the transferee, the maker might prove a payment, made while it remained in the hands of the payees, and in that case the note was payable *with interest*.

In *Sice* v. *Cunningham*, where the action was by the endorsee against the endorsers, it was held, that a note payable on demand, was due presently, and must be demanded within a reasonable time, and that a delay of five months in making demand of the maker, discharged the endorser; and the court also held, that proof of a parol agreement to vary the time of payment fixed by the note, could not be received.

In *Wethey* v. *Andrews*, the Supreme Court, for the first time noticed any distinction between demand notes, with or without interest. That was an action of the subsequent holder against the maker of a note on demand with interest. It was transferred from the payee to one Grimshaw, a purchaser thereof, within a week after it was executed, and within about a month after its execution he transferred it to the plaintiff, who paid him the money for it. The defendant, the payee and the first transferee, all lived in the same village, and the plaintiff lived within two and a half miles of them; and the defence offered was, that the note was executed without consideration. The plaintiff recovered, the court holding that the cases furnish no principle for fixing the time with exactness, when a negotiable note, payable on demand, shall be deemed dishonored, so as to let in a defence against the payee, as against one to whom it has been negotiated; that the note was *with interest*, and came to the hands of the plaintiff some four or five weeks after it was executed, and that no law adjudges such a note to be dishonored so soon after its date. In delivering the opinion, Cowen, J., says in substance, that if the note had not been on interest he should have thought it right to presume it had been demanded and payment refused, perhaps even at the time when Grimshaw obtained it; but he thought the contrary was to be presumed with regard to one which bore interest, and thought it would be contrary to the general course of business to demand payment short of some proper time for computing interest. He also cited the case of *Barough* v. *White*, as reported in 6 Dowl. & Ryland, and in 4 Barn. and Cres., as showing that such a note in England is considered as a continuing security and is not dishonored until payment is demanded and refused; but we are not informed that the court adopted that rule, and the whole case shows that it was meant to decide, and that such a note is not due or dishonored immediately.

Now, the precise question before the court in *Wethey* v. *Andrews*, was whether, in an action by a subsequent holder upon a note on demand, with interest, transferred by the payee *within a week* after its inception, the maker could set up the defence existing between him and the payee that the note was without consideration, upon the sole ground that it was dishonored by the delay of a week without demand for payment. The court was doubtless correct in its decision, and correct in saying that there was no case holding such a note to be dishonored; and in that respect, I think there is no distinction, in the cases to which the court alluded, between such notes and those payable on demand, without interest; for I am not able to find any case which declares a note on demand, without interest, dishonored by not being demanded or paid within a week after it is executed; and although, in the opinion, the judge treats the the case as though the material transfer took place four or five weeks after the making of the note, it is actually certain that no such question was involved; for it is perfectly clear, upon principle and authority, that if the transfer to Grimshaw was before the note was dishonored, the subsequent holder would succeed to all his rights as between him and the maker, irrespective of all questions of notice to or of valuable considerations paid by such subsequent holder. It would seem that the judge supposed that the rule held in the case of *Barough* v. *White*, which he cited, was different in England in regard to notes on demand, *with interest*, from what it was in regard to demand notes not on interest; and if so, I think he was mistaken. But whether the *opinion* expressed by the judge in *Wethey* v. *Andrews* was correct or not, it must be conceded that the law of that case was correctly decided.

The Supreme Court, in the case at bar, followed what was supposed to be the principle adopted by this court in the case of *Merritt* v. *Todd*, 23 N. Y. 28. It is doubtless true that this court held, in that case, that a promissory note, payable on demand, with interest, is a continuing security; that the endorser remains liable until an actual demand of payment; and that the holder, as between him and the endorser, is not chargeable with neglect for omitting to make such demand within any particular time; and whether the reasoning upon which the decision was based be correct or not, such is the decision of this court. It, however, only *decides* what the law is between holder and endorser; and the chief judge, in his opinion discriminates between that case and such as the one before us, and says: "It may be well to observe that the present question is not identical with the one which arises when, after the transfer of such a note, the maker seeks to introduce a defence existing against the first holder. The lapse of time, or the non-payment of interest after the regular period, or period for such payment have passed, may be sufficient to put the purchaser on inquiry, or to justify a presumption that the instrument was actually dishonored before the transfer. It might well be true, in such a case, *that a demand had been actually made and notice given to the first endorser, so as to charge him, while at the same time the maker would be let in to defend, if he had any defence.* Questions of charging the endorser, therefore, and questions of allowing an original defence to the maker may depend on very different considerations." In other words, that, as to the maker, the note might be considered dishonored, while, at the same time, as between the holder and endorser, the former has been guilty of no laches.

It is clear to my mind, that this court did not intend to decide what the rule should be as between maker and holder, but only as between holder and endorser, and therefore it cannot be claimed, as the Supreme Court seemed to suppose, that their decision in the case before us was required and controlled by the case of *Mer-*