance constituting waiver of process by, defendant appears in the record. The question *arises* whether such procedure, and such remedy continues despite the statute with respect to cognovit notes issued abroad but solvable here, where no effort is made to invoke the cognovit feature thereof. Or, in other words, in contracts executed without, but solvable within, the state, with the obnoxious clause written therein, is the *whole* instrument invalidated in the same manner as is true where the cognovit note is made within, solvable within the state? In other words, does the statute assume to operate extraterritorially, beyond the boundaries of the state with regard to instruments executed without the state?

It is always to be borne in mind that this is a penal statute and consequently the rule *strictissimi juris* applies against the assumption of crime on a particular state of facts. The language must be construed to exclude law violation, unless such

construction is an unnatural and strained one. Whatever is not made a crime by this statute will not result in invalidating former civil rights under it, because the act does not attempt to deal, and does not affect, except consequentially, civil rights and remedies on cognovit notes as therein defined.

Ordinarily a statute which denounces the commission of some act a crime, has relation to its commission and venue within the state. Examining some fundamental principles of criminal law (for that is what we are now dealing with) we note that a crime is essentially local; an offense against the sovereignty offended; and can be taken notice of and punished only by the sovereignty offended. A state has no interest in an offense committed elsewhere, nor has it the power to enforce its will beyond its limits.[7] Therefore, it can be no crime to have in one's possession a cognovit note executed without the state but solvable within the state. Its civil status would be exactly as defined by the Supreme Court, *supra.* It would be enforceable as evidence of a debt, but not according to the tenor of the warrant therein contained. So much for having possession of the obligation, without dealing with it.

How about dealing with this sort of paper within the state? When the instrument comes within the state it is, of course, subject to its laws. It is then, "such a note," and amendable to the provisions of the statutes governing. Any transaction, other than the enforcement of the instrument by action, is governed by the *lex loci situs.* It will be particularly noted that there is no prohibition in the statute against enforcing such instrument in the courts of this state. The prohibition is against the attempted enforcement of a "judgment obtained in any other state or foreign country based upon any such instrument," meaning thereby the acquisition and exercise of jurisdiction over the maker by virtue of such portion of the instrument as constitutes the warrant of attorney—without service of process or appearance by the defendant, and, usually when the defendant has no knowledge whatever of the pendency of the proceedings against him.

There is no prohibition against retention of any instrument payable within this state *executed in another state.* There is no

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[7] *Bond v. Hume,* 243 U. S. 15, 61 L. Ed. 565; In re: Fowles, 47 L. R. A. N. S. 227; In re: Grice, 79 Fed. 627; *State v. Clark,* 178 Mo. 20, 76 S. W. 1007.

prohibition or penalty against any attempted enforcement of such a note or, for that matter, against the attempted enforcement of any cognovit note wheresoever executed and wheresoever payable. What the act prohibits and renders criminal, if the legislation is read in the light of the decisions cited under note *seven, supra,* are only the following acts:

(1) *Procuring,* within the state of Indiana, another or others to execute a cognovit note.

(2) *Procuring,* within the state of Indiana, another or others to indorse or assign a cognovit note.

(3) *Acceptance and retention* in his possession by the *payee, indorsee or assignee* of any cognovit note executed in the state of Indiana.

(4) Two or more persons *conspiring or confederating* for the purpose of procuring the execution of a cognovit note within the state of Indiana.

(5) Two or more persons *conspiring or confederating* for the purpose of procuring an indorsement or assignment of a cognovit note executed in the State of Indiana.

(6) *Attempting* within the state of Indiana *to recover upon or enforce any judgment of* another state taken on a cognovit note executed in the state of Indiana.

Therefore, the possession or enforcement of a cognovit note, executed without the state, but solvable within the state, is not made a crime; nor is it a crime for one to attempt to enforce a foreign judgment on such a cognovit note (jurisdiction being exercised on the basis of the warrant), but under the Irose case, *supra,* the attempt will prove futile if properly challenged. Nor is it made a crime to bring action on and reduce to judgment such a note within this state, on proper issuance and service of process, but the cognovit feature of the note will be ignored, the act in hand not having affected the juridical situation as it existed prior to 1927. However, if after the execution of such a note without the state, the payee brings it into Indiana and there *others procure* him "to indorse or assign such cognovit note" within the state, then, while the payee has committed no crime, those who have "procured" or "conspired or confederated to procure," the indorsement or assignment, are guilty, and the indorsement is void, but the instrument is still valid in the hands of the payee.

