

Bank of Alexandria v. Swann.

THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Washington, and was argued by counsel: On consideration whereof, it is adjudged and ordered, that the judgment of the said circuit court in this cause be and the same is hereby affirmed.

*The President, Directors and Company of the BANK of ALEXANDRIA, Plaintiffs in error, v. THOMAS SWANN. [*33

Promissory notes.—Notice of non-payment.

The general rule, as laid down by this court in *Lenox v. Robert*, 2 Wheat. 373, is, that the demand of payment of a promissory note should be made on the last day of grace; and notice of the default of the maker be put into the post-office, early enough to be sent by the mail of the succeeding day.

The note on which the action in this case was brought, having become due at the Bank of Alexandria, where it was made payable, payment of the same was demanded at the bank, before three o'clock on that day; notice of non-payment was put into the post-office on the following day, directed to the indorser, the defendant in error, who resided in Washington; according to the course of the mail from Alexandria to the city of Washington, all letters put into the mail, before half-past six o'clock, p. m., at Alexandria, would leave there some time during the night, and would be deliverable at Washington, the next day, at any time after half-past eight o'clock. The defendant in error contended, that as demand of payment was made before three o'clock, p. m., notice of the non-payment of the note should have been put into the post-office on the same day it was dishonored, early enough to have gone with the mail that evening. The court held, that the law does not require the utmost possible diligence in the holder in giving notice of the dishonor of the note; all that is required is ordinary reasonable diligence; and what shall constitute reasonable diligence ought to be regulated with a view to practical convenience, and the usual course of business.

The law, generally speaking, does not regard the fractions of a day; and although the demand of payment at the bank was required to be made during banking hours, it would be unreasonable, and against what the special verdict finds to have been the usage of the bank at that time, to require notice of non-payment to be sent to the indorser on the same day. This usage of the bank corresponds with the rule of law on the subject.

If the time of sending notice is limited to fractions of a day, it will always come in question, how swiftly notice could be conveyed. The notice sent by the mail, the next day after the dishonor of the note, was in due time.

The law has prescribed no particular form for such notice; the object of it is merely to inform the indorser of the non-payment by the maker, and that he is held liable for the payment thereof.

The note on which the suit was brought was for \$1400, made by H. P., in favor of the defendant in error, and the notice described it as for the sum \$1457; in the margin of the note, was set down in figures \$1457, and the special verdict found, that the note was discounted at the bank, as for a note of \$1457; the defendant in error was not an indorser on any other note drawn by H. P. and discounted at the bank, or placed there for collection. This case falls within the rule laid down by this court in the case of *Mills v. Bank of the United States*, 11 Wheat. 431, that every variance, however immaterial, is not fatal to the notice; it must be such a variance as conveys no sufficient *knowledge to the party of the particular note which has been dishonored. If it does not mislead him, if it conveys to him the real fact, without any doubt, the variance cannot be material, either to guard his rights, or avoid his responsibility. In that case, as in the one now before the court, it appeared, that there was no other note in the bank, indorsed by Mills; and this the court considered a controlling fact, to show that the indorser could not have been misled by the variance in the date of the note, which was the misdescription complained of.¹ [*34

Where it did not appear on the record, that a bond had been given to the clerk of the circuit

¹ See note to *Mills v. United States Bank*, 11 Wheat. 431; also, *United States Bank v. Watter-son*, 4 Cr. C. C. 445.

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court to prosecute the writ of error, the court continued the case to a subsequent day of the term, to ascertain whether a bond had been given.
Bank of Alexandria v. Swann, 4 Cr. C. C. 136, reversed.

ERROR to the Circuit Court of the District of Columbia, and county of Alexandria. This was an action in the circuit court of the county of Alexandria, instituted by plaintiffs in error against the defendant, on a promissory note made by H. Peake, and indorsed by the defendant, payable and negotiable at the bank of Alexandria.

