French's executrix *v.* Bank of Columbia.

Notice of non-payment.

The indorser of a promissory note for the accommodation of the maker, is entitled to strict notice.

If the drawer of a bill of exchange, at the time of drawing, has a right to expect that his bill will be honored, he is entitled to strict notice.

Bank of Columbia *v.* French's Executors, 1 Cr. C. C. 221, reversed.

Error to the Circuit Court of the district of Columbia, sitting at Washington.

This was an action of *assumpsit* upon the promissory note of W. M. Duncanson, payable to George French, or order, and by him indorsed to the plaintiffs, for $1400, at sixty days, dated October 10th, 1798, and due December 9th–12th.

On the trial at law in the court below, the plaintiff in error took a bill of
*142] exceptions which stated the following *facts: That the banking-house of the plaintiffs was situated in Georgetown, in the district of Columbia, at the time the note became payable; in which town the defendant's testator also resided. That Duncanson, the maker of the note, lived in the city of Washington, four miles distant from the Bank of Columbia. That the last day of grace upon the note expired with the 12th of December 1798. That the defendant's testator was very ill, and confined to his bed, from the 9th to the 14th of December 1798, on which last-mentioned day, he died; that the defendant proved his will and took out letters testamentary, on the 28th of the same month. That on the 15th of December, a notary-public called at the house of Duncanson, the maker of the note, to demand payment, but was informed that he had gone into Georgetown, whereupon, the note was protested; that one Weems, an agent of the defendant, had notice of the dishonor of the note, in January 1799, and conversed with and endeavored to make arrangements with the plaintiffs for the same.

That the note was indorsed by the defendant's testator, without any valuable consideration passing from him to any person for the same, merely to accommodate Duncanson, the maker of the note, and to give him a credit with the plaintiffs for the amount thereof, and that the plaintiffs received the same with a knowledge of its being so drawn and indorsed; that the defendant's testator, in his lifetime, and the defendant, since his death, had suffered no loss or injury from the circumstance of the note not having been demanded of the maker, before the 15th of December 1798, or of the want of notice to the defendant's testator, or to the defendant, other than as aforesaid; and that the court, at the plaintiffs' request, thereupon instructed the jury, that such *laches* and neglect of the plaintiffs, as to a demand on the maker, and in not giving other notice than as above stated to the indorser, did not debar and take away the plaintiffs' right to recover upon that note, in this action against the defendant.

The defendant below took another bill of exceptions to the refusal of the court to instruct the jury, that the neglect of the plaintiffs, to demand pay-
*143] ment and to give *notice, as before stated, discharged the defendant's testator from all liability upon the note, if the jury should be satisfied by the evidence, that Duncanson received the money from the plaintiffs,

with the assent of the defendant's testator, after his indorsement, and that at the time of the drawing and indorsing of the note, it was the understanding of all parties, that the money should be so paid; and that such payment and assent were a sufficient consideration passing from French to Duncanson.

The judgment below being for the plaintiffs, the defendant brought her writ of error.

Harper, for the plaintiff in error.—The plaintiffs below claimed a right to recover upon this note, notwithstanding their *laches*, upon three grounds. 1st. Because it was an accommodation-note, and no consideration passed from French to Duncanson. 2d. That French had suffered no injury by the neglect of the plaintiffs; and 3d. The assent of the defendant's agent, after the note became payable.

1st. It is not a note for the accommodation of the defendant's testator, but for that of W. M. Duncanson, the maker. No man ought to be held liable upon a contract, further than he has consented to bind himself. If this contract was conditional, he cannot be absolutely bound, until the condition has been performed. What, then, was the contract which the defendant's testator entered into, by indorsing the note?

By the law of Maryland, which must decide this case, and which on this subject is precisely the same as the law of England, an exact analogy exists between an indorsed promissory note and an accepted inland bill of exchange. *When an indorsed promissory note, payable to order, is [*144 indorsed by the payee, it is, in truth, an inland bill of exchange drawn by the payee, in favor of the indorsee, upon the maker (his debtor by the note), and by him accepted. Hence, the law with respect to both kinds of paper is the same. The contract of the first indorser of a promissory note is the same as that of the drawer of a bill of exchange. It is an express, not an implied contract. An implied contract is that which the law (to prevent a failure of justice) presumes the parties to have made, where they have failed to make an express contract for themselves; and courts will vary the terms of such implied contract, according to the principles of natural justice. But by writing his name on the back of the note, the indorser entered into an express contract, the terms of which are as well known, by a reference to the law-merchant, as if they were written at large on the note. He does not thereby bind himself to pay, at all events. He only says to the holder, "if you use due diligence in demanding the money of the maker, and he refuses to pay it, and if you give me reasonable notice thereof, I will pay you." It being then, a part of the express contract between the parties, that the holder should, in reasonable time, demand the money of the maker, and give due notice of non-payment to the indorser, before the latter can be charged, upon what principle can a court of justice dispense with the performance of those precedent conditions? There is no case upon a promissory note, in which they have been dispensed with, except in that of *De Berdt* v. *Atkinson*, 2 H. Black. 336, and there it was done, because the maker of the note was known by all the parties to be insolvent, at the time of making and indorsing the note, and therefore, the contract of the indorser in that case was not supposed to be conditional, but absolute. But the authority of that case, although attended by such special circum-

