ing to the best of my abilities and understanding, agreeably to the constitution and laws of the United States." Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? if it is closed upon him, and cannot be inspected by him? If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States, generally, but those only which shall be made in pursuance of the constitution, have that rank.

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.

The rule must be discharged.

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*Bailey E. Clark *v.* Robert Young & Co. [*181

Promissory notes.

In Virginia, it is not absolutely necessary, in all cases, to sue the maker of a promissory note, to entitle the holder to an action against the indorser.

If a promissory note of a third person be indorsed by the purchaser of goods to the vendor, as a conditional payment for the goods: *quære?* whether the vendor is, in any case, obliged to sue the maker of the note, before he can resort to the purchaser of the goods on the original contract of sale.[1]

A suit against the defendant, as indorser of the note, and a suit against the defendant, for the goods sold, are upon distinct and different causes of action; and the first cannot be pleaded in bar of the second.

It is not necessary for the plaintiff to offer to return the note, to entitle him to bring suit for the goods sold.

Error from the Circuit Court of the district of Columbia, sitting in the county of Alexandria.

This was an action on the case, for goods sold and delivered by Young & Co. to Clark. The declaration had three counts; one for the price of the goods; one on a *quantum valebant;* and one for money had and received. The cause came on to be tried in the court below, on the general issue, at April term 1802.

The facts, on the trial, appeared to be, that on the 9th of September 1794, Young & Co. sold to Clark, 400 bushels of salt, at 4*s.* 3*d.* per bushel, amounting to $283.33. At the time of the sale and delivery of the salt, Clark assigned to Young & Co., a negotiable promissory note, made by one Mark Edgar to Pickersgill & Co., and by them indorsed to Clark, dated September 5th, 1794, for $289, payable sixty days after date, at the bank of Alexandria. That Young & Co. instituted a suit, in Fairfax county court, in Virginia, against Clark, on his indorsement of this note; upon the trial of which cause, Clark, by his counsel, "prayed the opinion of the court, whether the plaintiffs could maintain their action against him, previous to

[1] See Harris *v.* Johnston, 3 Cr. 311; Roach *v.* Hulings, 16 Pet. 326.

their having commenced a suit and obtained judgment against the drawer or maker of the note; and until his insolvency should appear;" and the court gave it as their opinion, that they could not; and directed the jury accordingly. Whereupon, a verdict was found for the defendant. It also appeared, that at the time the note was indorsed by Clark to Young & Co., as well as at the time when it became payable, Mark Edgar, the maker of the note, was in bad circumstances, and was supposed and reputed to be insolvent. And that, about the middle or last of December 1794, he left Alexandria, and had never returned to it.

*182] *The record which came up to this court contained three bills of exceptions:

1. The first contained a demurrer, on the part of the defendant below, to the evidence, which the circuit court refused to compel the plaintiffs to join. This exception was abandoned by the counsel for the plaintiff in error.

2. The second bill of exceptions was in these words: "Memorandum, in the trial of this cause, the defendant gave in evidence to the jury, that the plaintiffs had instituted a suit against him, in the county court of Fairfax, upon the indorsement of the promissory note of Mark Edgar, hereinbefore mentioned; the proceeding in which said suit are in these words, to wit" (here was inserted the record of Fairfax county court): "Whereupon, the counsel for the defendant prayed the court to instruct the jury, that if, from the evidence given in this cause, they should be of opinion, that the promissory note aforesaid, was indorsed by the defendant to the plaintiffs, in consequence of the goods, wares and merchandise, sold as aforesaid (although the said indorsement was not intended as an absolute payment for the said goods, wares and merchandise, or received as such by the plaintiffs, but merely as a conditional payment thereof), yet, the receipt of the said note, under such circumstances, and the institution of the aforesaid suit by the plaintiffs, against the defendant, upon his indorsement aforesaid, made the note so far a payment to said plaintiffs, for the said goods, wares and merchandise, as to preclude them from sustaining any action against the said defendant for the goods, wares and merchandise, until they had taken such measures against the said Mark Edgar, as were required by the laws of Virginia; and that the plaintiffs, having instituted the said suit upon the said note, against the defendant, and *that* having been decided against the said plaintiffs, were barred from sustaining this action against the said defendant. But the court refused to give the instruction as prayed, and instructed the jury, that if they should be of opinion, from the evidence, that the salt was sold and delivered by the plaintiffs to the defendant, and the note was indorsed by the defendant to the plaintiffs, in consequence of the salt sold,

