JAMES MASON, Appellant, *v.* ROBERT WASH, who sues for the CITY BANK OF NEW YORK, Appellees.

APPEAL FROM MADISON.

Our act making promissory notes, &c., assignable, is not to be construed in the same way as in the statute of Anne, as they are different in their provisions and objects.

Under our statute an assignor of a note is not liable, unless due diligence by suit against the maker has been used where that course will obtain the money.

The laws of another state must be pleaded or proved—this court can not *ex-officio* take notice of them.

A discharge under the bankrupt law of New York is no bar to a suit brought here on a contract made before the discharge.

THIS action was commenced against the defendant below, who is plaintiff here, upon his liability as assignor of a promissory note. The declaration averred, that the note was executed by S. S. and C. Porter, at New York, and made payable six months after the date thereof, to James Mason or order.—That on the day of the execution of the note, and before its payment, James Mason, at New York, assigned the note to Robert Wash—that on the day the note fell due, and was payable, it was presented at New York to the makers for payment, and that payment by them was refused, of which the assignor, Mason, had notice. To this declaration the defendant demurred, which the court overruled. The defendant then plead, among other pleas, his discharge under the bankrupt laws of New York, to which the plaintiff demurred, and which demurrer the court sustained. A motion was also made by defendant in arrest of judgment, which the court overruled, but gave judgment for the plaintiff. To reverse which an appeal was granted, and the appellant assigned for error among others, 1. The judgment of the court in overruling his demurrer to the declaration; 2. Overruling his motion in arrest of judgment; and 3. In sustaining the plaintiff's demurrer, to the defendant's special plea of a discharge under the bankrupt laws of New York.

Chief Justice REYNOLDS, after stating the facts of the case, delivered the opinion of the court. In this case, the court is called upon to say, whether sufficient facts are shown in the pleadings to authorize the plaintiff below to recover. This depends, we conceive, upon the sound construction to be given to our act of the legislature, making promissory notes assignable.* We can not give to that act the same construction that

*Laws of 1819, page 1.

is given to the statute of Anne. The provisions of the two statutes are different; the statute of Anne, places promissory notes upon the same footing with inland bills of exchange—ours does not. Ours makes notes for the payment of property assignable—the statute of Anne does not. That statute was passed for the furtherance of commerce, and to suit the convenience and interests of a greatly commercial people. Ours was enacted at a time when but few persons inhabited the country, and whose pursuits were domestic and agricultural. Our statute expressly declares that the assignor shall *not* be liable, until due diligence has been used by the holder to obtain the money from the maker. To give our statute the same construction that the statute of Anne receives, would, in the opinion of the court, defeat the intention of the legislature, and the obvious understanding of the people. Hence, we are irresistibly led to conclude that the diligence contemplated by our statute is diligence by suit, when that course will obtain the money. No suit then, having been commenced and prosecuted against the makers of this note, as appears from the pleadings, the declaration is insufficient, and no recovery can be had thereon under the laws of this state. (1)

---

(1) Under the statute of this state there are three contingencies in which an assignor of a promissory note may become liable: 1, where the assignee, by the exercise of due diligence, prosecutes the maker to insolvency: 2, where the institution of a suit against the maker would be unavailing: 3, where the maker has absconded or left the state when the note falls due, or when suit should be brought. *Crouch* v. *Hall*, 15 Ill., 264.

The following cases have been decided on each of these propositions:

First. Due diligence, &c.

Thompson v. *Armstrong*, post. *Tarlton* v. *Miller*, id. *Wilson* v. *Van Winkle*, 2 Gilm., 684. *Curtis et al.* v. *Gorman*, 19 Ill., 141. *Allison* v. *Smith*, 20 Ill., 104. *Sherman* v. *Smith*, id., 350. *Nixon* v. *Weyhrich*, id., 600.

The diligence required in making the collection from the maker of the note, is such as a prudent man would use in the conduct of his own affairs. *Nixon* v. *Weyhrich*, 20 Ill., 600.

If an execution is relied on, as proof of diligence used in the collection of a debt, the process should remain in the hands of the officer, for its whole life; or the fact of the uselessness of its so remaining, should be pleaded. No presumption will be indulged that the money could not be made, during the remainder of the days it had to run, after return was made. *Hamlin* v. *Reynolds et al.*, 22 Ills., 207. *Chalmers* v. *Moore*, id., 359.

When it is designed to recover against the indorser of a note, action must be brought against the maker at the first term of any court having jurisdiction, although there may not be ten days between the time the note falls due, and the commencement of the term. *Chalmers* v. *Moore*, 22 Ill., 359.

Secondly. Where a suit would have been unavailing.

Humphreys v. *Coller et al.*, 1 Scam., 47. *Harmon et al.* v. *Thornton*, 2 Scam., 354. *Cowles et al.* v. *Litchfield*, id., 360. *Bledsoe* v. *Graves*, 4 Scam., 385. *Bestor* v. *Walker et al.*, 4 Gilm., 15. *Pierce* v. *Short*, 14 Ill., 146. *Crouch* v. *Hall*, 15 Ill, 263. *Roberts* v. *Haskell*, 20 Ill., 59.