stances, is shaken, if not overruled, by the case of *Nicholson* v. *Gouthit*, in the same book (p. 609), where notice to the indorser of a promissory note was held necessary, although the insolvency of the maker was known to the indorser, before the note became payable, and although he indorsed it for the accommodation of the maker, and merely to obtain him a credit. The latter
*145] is, in its circumstances, more like the case now before the court, *than that of *De Berdt* v. *Atkinson*. The judges, in giving their opinion in *De Berdt* v. *Atkinson*, relied not on the actual insolvency, but on the knowledge of the insolvency by all the parties, at the time of making and indorsing the note; whereby it appeared, that the defendant, in that case, had not annexed the usual conditions to his contract as indorser; but had waived them; and that the waiver was known to the plaintiffs.[1]

It is true that in the case of *Nicholson* v. *Gouthit*, it appeared that Burton, the other indorser, had put into the defendant's hands, funds to meet the payment of the note, but the note not having been demanded when due, the defendant had paid away those funds. But if the defendant was not entitled to notice, he paid away those funds in his own wrong, and therefore, if any damage arose to him in consequence, it could not make his case the better. It may also be observed, that the court, in giving an opinion, did not notice this circumstance as a ground of that opinion; the Chief Justice seems to exclude a presumption of that kind, because he says that the justice of the case is with the plaintiff, which could not be true, if the defendant had suffered damages imputable to the *laches* of the plaintiff. The only ground upon which the court rested their opinion was, that the form of guaranty which the parties had adopted, required due notice to the indorser, and therefore, although the justice of the case was with the plaintiff, they could not dispense with such notice.

Upon this ground, the opinion is certainly inconsistent with the case of *De Berdt* v. *Atkinson*; for in the latter, the same form of guaranty had been adopted, yet that circumstance was not deemed sufficient to render notice necessary, in a case where the undertaking of the indorser was to pay at all events; an undertaking which, in that case, was presumed from the fact that the insolvency of the maker of the note was known to all the parties, at the time of making and indorsing the note. But in the case of *Nicholson* v. *Gouthit*, the maker was not insolvent, but only embarrassed, at the time of the making and indorsing of the note, and did not become insolvent until afterwards, and before the note became payable, so that there was no
*146] circumstance upon which *to build the presumption, that the defendant intended to make himself liable, at all events.

The true principle which will reconcile all the cases upon this point is, "that notice need not be given to him who is liable in the last resort." In the present case, the insolvency of the maker of the note is not averred, nor any other circumstance to show that French was liable in the last resort. If the note had been made by Duncanson, to accommodate French, and French had received the money from the bank, then, indeed, it might have been

[1] See Farmers' Bank *v.* Vanmeter, 4 Rand. 553, 559; Buck *v.* Cotton, 2 Conn. 126–7, 131. In Barton *v.* Barker, 1 S. & R. 335, Chief Justice TILGHMAN says, the cases of De Berdt *v.* Atkinson, and Corney *v.* Da Costa, 1 Esp. 304, have been overruled, in Nicholson *v.* Gouthit, 2 H. Bl. 609, and Esdaile *v.* Sowerby, 11 East 114, and the case of Jackson *v.* Richards, 2 Caines 343, agrees with the law as settled by the last English cases.

contended, that as French was the person liable in the last resort, he was not entitled to notice. But the case stated is, that French indorsed the note to accommodate Duncanson, who received the money of the bank. The obligation of French, therefore, was simply that of an indorser of a promissory note; or of the drawer of an inland bill of exchange.