*183] although the said indorsement was not intended *as an absolute payment, and received as such by the plaintiffs, but merely as a conditional payment thereof, then the same is a discharge for the salt sold, unless it is proved, that due diligence has been used by the plaintiffs to receive the money due on the note; but the bringing a suit against Mark Edgar is not absolutely a necessary part of said diligence; but the want of such suit may be accounted for, by the insolvency of the said Edgar, if proved; or by the conduct of the defendant himself preventing such suit; to which refusal and

direction of the court, the defendant, by his counsel, prayed leave to except," &c.

3. The third bill of exceptions stated, that "the defendant, by his counsel, then prayed the opinion of the court and their direction to the jury, that the defendant was entitled to a credit for the amount of the said note, unless the plaintiffs could show that they had instituted a suit thereon against Edgar; or that Edgar had taken the oath of an insolvent debtor, or had absconded, at the time the note became payable; or unless the plaintiffs could show that they had offered to return and re-assign the said note to the said defendant, previous to the institution of this suit. But the court having before, in the trial of the said cause, on application by the defendant to instruct the jury in the manner set forth in his second bill of exceptions, given directions to the jury, comprehending all the material points contained in the above prayer, refused to give the instruction as prayed, to which refusal, the defendant, by his counsel, prayed leave to except," &c.

Verdict and judgment for the plaintiffs, for the full amount of the salt sold; on which judgment, the defendant brought a writ of error to this court.

Swann and *Mason*, for the plaintiff in error. *C. Lee* and *E. J. Lee*, for the defendants.

Swann.—If a note is indorsed to the vendor, at the time of the sale of goods, although it is not agreed to be an absolute *payment, yet it is a conditional payment, viz., if the note be paid, or if it be indorsed over by the vendor, or if he is guilty of *laches*. (*Kearslake* v. *Morgan*, 5 T. R. 513.) In that case, the plea (which was adjudged good on demurrer) stated that the note of one W. Pierce was indorsed by Morgan to Kearslake, "for and on account" of the goods sold, and that Kearslake "then and there accepted and received the note for and on account" of the sum due for the goods. [*184

The defendants in error, if they have been guilty of *laches*, have made the note their own, and must suffer the loss. (*Chamberlin* v. *Delarive*, 2 Wils. 353.)

The question then arises, what was due diligence in this case? As the law stands in Virginia, Young & Co. ought to have sued Mark Edgar, the maker of the note. Such is the opinion of Judge Roane, in the case of *Mackie* v. *Davis*, 2 Wash. 230, which is confirmed by the judgment of the court of appeals in the case of *Lee* v. *Love*, 1 Call 497.

But it is unnecessary to resort to the general law in Virginia on this point, because the court of Fairfax county has decided the law in this case, and while that judgment stands unreversed, it is conclusive. The plaintiffs have made their election of two modes of proceeding to recover the money; having failed in one, they are barred as to the other. The same evidence is necessary to support both, and this is the test to prove that they are for the same cause. (*Kitchen* v. *Campbell*, 3 Wils. 304.)

That court has decided, that Clark was not liable on his indorsement of the note, because Young & Co. had not brought suit against Edgar; or, in other words, they have decided that Young & Co. have not used due diligence, and therefore, have made the note their own; and if so, the original contract for the salt is at an end. Yet the court below have decided this

very question differently; they have said that a suit against Edgar was not a necessary part of due diligence. The same question, between the same parties, has been differently decided by the two courts.

*185] *Mason*, on the same side.—The court below was concluded by the decision of the county court of Fairfax. *Nemo bis vexari debet.* The plaintiffs below had two modes of recovering their money from Clark, viz., by a suit for the salt sold, or by an action against Clark on his indorsement of the note. They made their election of the latter, and it has been decided against them. This ought to end the business. (*Kitchen* v. *Campbell*, 3 Wils. 304.)

