*Bank of Columbia, for the use of the Bank of the United States, v. John Lawrence.

Promissory notes.—Notice of non-payment.—Question of due dilgence. Notice by mail.

A promissory note was made at Georgetown, payable at the Bank of Columbia, in that town; the defendant, the indorser of the note, living in the county of Alexandria, within the district of Columbia, and having, what was alleged to be, a place of business in the city of Washington; and the notice of the non-payment of the note, inclosed in a letter, and subscribed with his name, was put into the post-office, at Georgetown, addressed to him at that place: *Held*, that this notice was sufficient.[1] p. 582.

In cases where the party entitled to notice resides in the country, unless notice sent by the mail is sufficient, a special messenger must be employed for the purpose of sending it; but this case is not one which required such a duty. p. 582.

If the defendant had a place of business in the city of Washington, and the notice served there would be good, yet it by no means follows, that service at his place of residence in another place, would not be equally good; parties may be, and frequently are, so situated, that notice may well be given at either of several places. p. 582.

That is not properly a place of business, in the commercial understanding of the term, which has no public notoriety as such, no open or public business carried on at it, by the party, but only occasional employment by him there, two or three times a week, in a house occupied by another person, the party being only engaged in settling up his old business. p. 582.

The general rule is, that the party whose duty it is to give notice of the dishonor of a bill or note, is bound to use due diligence in communicating the same; but it is not required of him to see that the notice is brought home to the party; he may employ the usual and ordinary modes of conveyance; and whether the notice reaches the party or not, the holder has done all that the law requires of him. p. 582.

It seems to be well settled, that when the facts are ascertained and undisputed, what shall constitute due diligence is a question of law.[2] p. 583.

The rules relative to diligence ought to be reasonable, and founded in general convenience, and with a view to clog, as little as possible, consistently with the safety of the parties, the circulation of paper of this description. p. 583.

When a person has a dwelling-house, and a counting-room, in the same city or town, a notice sent to either place is sufficient; if parties live in different post-towns, notice through the post-office is sufficient. Notice to a party living at another place than the holder, sent by mail to the nearest post-office, is good, under common circumstances, and in such cases, where notice is sent by mail, it is distance alone, or the usual course of receiving letters, which must determine the sufficiency of the notice. p. 583.

Some countenance has lately been given in England, to the practice of sending a notice by a special messenger, in extraordinary cases, by allowing the holder to recover of the indorser the expenses of serving the notice in this manner. The holder is not bound to use the mail, for purpose of sending the notice; he *may* employ a special messenger, if he pleases, but it has not been decided that he *must*; to compel the holder to the expense of a special messenger, would be unreasonable. p. 584.

Bank of Columbia *v.* Lawrence, 2 Cr. C. C. 510, reversed.

*Error to the Circuit Court of the United States for the District of Columbia, county of Washington. [*579

The plaintiffs in error instituted a suit on a promissory note, against the defendant in error, who was the indorser thereof, and which was discounted at the Bank of Columbia, and protested for non-payment. The note was

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[1] See Jones *v.* Lewis, 8 W. & S. 14; Browning *v.* Armstrong, 9 Phila. 59; Spalding *v.* Krutz, 1 Dill. 414. The sufficiency of the notice in this case appears to depend on the fact that the post-office at Georgetown was the one at which the indorser usually received his letters.

[2] Bank of Alexandria *v.* Swann, 9 Pet. 33; Rhett *v.* Poe, 2 How. 457; Harris *v.* Robinson, 4 Id. 336.

dated at Georgetown, where the banking-house of the plaintiffs at that time was located, and was payable at the Bank of Columbia. The evidence on the part of the plaintiffs established all the facts relative to the note, which were proper to be proved, except the notice of the non-payment to the defendant, the indorser; and the bill of exceptions tendered by the plaintiff presented the evidence at length, upon which the question arose, whether due notice of the dishonor of the note had been given, and due diligence had been used by the plaintiffs to convey such notice to the defendants. The opinion of the court, as delivered by Mr. Justice THOMPSON, contains a full exhibition of all the evidence, from which the conclusions of the court were drawn.