Considered in this point of view, the plaintiffs rely upon those cases which say, that the drawer of a bill of exchange, without funds, is not entitled to notice. It is admitted, that an analogy exists between an indorsed promissory note and an inland bill of exchange. But the analogy is not complete, until the bill of exchange is accepted. There is no case in which notice has been deemed unnecessary, when the bill has been accepted, except that of *Walwyn* v. *St. Quintin*, 1 Bos. & Pul. 652, which will be noticed presently. In all the prior cases, in which the want of funds has been holden as excusing the want of notice, acceptance has been refused; so that the question has never arisen on an accepted bill, but in the single case of *Walwyn* v. *St. Quintin*.

It is admitted, that it has been decided, that if the drawer has neither funds in the hands of the drawee, before the bill becomes payable, nor a right to draw, he is not entitled to notice; and the reason given is, because *he cannct expect the bill to be accepted and paid, and therefore, practises a fraud upon the holder; and because he cannot suffer injury [*147
by the want of notice. These reasons extend only to the case of a drawer who has no right to draw, and the bill is not accepted; for the acceptance is conclusive evidence that the drawer had funds (or credit, which is the same thing in substance), against every person but the acceptor, in a suit between him and the drawer. If the drawee has promised to accept the bill, the drawer has a right to expect that his bill will be accepted, and he has practised no fraud upon the holder of the bill. Notice of non-acceptance, and, *a fortiori*, of non-payment, of such a bill, may be very material to the drawer as he would be thereby liable for interest, damages and costs, which he would have a right to recover over against the drawee who had thus violated his faith, in not honoring his bill according to a promise; and by the want of such notice, the drawer may lose his remedy against the drawee by his insolvency. This may be the case where the drawer draws the bill for his own accommodation, without funds, and the drawee agrees to accept it, to give the drawer a credit.

But in the present case, the bill is drawn, not for the accommodation of the drawer, but of the drawee, and the drawee has not only agreed to accept, but has actually accepted it; and if the reasons for dispensing with notice did not apply to that case, much less can they to this. If a bill of exchange be drawn to accommodate the drawee, the drawer has a right to expect that it will be accepted; and if accepted, has not only a right to expect, but to insist, that it shall be paid, precisely in the same manner as if it had been drawn upon funds, in the regular course of mercantile transactions. He stands precisely in the same situation as if it had been so drawn.

In a regular transaction, if the drawee, having funds, after agreeing to accept, refuse acceptance, the holder *may immediately call upon the [*148
drawer, who, after taking up the bill, may recover against the drawee the principal, interest, damages and costs. So, if the bill be drawn for the accommodation of the drawee, and be not accepted, the holder can immedi-

ately call upon the drawer, who, upon taking it up, may recover of the drawee the amount of the bill, with interest, damages and costs. Immediate notice of non-acceptance is, therefore, equally necessary in both cases; a failure of the drawee, in either case, being equally prejudicial to the drawer.

In a regular transaction, if, after acceptance, the acceptor, having funds, refuse to pay, the drawer, after taking up the bill, may recover against the acceptor, the principal, interest, damages and costs. So, if a bill be drawn to accommodate the drawee, if, after acceptance (which is the present case), the acceptor refuse to pay, the drawer, after taking up the bill, may recover against the acceptor, in like manner. If the acceptors, in both cases, should become insolvent, both drawers would sustain precisely the same injury; the one, by being unable to withdraw his funds, and obtain security for the interest, damages and costs, and the other, by being unable to get a reimbursement of the principal, interest, damages and costs, which he had been compelled to pay for the accommodation of the drawee. The two cases are precisely parallel; and if notice is necessary in one case, it is equally necessary in the other.

If the note of Christian to 2 Bl. Com. 470, be cited, the answer is, that the author of that note refers to no case but *De Berdt* v. *Atkinson*. The only case reported, which has decided that the drawer of an accepted bill is not entitled to notice, is that of *Walwyn* v. *St. Quintin*, 1 Bos. & Pul. 652. *149] The *bill there was drawn for the accommodation of the payee, and the action was by the indorsee against the drawer. The acceptor had funds of the payee, but not of the drawer. It is difficult to understand the Chief Justice, in delivering the opinion of the court in that case. He says, "as far as concerns the drawer, it is, what it has been called, a mere accommodation." This is true, but it was not for his own accommodation, which is the only kind of accommodation that will justify the want of notice. He then proceeds, "and all consideration of effects of the drawer in the hands of the acceptor may be laid aside." This again is strictly and literally true; but the drawer had a fair pretence for drawing, and the acceptance was on the ground of a fair mercantile agreement; for it is stated, that the drawee had actually accepted the bill, on the faith of funds put into his hands by the payee to meet the payment. And in the next page, his lordship says, "But it may be proper to caution bill-holders not to rely on it as a general rule, that if the drawer has no effects in the acceptor's hands, notice is not necessary. The cases of acceptances upon the faith of consignments from the drawer, not come to hand, and the case of acceptances, on the ground of fair mercantile agreements, may be stated as exceptions; and there may be possibly many others." In the next sentence, also, he seems to admit, that where the drawer has no effects in the hands of the drawee, yet if he has "a fair pretence for drawing," although it is for the purpose of raising money by discount for himself, yet he is entitled to notice. Here, then, is a difference between the opinion and the judgment of the court, which it is difficult to reconcile. He proceeds, "It seems clear, that notice can be of no use to him (the drawer), his situation being this, that if the acceptor does not pay, he must; and may then, and not till then, resort to the acceptor to be reimbursed; notice, therefore, can amount to nothing, since his situation cannot be changed." So, in the case of a real negotiation, the situation of the