E. J. Lee, contrà.—The question seems to turn on the second bill of exceptions. It appears by that, that the note was not given as an absolute, but a conditional payment. It is unreasonable to suppose, that the condition was, that Young & Co. should be obliged to prosecute a suit against Edgar through all the courts of Virginia. The prayer was to instruct the jury that a suit must be proved to have been prosecuted against Edgar, and his insolvency made to appear.

The judgment of the county court of Fairfax is no bar. It was not even a bar to a second suit by Young & Co. against Clark, on the same note. For the opinion of that court was not, generally, that the suit would not lie against Clark, on his indorsement, but that it would not lie against him, previous to a suit against Edgar, and his insolvency being made to appear. Therefore, after proving Edgar insolvent by a suit, Young & Co. might have brought a second suit against Clark, and recovered, for anything that appears by the opinion of that court. If, then, Young & Co. might have had a second action upon the note, they may well bring a suit upon their original cause of action. The opinion of the Fairfax court was only that the plaintiffs had brought their action too soon.

It is said, this is the same cause of action which has been decided in the county court of Fairfax, and that the judgment in that court is a bar to this *186] action. *In order to prove this, it is necessary to show, not only that the same evidence applies to both, but the former judgment must have been upon the same point. And that point must be on the merits. 5 Bac. Abr. (new ed.) p. 442.

In the case of *Kearslake* v. *Morgan*, cited from 5 T. R. 513, it did not appear what had become of the note; it might have been paid. Besides, that was a case under the statute of Anne, which makes promissory notes a payment. The case of *Chamberlyn* v. *Delarive*, in 2 Wils. 353, was decided on the gross negligence of the plaintiff, in holding the order four months, without making a demand of the money, until the drawee failed.

The refusal of the court below to give the instruction prayed, and the direction which they did give to the jury, are both justified by the decisions of the court of appeals of Virginia. That court has never decided, that a suit against the maker of the note is, in all cases, necessary, before resort can be had to the indorser. It is true, that in the case of *Mackie* v. *Davis*, Judge Roane said, that "the assignee of a bond acquires a legal right to bring suit upon it, and to receive the money, discharged from any control of the assignor over the subject;" and that "it is, therefore, his duty to bring

suit." But that was only an *obiter* opinion, not applicable to the point of the cause. It is certainly not a self-evident truth, nor is it very apparent, how the conclusion flows from the premises; and Judge CARRINGTON, in his opinion, in the same case (p. 231), says, "As to the lengths which it behooves the assignee to go in pursuit of the obligor, before he can resort to the assignor, it is unnecessary to lay down any general rule; it may suffice to say, that in the present case, he went far enough." In that case, indeed, a suit had been brought; but the courts of Virginia have never laid down any general rule as to what is due diligence in such a case. In the case of *Lee* v. *Love*, in 1 Call 497, and *Minnis* v. *Pollard*, Ibid. 226, it seems rather to be inferred, that a suit is not in all cases necessary. In the case of *Mackie* v. *Davis*, the court decided, that the remedy of the assignee of a bond against the assignor, was by the common law; and it is clear, from [*187
*the case of *Lambert* v. *Oakes*, in 1 Ld. Raym. 443, that, by the common law, the indorsee of a note had his remedy against the indorser, if the money was not paid by the maker of the note, on demand.

If, therefore, a suit against the maker of a note is not, in all cases, necessary to charge the indorser, the court below were right, both in refusing the instruction as prayed, and giving the opinion which they did.

C. Lee, on the same side.—1. The point arising from the first bill of exceptions is, that the court might well refuse to compel the plaintiffs below to join in demurrer to the evidence. This point being now agreed, I shall consider—

2. Whether the court did right in refusing the instruction to the jury, as prayed in the second bill of exceptions. It is not necessary to inquire whether the instruction which they did give was right, but whether they were bound to give that which was asked.