It has been suggested to the authors of this article that if this construction prevailed, (making it no offense to retain and enforce in this state a cognovit note executed without but payable within the state) then it would be entirely at variance with the construction of other criminal laws which provide that, e.g.,

"The manufacture, sale, keeping for sale, and possession of intoxicating liquor for beverage purposes is prohibited and shall be punished", etc.

under which, on the same anology, it might be argued, that as the state has no power to prohibit or punish offenses occurring in another state, if the liquor were manufactured in Canada, then it would constitute no crime to possess it in Indiana. The plain distinction is that in the one instance the taboo is against *all* intoxicating liquor; in the other, not the *making* of the note, but the *procurement*—it is always to be recalled that it is no offense to *make* such a note, nor for anyone to possess it where it has, *in this state*, undergone no contractual alteration.

Thus, if the statute under consideration were to read:

"The execution, indorsement, assignment, procurement, or possession of any note which contains a provision," etc., etc., "is prohibited and shall be punishable," etc.

a different question would arise. We do not hold that it would be beyond the capacity of the legislature to so enact. But the fact is it has not so enacted.

We have, under this category, yet to consider the endorsement or assignment of "such an instrument". It must be admitted that notwithstanding the instrument is made without the state, when it enters this state the legislature can control it by appropriate legislation. Procuring another to endorse and assign "such instrument" when it comes into the state, appears to be an offense. Likewise, if it undergo such contractual alteration, and *in this* state the indorsee or assignee "shall accept *and* retain" the instrument, such indorsee or assignee is also punishable. But if the assignment or endorsement be made in this state (without procuration and the instrument again leave the state for *acceptance* in another, such acceptance beyond the borders of this state would not constitute a crime, nor would the subsequent bringing of action thereon in this state make the indorsee punishable, because the copulative *"and"* is used in the statute, i.e., "shall accept *and* retain," (in this state), whereas only the matter of retaining in the hypothetical case instanced, has occurred in this state.

However, were the endorsee to *"accept"* the endorsed instrument in this state, he would acquire no title to the paper by the endorsement, besides being liable to punishment; we do not, however, believe it would operate to discharge the maker's obligation to the original payee on the paper.

(c) *Cognovit Notes executed without the State Solvable without the State, and Foreign Judgments Thereon.*—As has been heretofore noticed, the state being without power to affect, by penal laws, transactions confined wholly within another state, no extra-territorial virtue can be ascribed to the act; therefore, so far as the execution—whether by procurement, confederacy, conspiracy, etc.,—of a cognovit note payable without the state is concerned, in a state where such notes are not placed under a like ban of the statute as here, whether executed by a citizen of Indiana, or not, the statute is inoperative. If, however, such a cognovit note, after execution, comes into this state, and is here subjected to contractual alteration by way of assignment or endorsement, the rules obtainable in case of paper executed without, but payable within, the state would seem to apply to such endorsement or assignment and to the assignee or endorsee.

If such a note be unaffected by any assignment or endorsement, title remaining with the payee, or there be an assignment or endorsement without the state, and the note be reduced to judgment by either payee, assignee or endorsee, in a foreign jurisdiction, where the power of cognovit and warrant is recognized, and under such power and without service of process or personal appearance, it is difficult to see how the courts of Indiana could fail to give due force and virtue to such a judgment, or how they could refuse to recognize a judgment, whether the executant of the note was or was not a resident of Indiana at the time of executing the instrument.[8]

A more difficult question would arise were there a taint of contractual history effected in Indiana, by endorsement or assignment in this state, and the endorsee or assignee should bring