drawer is, *that if the acceptor does not pay, he must; provided he has due notice.

If the Chief Justice meant to say, that St. Quintin was absolutely bound to pay, if the acceptor did not, it was begging the question. But his argument seems to rest on the ground, that the drawer could not resort to the acceptor, until he (the drawer) had paid the bill. But notice was necessary to him, that he might know where to apply to take up the bill, before the acceptor should become insolvent. Notice might also be of use to him, even before payment, as he might take measures to get security from the acceptor, to indemnify him against the bill, when it should come back to him. His situation would certainly be very much changed, by the want of notice, if the acceptor should become insolvent, after the bill became payable; for if due notice had been given, he might have taken up the bill, and compelled the acceptor to repay him the money. His lordship, with great force of reasoning, says, "Perhaps, indeed, notice ought never to be dispensed with, since it is a part of the same custom of merchants which creates the duty; especially, as the grounds for dispensing with it are such, as cannot influence the conduct of the holder of a bill, at the time when he is to determine whether he will, or will not, give notice; for, ninety-nine times in a hundred, he cannot know whether the drawer have or have not effects in the hands of the acceptor, or for whose accommodation the bill was drawn. It has, however, been resolved in many cases, where the drawer has had no effects in the hands of the acceptor, that notice might be dispensed with." In this last position, his lordship was certainly mistaken, for there had not then been a single decision that notice was not necessary to the drawer, if the bill had been accepted. He also says, "where the drawer has no effects, and has no fair pretence for drawing, or where he draws, without having effects intended to be applied in payment, and only for the purpose of raising money by discount for himself, and, *à fortiori*, for the acceptor, which is this case, it is fairly deducible from the cases *which have been resolved, [*151
that notice need not be given."

It is difficult to conceive why there should be a stronger reason for dispensing with notice to a drawer for the accommodation of the acceptor, than to a drawer for his own accommodation. Indeed, in the former case, there is no reason for dispensing with notice which will not apply to every possible case. The case of *Whitfield* v. *Savage*, 2 Bos. & Pul. 277, has settled the point, that the insolvency of the acceptor will not dispense with notice to the drawer.

2. The second ground on which the plaintiffs rest their claim to recover is, that the defendant has shown no actual damage by reason of the want of notice. But if the drawer, for the accommodation of the acceptor, is as much entitled to notice as the drawer upon actual funds, there is no more reason why the drawer should be bound to show actual damage in one case than in the other. It cannot be, because he has paid no consideration for the bill, because, in the case of a bill drawn on actual funds, although the drawer pays a consideration, when he deposits the funds, yet he also receives a consideration from the payee when he delivers the bill, so that when he has drawn and delivered the bill, he is nothing out of pocket; he has, in fact, parted with nothing. What he gave, he has received.

In the present case, although French paid nothing to Duncanson, yet he

received nothing from the bank; so that he stands exactly in the same situation as if he had paid Duncanson the whole money, and received the same amount from the bank. In either case, nothing rested with French; and he stood precisely in the same situation, as if he had loaned the money to Duncanson upon his note, and had afterwards got the money from the bank, upon the same note.

*152] *3. As to the third ground on which the action is attempted to be supported, it is sufficient to say, that the case stated in the bill of exceptions shows nothing, at most, but an attempt to compromise with the bank, without a knowledge of the fact of want of notice, or of the law arising upon that fact.

Mason, contrà, contended, that French was to be considered as the drawer of a bill of exchange, without funds, and therefore, not entitled to notice, and cannot set up the want of it as a defence, unless he can show that he has actually sustained an injury by such want. Chitty 68, 88.

No consideration passed from French to Duncanson. If French had paid Duncanson for the bill, then that money would have been funds of French, in the hands of Duncanson, upon which French might have drawn. The burden of proof lies on French to show that he had funds, or that he has suffered actual loss by the want of notice.

