til the 28th of April, or 1st of May, 1861, when he transferred it to his brother, Delaus W. Herrick, the plaintiff.

The note was executed and delivered to Jonathan R. Herrick upon a transfer by him to the defendant of fifty shares of the capital stock of the Bank of Albany. The plaintiff defendant, Hawkins, and Jonathan R Herrick, were at the time merchants, doing business in Broadway, in the city of Albany; and before the commencement of the action, the defendant duly tendered the stock, and demanded the note, which was refused.

The question of fact litigated at the trial, in regard to the execution and delivery of the note to Jonathan R. Herrick, was, whether as between him and the maker, it was, or was not, without consideration; or rather, whether it was given, as the defendant claimed, as a mere memorandum, by way of security for the return of fifty shares of the capital stock of the Bank of Albany, borrowed by the defendant from Jonathan R. Herrick; or, as claimed by the plaintiff, given to secure the payment for said fifty shares of stock purchased of said Herrick by the defendant. The plaintiff claimed that it was a sale of the stock, and that the note was given for the purchase price. The defendant claimed the transaction was a mere loan of the stock, to secure the return of which the note was made. Upon this issue the evidence was conflicting. No evidence was given by either party to show whether or not the plaintiff before, or when he took the transfer of the note, had any actual notice of the claim of the defendant; that it was executed to secure the return of the stock, or to shew whether or not the transfer of it to him from Jonathan R. Herrick was for a valuable consideration.

The court charged the jury among other things, that the note having been given nearly three months before it was transferred to the plaintiff, and all the parties living in the same street, doing business with each other, it was notice to the purchaser to inquire as to the note; and if he failed to make such enquiry, the note was open to any defence existing between the original parties. To which the plaintiff's counsel excepted.

The counsel for the plaintiff asked the court to charge that the note being payable on demand, *with interest*, it was a continuing security, and did not become due until an actual demand was made. The court refused so to charge, and the plaintiff's counsel excepted.

The jury found that the transaction was a mere loan of the stock, and that the note was made as a memorandum by way of security for the return of the stock, and for no other purpose, and rendered a verdict for the defendant.

The plaintiff made and served a bill of exceptions, which was ordered to be heard in the first instance at the General Term, where a new trial was granted, with costs to abide the event, and the defendant appealed to this court, pursuant to the last clause of subdivision 2, sect. 11, of the Code.

Opinion by Foster, J. Delivered March, 1870.

The jury having found that the transaction between the defendant, who was the maker of the note, and Jonathan R. Herrick, who was the real payee or first holder, was a mere loan of the bank stock from the latter to the former, and that the note was made as a memorandum by way of security for the return of the stock, and for no other purpose, they virtually found that the paper, though in form a promissory note, was never intended as such between them; that it was issued to be used only for the purpose above specified, and was never intended by them to be issued, used, or circulated as a *promissory note*, and doubtless, as between them, it could not be claimed to be such; at least, unless default should be made by the defendant in the return of the stock, and it cannot be claimed, upon the evidence in the case, that such default had been made.

An important inquiry, therefore, is whether at the time the note was transferred from the payee to the plaintiff, it had become due, in such sense as to be dishonored; for if it was, then the plaintiff took it subject to all equities between the payee and maker, and he could not recover upon it, even though he took it without any actual notice of the defence and for a valuable consideration; for in such case the law implies notice to him of all exising equities or defences which the maker had to it as against the payee, and such presumption is conclusive.

If, therefore, the note was dishonored when the plaintiff received it, the charge of the judge and his refusal to charge as requested by the plaintiff's counsel were correct. This proposition of law is not disputed, and is well established.

The uniform consent of authority in this State was, that a note payable on demand must be presented within a reasonable time, or it would be deemed due and dishonored, so that a negligent transferee would take it subject to all equities existing between the original parties; and that the rule applied, whether the note was payable *with interest* or not. *Furman* v. *Haskins*, 2 Cains, 369; *Losee* v. *Durkin*, 7 J. R. 70; *Sice* v *Cunningham*, 1 Cowen, 397, where the same rule was held between subsequent holder and endorser. And *Wethey* v. *Andrews*, 3 Hill, 582, gives the same rule as applicable to notes on demand, *with interest*, holding that a note on demand with interest is a lasting security, but applying the rule to it that the demand must be made within a reasonable time; and says, that notes on demand, without interest, are due immediately.

The rule, as to reasonable time, which has been applied to such notes, has been quite different from the rule, in that respect, applicable to checks, as between drawer and holder, and to drafts or bills of exchange, as between drawer or endorser and holder, which requires them to be presented without delay. The rule as to such notes, requiring them to be presented within such time, as under all the circumstances of the case, and the situation of the parties, the court shall adjudge as matter of law, to be reasonable between them. In *Furman* v. *Haskins*, the note was held dishonored, where the transfer was made eighteen months after its execution. In *Losee* v. *Durkin*, where no special circumstances appeared, the court held, where the note was transferred two and a half months after it was executed, that in an action brought thereon by