The case was argued by *Key* and *Dunlop*, for the plaintiffs; and by *Jones* and *Taylor*, for the defendant.

For the *plaintiff*, it was urged, that the distance of the actual residence of the defendant from Georgetown, created a difficulty in giving him a personal notice; and it is not incumbent on the holder of a note to follow the indorser, or to resort to other than the ordinary modes of conveyance; the post-office has always been deemed this mode, and it was the usage of this bank, as well as of all other banks in the District of Columbia, to proceed in this manner. It was claimed, that the defendant knew of this usage. This usage, therefore, became a part of the contract; and that an agreement to comply with the usage is binding, has been decided at the present session of this court, in *Brent's Executors* v. *Bank of the Metropolis* (*ante*, p. 89), *Renner* v. *Bank of Columbia*, 9 Wheat. 590; *Mills* v. *Bank of the United States*, 11 Ibid. 431. These cases show that a departure from the general law relative to a demand of payment, when according to established custom, was sustained.

The evidence showing that the defendant transacted business at his former residence in Washington, does not establish that as his established place of business, and if it did, the bank was not obliged to give a notice there, as it was not in the place where the note was dated, and where the note was payable. Objections of equal, perhaps, of greater validity, would have been made, had any other mode been employed; and therefore, the notice through the post-office, which gave the opportunity to find it where the defendant was accustomed to receive his letters, was the most proper.

*580] The reasonableness of notice is a *question to be decided by the court; the time of giving notice and the place where, are questions of law. *Tindal* v. *Brown*, 1 T. R. 167; Chitty on Bills 292. Where the holder and indorser reside in the same town, the rule is, that the notice must be personal, or left at the indorser's residence, or place of business. When the indorser's residence or place of business is in a different town, the holder is not bound to follow him there, but may give notice through the post-office. Chitty on Bills 288; *Ireland* v. *Kipp*, 10 Johns. 490; *Same* v. *Same*, 11 Ibid. 231.

What constitutes a place of business, is a question of law, although the facts in reference thereto may be for the decision of the jury, and in this case, the court below had the right to say, and should have said, the evidence was not sufficient, supposing it uncontradicted, to make the house of

the former residence of the defendant his place of business. Chitty on Bills 285–86 ; *Bank of Utica* v. *Smith*, 18 Johns. 230 ; *Reid* v. *Payne*, 16 Ibid. 218.

Jones and *Taylor*, for the defendant.—The claim to maintain the rights of the plaintiffs, by showing a usage relative to notice of the dishonor of notes or bills may, if it shall be admitted, establish a principle of great danger in reference to the subject matter. The usage will operate in favor of an indorser, who, by residence or other circumstances, may be supposed to be acquainted with it, and another, a distant indorser, will not be within its influence. A waiver of the regular mode of giving notice of the dishonor of a bill cannot be implied, it must be proved to have been expressly declared. Chitty 308.

2. The notice should have been sent to the place of the defendant's business, and this was in Washington ; and the holder of a bill must adopt the usual means to convey or give the notice. 11 Johns. 490. The nearest post-office may not always be the proper post-office ; as cases may exist, in which, for convenience, a party is in the practice of going to and using a more distant post-office. 10 Johns. 411. Nor is a post-office the proper place to leave a notice not intended to be conveyed from it ; as post-offices are places from which letters are to be forwarded, and it is not their duty to receive, nor are they responsible for letters which are to be left in them.

The expense of sending a special messenger is to be paid by the party to whom he is sent, and as the defendant was not a resident of Georgetown, such a messenger should have been employed to give the notice. Chitty on Bills 276, 278.

Thompson, Justice, delivered the opinion of the court.—This case comes before the court upon a writ of error to the circuit court of the district of Columbia. *The defendant was sued as indorser of a promissory note for $5000, made by Joseph Mulligan, bearing date the 15th of [*581 July 1819, and payable sixty days after date, at the Bank of Columbia. The making and indorsing the note, and the demand of payment, were duly proved ; and the only question upon the trial was, touching the manner in which notice of non-payment was given to the indorser ; no objection being made to the sufficiency of the notice in point of time.