[8] *Roche v. McDonald,* 48 S Ct. 142, 275 U. S. 449, 72 L. Ed. 365, 53 A. L. R. 1141; *Christmas v. Russell,* 18 L. Ed. 475; *Fauntleroy v. Lum,* 210 U. S. 231, 52 L. Ed. 1039, 28 Sup. Ct. 641; *Keeney v. Supreme Lodge L. O. M.* 252 U. S. 411, 64 L. Ed. 638, 10 A. L. R. 716, 40 Sup. Ct. 371; In re: Kensington, 46 L. Ed. 190, 22 Sup. Ct. 102, 183 U. S. 263; *Egley v. T. B. Bennett & Co., supra.*—Note 4, p. 94.

the action on the instrument in a foreign jurisdiction, recover judgment on jurisdiction obtained by virtue of the warrant of attorney, and seek the enforcement of such judgment in this state. We believe, that while such assignee or endorsee would violate no law of this state, in such attempt, he would not be successful if the defense of his lack of right to avail himself of the cognovit provision of the note were pleaded and proved. Not on the theory that the provision was unenforceable, but on the theory that the judgment plaintiff had no right or authority to enforce it, not having acquired legal title to the paper by the void endorsement or assignment.

(d) *Cognovit notes Executed within the State and Solvable without the State; and foreign Judgments rendered Thereon.*— In the hands of the payee or any indorsee *becoming such in Indiana* (whether before or after maturity) it would appear that the paper is a nullity and no action can be brought thereon in this state; and, of course, any judgment procured by such payee or endorsee in another state, on the strength of the cognovit and warrant of attorney, would be subject to the same infirmities if enforcement were sought in Indiana, as would be the case mentioned under sub-division (c) *supra.* However, were the payee to endorse the same *without the state* prior to maturity, and vest title to a holder for value in due course within the meaning of the Uniform Negotiable Instruments Act,[9] it is believed the latter would have the same rights with respect to cognovit notes executed within but solvable without the state as would one who, in the same circumstances, took title to a cognovit note executed without and performable without the state— both as to his rights to maintain an action on the instrument in Indiana, and to enforcement of judgments taken without the state perforce jurisdiction acquired by the cognovit and warrant only.

5. INCIDENTAL CONSIDERATIONS HAVING REGARD TO ADMINISTRATIVE POWERS AND PROCEDURAL FEATURES.

We have, in this article, confined our study to consequential, rather than to main or direct implications of the act. To reiterate: the statute defines and fixes the punishment for a crime, but our present interest is directed to the incidents of the act on civil rights. We shall not go into the question of the administration

[9] Burns R. S. 1926, Sec. 11364- sub-div. 2; Burns R. S. 1926, Sec. 1141 *et seq.*

of the criminal law under its provisions, except to touch on the probable status and criminal liability of the attorney who is retained to enforce cognovit notes or judgments taken thereon. Collating the sub-divisions as previously outlined, we suggest the following status in the following instances:

When the attorney takes for collection a

(a) Cognovit note executed within and solvable within the state, with knowledge of such facts, he is equally guilty with his client under the penal provisions of the act.

(b) Cognovit note executed without the State, solvable within the state, without further contractual incidents occurring within the state he is guilty of no crime; but if with knowledge of the facts, he receives the same from an endorsee who became such in Indiana, he is equally guilty with his client.

(c) Cognovit note executed without and solvable without the state, there is no liability unless he, with knowledge of the fact, receive the same from and act for an endorsee who became such in the State, in which event he is liable with his client.

(d) Cognovit note executed within the state and solvable without the state, with knowledge of the fact, he is liable if he received the same from the maker or endorsee who became such in the state (whether before or after maturity), but otherwise if he receive the same from an endorsee who became such without the state.

(a-1) Foreign judgment on a cognovit note rendered perforce the cognovit and warrant executed within the state and solvable within the state, with knowledge of the facts, if he seek its enforcement within the state, whether for payee or any endorsee, he is guilty.

(b-1) Foreign judgment on a cognovit note, rendered perforce the cognovit and warrant, executed without the state, but solvable within the state, is not liable unless, with knowledge of the fact, he seek to enforce it on behalf of one who became an endorsee within the state.