In the case of *De Berdt* v. *Atkinson*, the insolvency of Brown did not affect the question, and was not relied on by the court. When Brown signed the note, he was notoriously insolvent, but he might have become solvent, when the note became due. There is only one ground upon which that case can be supported, and that is, that it was an accommodation-note, and governed by the same principle as a bill drawn without funds. BULLER'S opinion is strong, that notice is only requisite in a fair mercantile transaction, for value received in the regular course of trade. The same doctrine is laid down by Christian, in his note to 2 Bl. Com. 470. The case of *Nicholson* v. *Gouthit* is not contradictory to that of *De Berdt* v. *Atkinson*. The latter case turned upon the fact, that the defendant had suffered a loss by the want of notice; he having given up a security which he held. The case of *Walwyn* v. *St. Quintin* only decides the old point, that notice is not necessary, if the drawer has no funds.

*153] **Harper*, in reply.—It is said, that it must be a mercantile transaction. A mercantile transaction is a transaction usual among merchants; and bills drawn for accommodation, are more frequent among merchants than bills drawn upon funds. The true principle is, that the *lex mercatoria* having fixed the terms of this species of contract, a man is supposed to contract accordingly. It is said, that a bill drawn without funds, is not a mercantile transaction; but a man may fairly draw on what he supposes to be funds, but may be deceived. A merchant may agree to accept, or to give credit, or to lend the money; a bill drawn under such circumstances would be a fair and regular mercantile transaction. The fallacy of the argument is, that it was not an accommodation to French, but to Duncanson. French selected this form of guaranty, and is entitled to all its privileges.

February 23d, 1807. MARSHALL, Ch. J., delivered the opinion of the court.—The material question in this case is, whether a person who indorses

a promissory note for the accommodation of the maker, be discharged from the responsibility which the indorsement creates, by the failure of the holder to demand payment of the maker, in the usual time, and to give notice to the indorser that the note is not paid.

That by the general rule of law, the omission to demand payment from the maker, when the note becomes payable, and to give notice to the indorser that payment has been refused, discharges the indorser, is admitted; [*154 *but from this general rule of law exceptions exist, and the counsel for the defendants in error contend, that the case stated is comprehended in one of these exceptions.

It is laid down as an exception to the general rule, in its application to bills of exchange, that if the drawer has no effects in the hands of the drawee, notice of the dishonor of the bill may be dispensed with, and the case of an indorser of a promissory note for the accommodation of the maker, is said to come within the same reason and the same law. The correctness of this position will be best tested, by considering the reason of the rule, and the reason for the exception.

Why is it that notice must immediately be given to the drawer, that his bill is dishonored by the drawee? It is, because he is presumed to have effects in the hands of the drawee, in consequence of which, the drawee ought to pay the bill, and that he may sustain an injury by acting on the presumption that the bill is actually paid. The law requires this notice, not merely as an indemnity against actual injury, but as a security against a possible injury which may result from the *laches* of the holder of the bill. To this security, then, it would seem, the drawer ought to remain entitled, unless his case be such as to take him out of the reason of the rule.

A drawer who has no effects in the hands of the drawee, is said to be without the reason of the rule, and therefore, to form an exception to it. This has been laid down in the books as a positive qualification of the rule, but has seldom been so laid down, except in cases where, in point of fact, the drawer had no right to expect that his bill would be honored, and could sustain no injury by the neglect of the holder to give notice of its being dishonored. In reason, it would seem, that in such cases only, can the exception be admitted, and that the necessity of notice ought to be dispensed with only in those cases where *notice must be unnecessary, or immaterial to [*155 the drawer.

The reasoning of the judges, in most of the cases which have been cited, would seem to warrant this restriction of the exception. The case of *Bickerdike* v. *Bollman* was a bill drawn by a debtor on his creditor, without a single accompanying circumstance, which could raise an expectation that the bill would be accepted or paid. Notice in this case was declared to be unnecessary. Justice Ashhurst gives as a reason for this opinion, that the drawing was in itself a fraud. This reason must be considered as additional to the general ground on which the case was placed in the argument, which was, that the want of notice could not possibly affect the drawer. The particular reason given by Justice Ashhurst for his opinion, is clearly inapplicable to any case in which the drawer was justified in drawing. Into the opinion of Justice Buller, some general reasoning is introduced, from which it is fairly deducible, that he considered the drawer as having no right to expect that the bill would be paid, and as being liable to no injury from the want

of notice, and that these were the true grounds of the exception. He says, "If it be proved on the part of the plaintiff, that from the time the bill was drawn, till the time it became due, the drawee never had any effects of the drawer in his hands, I think, notice to the drawer is not necessary; for he must know whether he had effects in the hands of the drawee or not; and if he had none, he had no right to draw upon him and to expect payment from him; nor can he be injured by the non-payment of the bill, or the want of notice that it has been dishonored." These observations were, in fact, applicable to the case, for the drawer was the debtor of the drawee, and had no right to draw the bill, nor reason to expect that it would be accepted.