The material facts before the court, upon this part of the case, as shown by the bill of exceptions were : That the banking-house of the plaintiffs was in Georgetown, at which place the note appears to be dated ; that some time before the note fell due, the defendant had lived in the city of Washington, and carried on the business of a morocco leather-dresser, keeping a shop, and living in a house of his own, in the said city ; that about the year 1818, he sold his shop and stock in trade, and relinquished his business, and removed with his family to a farm, in Alexandria county, within the district of Columbia, and about two or three miles from Georgetown ; that the Georgetown post-office was the nearest post-office to his place of residence, and the one at which he usually received his letters. The notice of non-payment was put into the post-office at Georgetown, addressed to the defendant at that place. It was proved, on the part of the defendant, that at the time of his removal into the country, and from that time until after the note in

question fell due, he continued to be the owner of the house in Washington where he formerly lived; and which was occupied by his sister-in-law, Mrs. Harbaugh. That he came, frequently and regularly, every week, and as often as two and three times a week, to his house; where he was employed in winding up his former business and settling his accounts, and where he kept his books of account, and where his bank notices, such as were usually served by the runner of the bank on parties who were to pay notes, were sometimes left, and sometimes at a shop opposite to his house; and where also his newspapers and foreign letters were left. That his coming to town and so employing himself, was generally known to persons having business with him; tnat his residence in the country was known to the cashier of the bank; that there was a regular daily mail from Georgetown to the city of Washington, and that the defendant's house was situated in Washington, less than a quarter of a mile from Georgetown.

There was also some evidence given, on the part of the plaintiffs, tending to show that the usage of the bank in serving notices in similar cases, was conformably to the one here pursued, and that the defendant was apprised of such usage. But *that testimony may be laid out of *582] view; as this court does not found its opinion in any measure upon that part of the case. Upon this evidence, the plaintiffs prayed the court to instruct the jury, that it was not incumbent on them to have left the notice of the non-payment of the note at the house occupied by Mrs. Harbaugh, as stated in the evidence; but that it was sufficient, under the circumstances stated, to leave the notice at the post-office in Georgetown; which instructions the court refused to give, but instructed the jury, that their verdict must be governed according to their opinion and finding on the subject of usage which had been given in evidence. The jury found a verdict for the defendant.

From this statement of the case, it appears, that the note was made at Georgetown, payable at the Bank of Columbia, in that town. That the defendant, when he indorsed the note, lived in the county of Alexandria, within the district of Columbia, and having what is alleged to have been a place of business, in the city of Washington; and the notice of non-payment was put into the Georgetown post-office, addressed to the defendant at that place, by which it is understood, that the notice was either inclosed in a letter, or the notice itself, sealed and subscribed with the name of the defendant, with the direction "Georgetown" upon it; and whether this notice is sufficient, is the question to be decided.

If it should be admitted, that the defendant had what is usually called a place of business, in the city of Washington, and that notice served there would have been good; it by no means follows, that service at his place of residence, in a different place, would not be equally good. Parties may be, and frequently are, so situated, that notice may well be given at either of several places. But the evidence does not show that the defendant had a place of business in the city of Washington, according to the usual commercial understanding of a place of business. There was no public notoriety of any description given to it as such. No open or public business of any kind carried on, but merely occasional employment there, two or three times a week, in a house occupied by another person; and the defendant only engaged in settling up his old business. In this view of the case, the inquiry

is narrowed down to the single point, whether notice through the post-office at Georgetown was good; the defendant residing in the country, two or three miles distant from that place, in the county of Alexandria.

The general rule is, that the party whose duty it is to give notice in such cases, is bound to use due diligence in communicating such notice. But it is not required of him, to see that the notice is brought home to the party. He may employ the *usual and ordinary mode of conveyance, and whether the notice reaches the party or not, the holder has done all [*583 that the law requires of him.