(c-1) Foreign judgment on a cognovit note, rendered perforce the cognovit and warrant, executed without the state and solvable without the state, is not liable unless with knowledge of the fact, he seek to enforce it on behalf of a judgment plaintiff who obtained it by assignment or endorsement in Indiana.

(d-1) Foreign judgment on a cognovit note, rendered perforce the cognovit and warrant, executed within the state and

solvable without the state, will be guilty if he seek its enforcement with knowledge of the facts, unless he represent one who became a holder in due course *without the state.*

Some fine questions are likely to arise in the determination of the status of security, by way of chattel mortgage or other collateral instrument, given to insure the payment of cognovit notes executed, or with a subsequent contractual history which fetches them, under the ban of the law. Obviously, the debt itself is not discharged by the vitiation of the note evidencing it, but were one to sue on such an instrument and ask that the security be exhausted in the same action, where would it lead? We have, unfortunately, not space to pursue this interesting subject further, but it merits study and comment.

In view of the fact that so many substantive features of the subject of cognovit notes in Indiana are left undisturbed by the act, it would not be out of place, we believe, by way of addenda, to repeat the enumeration of the law applicable to promissory notes executed in one state and payable in another, having conflicting laws, as laid down by Judge Gause in the Egley case, *supra;*[10]

"1. All matters bearing upon the execution, the interpretation and validity of the note, including the capacity of the parties to contract, are to be determined by the law of the place where the contract is made. 2. All matters connected with the payment, including presentation, notice, demand, protest and damages for non-payment, are to be regulated by the law of the place where, by its terms, the note is to be paid. 3. All matters respecting the remedy to be pursued, including the bringing of suits, service of process, and admissibility of evidence, depend upon the law of the place where the action is brought."

We have sought, by the inditement of this article, to steer our course by the cardinal points of this compass, with the full faith and credit clause of the federal Constitution, the cited provisions of our own Constitution, and elementary principles of criminal jurisprudence in view constantly from which to note our bearings. Despite these safeguards, our reasoning may in instances be fallible, but if there be error, it is the inherent weakness of man that is at fault, and not lack of conscientious purpose to come to a disinterested conclusion on the numerous interesting questions suggested. We cannot transcend our own natural limitations.

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[10] *Egley v. T. B. Bennett & Co.*, 196 Ind. 50 (55).

On the merits or demerits of the statute, we trust this comment may be vouchsafed us: Does it not, after all, merely amount to the creation of another crime of what anciently was, and in numerous states is now, regarded as a legitimate transaction of commerce? We have nothing to urge against the public policy of the state—as it existed without the encumbrance of this act—to deny recognition of a power given by an Indiana contract to a creditor or his assigns to go unceremoniously into court, in any state giving the power effect, and there obtain a judgment without an opportunity to the defendant to have his day in court. The policy is laudable, but what fortification does it inherit by making many men unwitting criminals? Must every public policy be reinforced by a penal law? Then why not pass a criminal law punishing one by six months imprisonment who undertakes to assign his expectancy in his father's estate before his ancestor's demise—generally and innocently believed by the layman as feasible, but against public policy? Or why not deal thus with one who shall at an unguarded moment disclose a confidential communication of a character he or she would not be required to disclose in court? Or incarcerate one "in durance vile" who shall (innocently believing it proper) in his will provide that his estate shall be held in trust for the benefit of his heirs to the fifth generation? or send the man for a term to the penitentiary because he acted on the belief that he could waive his exemption rights by contract? or hang a husband and wife because they believed it eminently proper, in the circumstances of perpetual strife between them, to agree that they should be divorced and that the one would not contest the pending action instituted by the other, brought to legally consummate what was factually in being?

Are we not, like moths to the spurt of a gas-jet, fluttering hectically, in a self-immolating frenzy of reform by legislative fiat? Ten criminal statutes now shout for attention where one whispered when our fathers were young. Legislatures, more impatient than meditative, pile Ossae of jail-cells upon Pelions of "don'ts." Whither will it all lead? The answer will be given, perhaps not in this, but in the next or some succeeding generation. Futility, it seems to us, has already cast her depressing shadow over those ardent souls who spend their lives cultivating their own inhibitions and pronouncing anathemas on those who fail to conform to the common denominator of reform determinism.