*156] *This principle was recognised in *Goodall* v. *Dolly*, in which the same idea, so far as respects the impossibility of injury to the drawer, was repeated. This point came on again to be considered in the case of *Rogers* v. *Stephens*, 2 T. R. 713, in which, as between the drawer and drawee, there was no pretext of a right to draw. It was said, that a third person had stated himself to have funds in the hands of the drawee; that the bill was really drawn on the credit of those funds, and that loss had been actually sustained from the want of notice. But these facts formed no part of the case. If they had, it is apparent, that, in the opinions of Lord KENYON and Justice GROSE, they would have been decisive in favor of the necessity of notice, unless that necessity had been dispensed with by the subsequent conduct of the drawer. Lord KENYON states the reason why notice need not be given to the person who draws, without funds in the hands of the drawee, to be, "because the drawer must know that he had no right to draw on the drawee." The opinions of Lord KENYON and Justice GROSE in this respect, though not assented to, were not controverted by Justice ASHHURST. The decision in *Rogers* v. *Stephens* was made on the authority of *Bickerdike* v. *Bollman*.

It would seem to be the fair construction of these cases, that a person having a right to draw, in consequence of engagements between himself and the drawee, or in consequence of consignments made to the drawee, or from any other cause, ought to be considered as drawing upon funds in the hands of the drawee, and therefore, as not coming within the exception to the general rule. The transaction cannot be denominated a fraud, for in such case, it is a fair commercial transaction. Neither can it be truly said, that he had no right to expect his bill would be paid, for a person authorized to

*157] draw, must expect his draft will be honored. *Neither can it be said, that he has virtual notice of the protest, and that actual notice is useless, and the want of it can do him no injury; for this is only true, when, at the time of drawing, the drawer has no reason to expect that his bill will be paid. A person having a right to draw, and a fair right to expect that his bill will be honored, would not come within the reason of the exception, and, therefore, it may well be contended, ought not to be brought within the exception itself.[1]

This doctrine appears to be contradicted in the case of *Walwyn* v. *St. Quintin*. In that case, the bill was drawn to accommodate the indorser, who had previously placed securities, on which he wished to raise money, in

[1] Dickins *v.* Beal, 10 Pet. 578; Commercial Bank *v.* Hughes, 17 Wend. 94; Robinson *v.* Ames, 20 Johns. 146.

the hands of the acceptor; but the drawer had no effects in his hands. It was determined, that, in this case, notice to the drawer was unnecessary. If this determination should be considered without examining the reasoning on which it was founded, the reader would conclude, that the single circumstance of drawing, without funds in the hands of the drawee, belonging to the drawer, subjected him, without notice, to the payment of his bill, if dishonored, at any period of time when not barred by the act of limitations; and that no demonstration of his perfect right to draw, or of the loss to which the want of notice had exposed him, could relieve him from the claim of the holder of the bill. For, in this case, the drawee having accepted on funds, the drawer had a right to expect that the bill would be paid, could not be chargeable with fraud in drawing, nor required to prepare other funds to prevent the disgrace and injury of his bill's being dishonored, or to take measures to secure himself against the acceptor or indorser. He does not appear to have come within any one reason assigned in the cases of *Bickerdike* v. *Bollman*, or of *Rogers* v. *Stephens*, for the exception stated in those cases to the general rule. *This induces the necessity of examining with particular attention the reasons given by the judge, which must be considered as explanatory of the decision. [*158

In delivering the opinion of the court, Lord Chief Justice Eyre said, "the true fact is, that this was the acceptor's bill, and not the drawer's." "The transaction in this case was a mode by which the acceptor advanced a sum of money to the payee, and the drawer was a mere instrument of the acceptor." "It seems clear, that notice can be of no use to him, his situation being this, that if the acceptor do not pay, he must, and may then, and not till then, resort to the acceptor to be reimbursed. Notice, therefore, can amount to nothing, for his situation cannot be changed."