If the note was not received, at the time, as absolute payment for the salt, Young & Co. had a right of action for the price of the salt, upon demand and refusal of payment of the note by Edgar. The liability of the indorser to the indorsee of a note is at common law, and not by the custom of merchants, or the statute of Anne. And by the common law, nothing more was necessary to fix that liability, than a demand upon the maker of the note, and his refusal to pay. Upon this, and this only, the right of action accrued against the indorser. It is true, that Young & Co. had two remedies: they might either sue Clark upon his indorsement, or upon the original contract for the salt. Having failed in the former, they are not precluded from resorting to the latter: their election of the first is not a waiver of the last.

The action in Fairfax county, on the note, was no bar to the action in the district of Columbia, upon the account. The note was no payment of the account, nor *was the former action for the same cause as the [*188
present: the causes of action, and the evidence necessary to support them, were entirely different. The declaration in Fairfax county contained three counts: 1st. A special count on Clark's indorsement of the note; 2d. For money lent; 3d. For money had and received. In the present action, the declaration has also three counts: 1st. For the price of the salt sold; 2d. A *quantum valebat*; 3d. Money had and received. The same evidence will not support both actions: The indorsement of Clark is the evidence

necessary in one: the delivery of the salt is the evidence to support the other.

In the case of *Kitchin* v. *Campbell*, 2 W. Bl. 827, 831, the court said, "the principal consideration is, whether it be precisely the same cause of action in both, appearing by proper averments, in a plea; or by proper facts stated in a special verdict, or a special case. One great criterion of this identity is, that the same evidence will sustain both the actions;" and cited *Putt* v. *Royston*, 2 Show. 211; Ld. Raym. 472; 3 Mod. 1; Pollexfen 634; *Mortimer* v. *Wingate*, Moore 463; Bro. Action on the Case, 97, 105. And not only must it require the same evidence to support both, but in both, the question must be the same. *Kitchin* v. *Campbell*, 2 W. Bl. 832; *Ruff* v. *Webb*, 1 Esp. R. 130. That was an action for a servant's wages, against his master, who had given him a draft for the full amount of his wages, on a third person, which was not stamped. And although the plea stated, that he accepted it in absolute payment, yet it was held to be no bar.

The case of *Kearslake* v. *Morgan* depends on the statute of Anne, which declares that a note given for a debt due by account, shall be a satisfaction, unless the plaintiff uses due diligence: no such statute exists in Virginia. In the case of *Chamberlyn* v. *Delarive*, there was no demand at all upon the drawee of the bill. Neither of those cases, therefore, were like the present.

*189] *Swann*, contrà.—If a note is agreed to be taken in payment absolutely, it is a satisfaction; but where there is no such agreement, the law implies a condition, that the holder shall use due diligence. The county court of Fairfax has decided that Young & Co. have not used due diligence: that decision is valid and conclusive all over the world, until reversed by a competent authority. How, then, does this case stand? Young & Co. sold salt to Clark, and received a note, as a conditional payment, or a collateral security, no matter which; which note they have made their own by their own *laches*. The maker of the note has become insolvent and run away. Who ought to bear the loss? The law says clearly, the person who has been negligent, who has not complied with the requisites of the law.

It is immaterial, whether the judgment in Fairfax is an absolute or a temporary bar; for if it is a temporary bar only, yet Young & Co. have not done what that court decided to be necessary.

Mason, on the same side.—A judgment on the same question between the same parties is conclusive, until reversed. What is the same question? It is the real merits, the matter of right between the parties. The same evidence is not the criterion. Trespass and trover require different evidence; yet, if the merits of the same question are the gist of both, the one is a bar to the other. Here, the question was the same as in Fairfax, viz., whether Young & Co. had not been guilty of *laches* in respect to the note; for if they had, they had barred themselves not only from a right to recover upon the note, but upon the original contract for the salt. One and the same question will decide both cases. That question is upon the merits, and is, in fact, the only question in dispute between the parties.