It seems at this day to be well settled, that when the facts are ascertained and undisputed, what shall constitute due diligence is a question of law. This is certainly best calculated to have fixed or uniform rules on the subject, and is highly important for the safety of holders of commercial paper. And these rules ought to be reasonable, and founded in general convenience, and with a view to clog, as little as possible, consistently with the safety of parties, the circulation of paper of this description; and the rules which have been settled on this subject have had in view these objects. Thus, when a party entitled to notice, has, in the same city or town, a dwelling-house and counting-house or place of business, within the compact part of such city or town, a notice delivered at either place is sufficient, and if his dwelling and place of business be within the district of a letter-carrier, a letter containing such notice, addressed to the party and left at the post-office, would also be sufficient. All these are usual and ordinary modes of communication, and such as afford reasonable ground for presuming that the notice will be brought home to the party, without unreasonable delay. So, when the holder and indorser live in different post-towns, notice sent by the mail is sufficient, whether it reaches the indorser or not. And this, for the same reason, that the mail being a usual channel of communication, notice sent by it, is evidence of due diligence. And for the sake of general convenience, it has been found necessary to enlarge this rule. And it is accordingly held, that when the party to be affected by the notice, resides in a different place from the holder, the notice may be sent by the mail to the post-office nearest to the party entitled to such notice. It has not been thought advisable, nor is it believed that it would comport with practical convenience, to fix any precise distance from the post-office, within which the party must reside, in order to make this a good service of the notice. Nor would we be understood, as laying it down as a universal rule, that the notice must be sent to the post-office nearest to the residence of the party to whom it is addressed. If he was in the habit of receiving his letters through a more distant post-office, and that circumstance was known to the holder, or party giving the notice, that might be the more proper channel of communication, because he would be most likely to receive it in that way; and it would be the ordinary mode of communicating information to him, and therefore, evidence of due diligence.

In cases of this description, where notice is sent by mail to a party living in the country, it is distance alone, or the usual *course of receiving [*584 letters, which must determine the sufficiency of the notice. The residence of the defendant, therefore, being in the county of Alexandria, cannot affect the question. It was in proof, that the post-office in Georgetown was the one nearest to his residence, and only two or three miles distant, and

through which he usually received his letters. The letter containing the notice, it is true, was directed to him at Georgetown. But there is nothing showing that this occasioned any mistake or misapprehension with respect to the person intended, or any delay in receiving the notice. And as the letter was there, to be delivered to the defendant, and not to be forwarded to any other post-office, the address was unimportant, and could mislead no one. No cases have fallen under the notice of the court, which have suggested any limits to the distance from the post-office, within which a party must reside, in order to make the service of the notice in this manner good. Cases, however, have occurred, where the distance was much greater, than in the one now before the court, and the notice held sufficient. (16 Johns. 218.)

In cases where the party entitled to notice resides in the country, unless notice sent by mail is sufficient, a special messenger must be employed for the purpose of serving it. And we think, that the present case is clearly one which does not impose upon the plaintiffs such duty. We do not mean to say, no such cases can arise, but they will seldom, if ever, occur, and at all events, such a course ought not to be required of a holder, except under very special circumstances. Some countenance has lately been given to this practice, in England, in extraordinary cases, by allowing the holder to recover of the indorser the expenses of serving notice by a special messenger. The case of *Pearson* v. *Crallan* (2 Smith 404 ; Chitty 222 note) is one of this description. But in that case, the court did not say, that it was necessary to send a special messenger, and it was left to the jury to decide, whether it was done wantonly or not. The holder is not bound to use the mail for the purpose of sending notice ; he may employ a special messenger, if he pleases; but no case has been found, where the English courts have directly decided that he must. To compel the holder to incur such expense, would be unreasonable, and the policy of adopting a rule that will throw such an increased charge upon commercial paper, on the party bound to pay, is at least very questionable. We are accordingly of opinion, that the notice of non-payment was duly served upon the defendant, and that the court erred in refusing so to instruct the jury.

Judgment reversed, and a *venire facias de novo* awarded.

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