It is observable, that the principle supposed to be laid down in the cases previously adjudged as constituting the reason for the exception is here expressly recognised, and forms the great and operative motive for the judgment of the court. It is, that notice could be of no use; that the drawer could not avail himself of it; that he could take no step which would in any manner change his situation; that he could have no recourse against the acceptor, until he paid the bill. In no case is the reason of the exception more explicitly given, and the only difficulty is to apply the reasoning to the facts as reported.

The court seem to have supposed, that since the drawer could not maintain an action against the acceptor, until he had taken up the bill, that it was perfectly useless to enable him, by proper notice, to employ those other various means which he might have taken to secure himself. Such is not the reasoning of the judges, in the cases previously decided; and this reasoning certainly would not be permitted to apply to an indorser who had given value for the bill, not knowing that it was drawn without funds in the hands of the drawee. Yet he would be unable to recover from the drawer, until he had taken up the bill. *If an action could not have been maintained, might not the drawer have effects of the drawee in his hands, which he might retain; or might not various other means of saving himself be neglected, in consequence of the opinion that the bill would be paid? If this might be, how can it be true, that notice can be of no use to him? [*159

If the fact even be, that the drawer could only sue the acceptor, in such a case as this, after having himself discharged the bill, still he ought to have notice, that he might immediately take it up for the purpose of proceeding against the acceptor. The reasoning of Lord Chief Justice EYRE, to be perfectly consistent with itself, and with the principles laid down in previous decisions, would seem to be predicated on an understanding on the part of the drawer, when the bill was drawn, that it was not to be paid by the acceptor; or on the idea that a bill drawn without funds, is not a commercial transaction, and not subject to commercial rules. The presumptions are rendered the stronger from the cases afterwards stated, in which a drawer without funds in the hands of his drawee would still be entitled to notice. These are "acceptances on the faith of consignments from the drawer, not come to hand," and "acceptances on the ground of fair mercantile agreement;" to which, he says, may possibly be added many others. If the exception admits of these exceptions and of many others, it would be difficult to apply it to any case of a fair transaction, where the drawer had really a right to draw, unless it be supposed not to be governed by the law-merchant.

The judge next proceeds to describe the case in which notice is not requisite. He says, "where the drawer has no effects, and has no fair pretence for drawing, or where he draws without effects intended to be applied
*160] in payment, and only *for the purpose of raising money by discount for himself, and, *à fortiori*, for the acceptor, it is fairly deducible from the cases, that notice need not be given." It is not only necessary that the drawer should have no effects, but also that he should have no fair pretence for drawing. Now, he may have a fair pretence, as in the case of a "fair mercantile agreement," without having any funds in the hands of the drawee, which notice of non-acceptance of the bill might enable him to withdraw; and yet, in such case, it would appear, from the language of the court, that notice could not be dispensed with. "Where he draws only for the purpose of raising money by discount for himself, and, *à fortiori*, for the acceptor," notice need not be given. Where he draws solely for the purpose of raising money by discount for himself, he expects to pay the bill, and there is no person to whom he can resort for repayment. There is no person on whom he can have a legal or an equitable demand, in consequence of the non-payment of the bill. But how can the same reasoning be said to apply, *à fortiori*, to the case of the bill being drawn for the use of the acceptor? In such case, the relative situation of the parties must be substantially the same, as if the money raised on the bill for the acceptor were funds of the drawer in his hands, on which the bill was drawn. Every motive for requiring notice of non-payment, in the case of a bill drawn upon funds, except that which results from a right to claim those funds by a suit, would apply to a bill drawn to raise money for the acceptor, unless it was understood at the time, that the acceptor was not to pay the bill.

The case of *Walwyn* v. *St. Quintin*, then, can only be supported on the idea of an understanding that the drawee was not to pay the bill, or that a bill, drawn, not in the usual course of business, is a transaction to which
*161] commercial rules do not apply. *In the case of *Whitfield* v. *Savage* (2 Bos. & Pul. 277), the drawer had funds in the hands of the acceptor, and the decision turned upon that point.

The reasoning on the cases of protested bills has been gone into the more at large, because it has been considered as applicable to promissory notes indorsed under the statute of Anne, which is admitted to be in force in Maryland. The indorser has been considered as the drawer, and the maker of the note as the acceptor; and in all cases of an indorsement for accommodation, the indorser is likened to a drawer without funds in the hands of the acceptor.