It is not important whether the note was received as an absolute or a
*190] conditional payment. For if it was a *conditional payment, the *laches* of Young & Co., have made it absolute. There is no evidence of

notice to Clark of the default of Edgar, until the bringing of the suit in Fairfax county, which was eighteen months after the note began payable. Having two remedies for the price of the salt, Young & Co. could not resort to both. They made their election to sue upon the note, and having pursued that remedy to judgment against themselves, they are for ever barred. The county court of Fairfax have decided the only question which existed between the parties, the negligence of the plaintiffs below, whereby they had made the note their own; and therefore, they must abide the loss.

February 17th, 1803. The Chief Justice delivered the opinion of the court.

This was a suit brought by the defendants in error against the plaintiff, in the circuit court of the district of Columbia, sitting in the county of Alexandria, and the declaration contains two counts for goods, wares and merchandises sold and delivered, and one for money had and received to their use. The cause came on to be tried on the general issue, and a verdict was found for the plaintiffs below, on which the court rendered judgment.

At the trial of the cause, it appeared, that the suit was brought for a quantity of salt, sold and delivered by Robert Young & Co. to Clark; after which, Clark indorsed to Robert Young & Co., a promissory note made by Mark Edgar to John Pickersgill & Co., which had been indorsed by them to the said Clark, and which was payable sixty days after date. This note was protested for non-payment; after which, a suit was brought thereon by Robert Young & Co., in the county court of Fairfax, against Clark; and the declaration contained two counts, one on the indorsement, and the other for money had and received to the use of the plaintiffs. In this suit, verdict and judgment was given for the defendant Clark: the court of Fairfax being of opinion, that a suit could not be maintained against the indorser *of the note, until a judgment had been first obtained against the maker, and his insolvency made to appear. [*191

After the determination of that action, this suit was instituted on the original contract; and at the trial, the counsel for the defendant moved the court to instruct the jury, that if, from the evidence given in the cause, they should be of opinion, that the promissory note aforesaid was indorsed by the defendant to the plaintiffs, in consequence of the goods, wares and merchandise sold as aforesaid, although the said indorsement was not intended as an absolute payment for the said goods, wares and merchandise, or received as such by the plaintiffs, but merely as a conditional payment thereof, yet the receipt of the said note, under such circumstances, and the institution of the aforesaid suit by the said plaintiffs against the said defendant, on his indorsement aforesaid, made the said note so far a payment to the said plaintiffs, for the said goods, wares and merchandise, as to preclude them from sustaining any action against the said defendant for the said goods, wares and merchandise, until they had taken such measures against the said Mark Edgar, as were required by the laws of Virginia; and that the plaintiffs, having instituted the suit aforesaid, upon the said note, against the said defendant, and that having been decided against the said plaintiffs, they were barred from sustaining this action against the said defendant.

This instruction the court refused to give, but directed the jury, that if they were of opinion, from the evidence, that the salt was sold and delivered

as alleged, and that the promissory note aforesaid was indorsed by the defendant to the plaintiffs, in consequence of the salt sold as aforesaid, although the said indorsement was not intended as an absolute payment for the said salt, or received as such by the plaintiffs, but merely as a conditional payment thereof, the same is a discharge to the defendant for the salt sold to him, unless it is proved, that due diligence has been used to receive the money due on the note; but that the bringing suit on the said note against Mark Edgar, was not essentially necessary to constitute the said diligence; and that the said diligence may be proved by other circumstances, and their omitting to bring the said suit against Edgar may be accounted for, by the
*192] insolvency of Edgar, *if proved, or any conduct of the defendant which may have prevented the bringing of the said suit.

To this opinion, the counsel for the defendant excepted, and then prayed the court to direct the jury, that the defendant was entitled to a credit for the amount of the said note, unless the plaintiffs could show that they had instituted a suit thereon against Edgar, or that Edgar had taken the oath of insolvency, or absconded, at the time the note became payable, or unless the plaintiffs could show that they had offered to return and re-assign the said note to the said defendant, previous to the institution of this suit. This direction the court refused to give, and referred the jury to their opinion already given on the principal points now stated, and to which an exception had already been taken. This opinion was also excepted to. A verdict and judgment was then rendered for the plaintiff, without giving credit for Edgar's note, which judgment is now brought into this court by writ of error.