Thirdly. Where the maker has absconded or left the state when the note falls due or suit should have been brought.

Hilborn v. *Artus et al.*, 3 Scam., 346. *Schuttler* v. *Piatt*, 12 Ill., 419. *Crouch* v. *Hall*, 15 Ill., 263.

But here we are met by an argument, that the right of action accrued under the laws of New York, the contract having been made there, and that the laws of that state must furnish the rule of decision in this case. It is a sufficient answer to that argument to remark, that the laws of New York were neither pleaded, nor proved in the court below, and that this court can not, *ex officio*, take notice of the laws of a foreign state. (*a*) (2) Here we might stop; but as the question which is the foundation of the third error assigned, may again be raised in the court below, it will be best, once for all, to settle it, and in doing so, it will be useless, and accounted a vain boast of learning to enter into argument or reasoning upon the subject, it having been settled by the highest judicial tribunal known to our government. The contract in this case was made after the passage of the bankrupt law of New York, and the discharge obtained under that law. But as the supreme court of the United States has determined that the discharge is equally unavailing whether the contract was made before or after the passage of the act, this court feels itself bound to yield to that opinion, how much soever some of the court might be disposed to question its correctness. We presume, however, it is founded upon the fact that the power to pass bankrupt laws is delegated to the general government, and hence, the states are restricted. (*b*)

The liability of the assignor on account of the maker's absence from the state, depends materially on the question whether the note was assigned before or after maturity. If assigned *before* maturity, although the maker resides out of this state, and was so known to all the parties at the time of the assignment, still if he is out of the state when the note becomes due, or suit should have been brought, the assignor will be liable, and the assignee is not required to prosecute him to insolvency in the foreign jurisdiction. *Schuttler* v. *Piatt*, 12 Ill., 419. But if the note is assigned *after* maturity, and the maker is out of the state at the time, the assignee can only recover of the assignor by showing that he used due diligence by prosecuting a suit against the maker, or that such suit would have been unavailing. *Crouch* v. *Hall*, 15 Ill., 264.

(*a*) Foreign laws are facts which must be proved before they can be received in a court of justice. 3 Cranch, 187.

Foreign statutes can not be proved by parol, but the common law of a foreign country may be shown by the testimony of intelligent witnesses of that country. 1 Johns. Rep., 385.

(2) Such is the rule as to the statutes of other states. *Crouch* v. *Hall, supra*. *Merritt* v. *Merritt*, 20 Ill., 65; but in the absence of all proof to the contrary, the courts will presume that the common law prevails in the states of the Union. Id.

The common law of another state may be proved by parol. Id. Statutes of other states can not. *Hoes* v. *Van Alstyne*, 20 Ill., 201.

(*b*) A discharge under the insolvent law of another state is no bar to a suit brought by any creditor, named in the insolvent's petition, against such debtor in New York. *White* v. *Canfield*, 7 Johns., 117.

Vide King v. *Riddle*, 7 Cranch, 168. 4 Wheat., 122. Ibid, 209. *Ogden* v. *Saunders*, 12 Wheat., 213. *Thompson* v. *Armstrong*, post.

Some other questions were raised in the argument of this cause, but as they relate principally to the sufficiency of the testimony to authorize the finding of the jury, are not of a character to require the interfering hand of this court. The judgment below must be reversed, the appellant recover his costs, and the cause remanded to the court below for new proceedings to be had, not inconsistent with this opinion.

Judgment reversed.

S. MOORE, Plaintiff in Error, *v.* J. WATTS, S. CROCKER AND M. WELLS, Defendants in Error.

ERROR TO ST. CLAIR.

A warrant for a felony founded upon an affidavit which stated "that A. B. entered the inclosure of C. D, and carried off her grain," is no justification to the officer who issued it, nor to the officer who executed it, as the affidavit contains no words importing a felony. All the parties to such a warrant are trespassers.

Opinion of the Court by Chief Justice REYNOLDS. This is an action of assault and battery and false imprisonment.

The defendants pleaded specially in substance, that the said Watts being a justice of the peace—that the defendant, Wells, appeared before the said justice, and made oath that the said plaintiff had entered her inclosure and carried off a quantity of her grain—that thereupon the said justice issued his warrant, upon which the plaintiff was arrested and committed. Under this proceeding the defendant justifies.

The plaintiff replied, that the assault and battery and false imprisonment was committed of the defendants' own wrong, and without any legal process, founded upon a charge of felony, sworn to before said justice. Upon this replication issue was taken. The affidavit, warrant and commitment, were read in evidence to the jury, and the court instructed the jury that they were a complete justification to the defendants. It is to this instruction the plaintiff excepts, and we are called upon to say whether it is correct. We will here remark that the plea contains an averment that the affidavit meant, that the plaintiff feloniously entered the inclosure of the said Wells, and carried off her grain. This kind of innuendo, if we may use the expression, can not alter the sense, or extend the meaning of the words. We will now consider, does the affidavit give to the justice jurisdiction? If it does, then was the officer who acted under it, justified. By the 17th section