Where the money raised upon the note is received by the indorser, so that the note is discounted, in truth, for his accommodation, not for that of the maker, he is, unquestionably, without funds in the hands of the acceptor, must expect to pay the note himself, and cannot require notice of its non-payment by the maker. But the same reasons do not appear to exist, where the note has been discounted for the maker. In that case, the funds which represent the note are in the hands of the maker, or, to use the language applicable to bills, in the hands of the acceptor, before the draft becomes payable; the drawer had a right to draw, and had a right to expect that his bill would be paid. Upon principles of reason and of justice, then, it would seem, that notice of non-payment could be as little dispensed with in this case, as if he had himself paid the money to the maker of the note, and then received it from the bank, or as if the note had been given him for a previous debt, and had been discounted for his own use.

Notice of non-payment by the maker is necessary, because the undertaking of the indorser is conditional, and wherever, in fact, the transaction is such, that the maker of the note ought, in justice, to pay it, and is bound ultimately to make it good, it would seem reasonable, that payment should be demanded from him, and that reasonable notice of non-payment should be given to the indorser.

*If, however, the course of decisions be otherwise, the indorser of a note for the accommodation of the maker must come within the exception which dispenses with notice in his case. The cases which have been adjudged in England on promissory notes, are anterior, in point of time, to the cases of *Walwyn* v. *St. Quintin*, and of *Whitfield* v. *Savage*. The first which has been cited is *De Berdt* v. *Atkinson*. This note was indorsed for the accommodation of the maker, the indorser well knowing at the time that the maker was insolvent. Four judges who tried the cause were unanimously of opinion, that want of notice did not discharge the indorser. The opinion of the Chief Justice was founded on the known insolvency of the maker, and the consequent impossibility that loss could be sustained by the indorser from want of notice. The opinion of Justice Buller was founded on the circumstance that the note was indorsed for the accommodation of the drawer. He states explicitly, that the general rule is only applicable to fair transactions, and by fair transactions he means "bills or notes given for value in the ordinary course of trade." Justices Heath and Rooke accorded in the decision, but whether for the reasons assigned by the Chief Justice, or for those assigned by Justice Buller, or for both, does not appear. [*162

The same point came on to be considered in the case of *Nicholson* v. *Gouthit*. This was a strong case, because the indorsement was made in consequence of a previous engagement on the part of the indorser to guaranty the payment of a debt due from the maker of the note, who appears,

from the transaction, to have been in bad circumstances at the time, and who became insolvent before the note was payable. From his connection with the maker, and from other circumstances, the indorser must have *163] known that the maker would not pay the note, and it was the *understanding of all parties that it should be paid by the indorser. The justice of the case was said to be clearly in favor of the plaintiff, and under an impression that the want of notice in this case could not injure the plaintiff, the Lord Chief Justice had, at the trial, instructed the jury, that it was unnecessary, and indeed, that it might be considered as received by anticipation. In this case, the note was not made merely to raise money, but was made to pay a debt. The indorser, however, gave no value for it, and if likened to the drawer of a bill of exchange, he had drawn without funds in the hands of the acceptor, and with a knowledge that the acceptor would not pay the bill.

But in the argument in favor of a new trial, the counsel contended, that the law upon a promissory note was differentt, in this respect, from the law on a bill of exchange, and though notice of the dishonor of a bill drawn, without funds in the hands of the drawee, need not be given, yet the rule in the case of promissory notes is totally different, and notice must in all cases be given to the indorser. In delivering the opinion of the court, Lord Chief Justice Eyre assented to this distinction, and admitted the rule with respect to notice to the indorser to be as stated. He, therefore, reversed his own decision at *Nisi Prius*, and granted a new trial upon the strict law, contrary to his ideas of the justice of the case. Heath and Rooke concurred in this opinion. Buller was not present, and, reasoning from his opinion in the case of *De Berdt* v. *Atkinson*, it is probable, he would not have concurred in the decision of this case.

However, then, the law may be, with regard to the drawer of a bill of exchange, who, from other circumstances, may fairly draw, but who has no effects in the hands of the drawer, it seems settled in England, by the case of *Nicholson* v. *Gouthit*, that the law with regard to a promissory note is *164] different, and that, if in *any case where the note is made for the benefit of the maker, notice to the indorser can be dispensed with, it is only in the case of an insolvency, known at the time of indorsement. In point of reason, justice, and the nature of the undertaking, there is no case in which the indorser is better entitled to demand strict notice, than in the case of an indorsement for accommodation, the maker having received the value.

This court is of opinion, that the circuit court erred in directing the jury, that the *laches* of the plaintiffs, in failing to demand payment of the maker of the note, and to give notice of non-payment to the indorser, did not deprive the plaintiffs of their remedy against the indorser, and therefore, the judgment rendered in this case is reversed, and the cause remanded for further trial. A new trial, with instructions, &c.

Judgment reversed.