On these exceptions, it has been argued, that the court has erred, because: 1st. The conduct of the plaintiffs, Young & Co., has disabled them from maintaining this action, and such ought to have been the direction to the jury. 2d. The verdict and judgment in Fairfax court is a bar to this action.

The conduct of the plaintiffs was entirely before the jury, to be judged of by them from the evidence, excepting only that part of it respecting which the court gave an opinion. We are, therefore, only to inquire whether the opinion given by the court be erroneous.

It is agreed on both sides, that the note in this case was not received as payment of the debt, and consequently, did not extinguish the original contract. It was received as a conditional payment only, and the opinion of the court was, that in such a case, the want of due diligence to receive the money due thereon would discharge the defendant. But the court
*193] proceeded to state that due *diligence might be proved, although no suit was instituted; and that circumstances, such as the known insolvency of Edgar, the maker of the note, or any conduct of Clark, preventing a suit, would excuse Young & Co. for not having instituted one.

This opinion of the court seems perfectly correct. The condition annexed to the receipt of the note cannot be presumed to have required that a suit should be brought against a known insolvent, or that it should be brought against the will of the indorser; if he chose to dispense with it, or took means to prevent it, nothing can be more unreasonable, than that he should be at liberty to avail himself of a circumstance occasioned by his own conduct.

It is not intended to say, that the person receiving such a note is compellable, without special agreement, to sue upon it, in any state of things. It is not designed to say, that he may not, on its being protested, return it to the indorser, and resort to his original cause of action? it is only designed to say, that, under the circumstances of this case, nothing can be more clear, than that there was no obligation to sue.

The court gave no opinion, that the suit in Fairfax was, or was not, a bar to that brought in the county of Alexandria. It is, however, clear, that no such bar was created.

To waive the question, whether, in such a case as this, with declarations for such distinct causes, a verdict in a prior suit may be given in evidence as a bar to another suit, really for the same cause of action? it is perfectly clear, that in this case, the same question was not tried in both causes. In Fairfax, the point decided was, that the suit against the indorser would not lie, until a suit had been brought against the maker; in the suit in Alexandria, the point to be decided was, whether the plaintiffs had lost their remedy on the original contract, by their conduct respecting the note. These were distinct points, and the merits of *the latter case were not involved in the decision of the former. [*194

On the second bill of exceptions, the only real new point made, is, whether the action is maintainable, unless Robert Young & Co. had offered to return and re-assign the note, before the institution of the suit? Unquestionably, Clark is entitled to the benefit of the note, but as it was no extinguishment of the original cause of action, there was no absolute necessity to prove an offer of the note, before the institution of the suit. Indeed, it does not appear in this bill of exceptions, whether the note was merely a collateral security or a conditional payment: this is nowhere stated positively. In the first opinion of the court, it is stated hypothetically, and that opinion must be considered, on the presumption that such was the fact. But no such presumption is raised respecting the second bill.

Judgment affirmed, with costs.

Wilson *v.* Lenox & Maitland.

Action on bill of exchange.

A declaration in debt, under the law of Virginia, upon a protested bill of exchange, for the principal, interest, damages and costs of protest, must aver the amount of those costs of protest.

Quære? Whether, if the holder of the bill of exchange, after due notice to the indorser of the non-payment by the drawee, charge the bill in account-current against the drawer, and upon the whole of that account, the balance due is less than the amount of the bill, the indorser is thereby discharged?

Whether the indorser is discharged, by the holder's receipt of part from the drawer, after due notice given to the indorser?

Whether it be necessary to aver protest for non-acceptance, in an action on protest for non-payment?

Whether the drawer be a competent witness for the indorser, in an action against the latter?

Lenox *v.* Wilson, 1 Cr. C. C. 170, reversed.

Error to the Circuit Court of the district of Columbia, sitting at Alexandria, on a judgment obtained by the present defendants in error, against the plaintiff in error, in an action of *debt*, as indorser of a bill of exchange, for 300*l.* sterling, drawn on the 2d January 1799, at Alexandria, by A. &