The first count in the declaration set forth the liability of the defendant on a note for \$1400, dated the 23d day of June 1829, and payable in sixty days from the date thereof. The declaration stated, that after the time limited in the note for the payment thereof, viz., on the 25th day of August 1829, the note was shown and presented to the maker, at the bank, and payment requested of the same, which was refused, of which notice was afterwards, on the said 25th day of August, given to the defendant. The second count was for the sum of \$1500, money laid out and expended. The defendant pleaded *non assumpsit*, and on the trial of the issue, the jury found the following special verdict :

"We, of the jury, find, that one Humphrey Peake, on the 14th day of March 1826, obtained, for his own accommodation, a discount at the bank of the plaintiffs, for the sum of \$1457.57, on his note for that amount, indorsed by defendant, on the day and year aforesaid, payable sixty days after date ; that the said discount was regularly continued from that time until the 5th day of February 1828, by new notes of the said Humphrey Peake, for this same sum, indorsed by the defendant, and discounted at the said bank, to take up the preceding notes, the sums discounted on which new notes were regularly so applied ; that on the said 5th day of February 1828, a note of the said Humphrey Peake for \$1457, of that date, payable
*35] sixty days after date, to the defendant, and *by him indorsed, negotiable and payable at the said bank, was there discounted towards taking up a note of the said Humphrey, indorsed by defendant, and discounted as aforesaid, for the sum of \$1457.60, which became due on the said 5th day of February 1828 ; and that the discount so made on the said note of \$1457, on the said 5th of February, was regularly continued by a series of notes of the said Humphrey, indorsed by the defendant, for the said last-mentioned sum, negotiable and payable at said bank, until the 23d of June 1829 ; all which discounts, so made, were applied regularly towards the discharge of the notes before discounted as aforesaid at the said bank. We find, that on the 23d day of June 1829, a note of the said Humphrey Peake, for the sum of \$1457, indorsed and discounted as aforesaid, became due and payable at the said bank ; and that, on the said 23d day of June 1829, the note in the declaration mentioned, was, at the instance of the said Humphrey, discounted at the said bank, as and for a note of \$1457, for the purpose of taking up the note of the said Humphrey, indorsed and discounted as aforesaid, which became due on the said 23d of June ; and that the sum of \$1441.45, the discount so made, was applied towards that purpose ; that, when the said discount was made, the said note was, from reference to the figures in the margin only, mistaken as a note for \$1457. We find, that the body and signature of the said note, dated the 23d day of June, including the date and figures in the margin, are wholly in the handwriting of the

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said Humphrey, and were written by him ; and that the indorsement of the name of the defendant thereon, is in the handwriting of the defendant, and was made by him, for the purpose of having the said note discounted at the said bank, for the object before expressed ; and we find, that the said note and indorsement are in the words and figures following :

“\$1457.

Alexandria, June 23, 1829.

Sixty days after date, I promise to pay to Thomas Swann, Esq., or order, for value received, fourteen hundred dollars, payable and negotiable at the Bank of Alexandria.

HUMPH. PEAKE.”

Indorsed—THO. SWANN.

*“We find, that during the whole period of time before mentioned, that is to say, from the 5th day of February 1828, and from thence to this day, there was no other note of the said Humphrey, indorsed by the said defendant, discounted by the said bank, or in the said bank for collection or otherwise. We find, that the business of the said bank always has been, and yet is, transacted at their banking-house, in the town of Alexandria ; and that the defendant, on the 25th day of August 1829, for a long time before, and ever since, was, and ever has, continued to be, an inhabitant and resident of the city of Washington, in the district of Columbia, distant about seven miles from Alexandria. We find, that during the whole month of August, in the year 1829, the mail from Alexandria to the said city of Washington, and to other towns on the main northern route, was made up, once a day ; that it closed at nine o'clock, P. M., on each day, and that letters for Washington and for the north, put in after half an hour after eight o'clock, P. M., were not, in the general course of proceedings in the post-office at Alexandria, sent by the mail which closed on that day, but were post-marked on the succeeding, and sent by the mail made up on such succeeding day ; and that all letters for Washington and the north, put into the post-office at Alexandria, before half-past eight o'clock, P. M., were post-marked on the day they were so put in, and sent by the mail which closed at nine o'clock, P. M., as before stated ; that the mail for Washington and other northern towns, which was closed at Alexandria, as aforesaid, at nine o'clock, P. M., was sent off from Alexandria, between twelve o'clock at night of the same day, and two o'clock in the morning of the succeeding day ; sometimes, but very rarely, leaving Alexandria before twelve o'clock at night, as aforesaid, and generally leaving that place about two o'clock in the morning of the day succeeding the making up and closing of the mail at Alexandria, as aforesaid.

“We find, that letters from Alexandria to Washington, sent by mail, were, during the period aforesaid, delivered out at Washington at any hour after eight o'clock, A. M., on the day succeeding that on which the mail was closed at Alexandria for that place. We find, that the hours of business at the said Bank of Alexandria, during the winter, have always been from ten o'clock A. M., to three o'clock, P. M., and during the *summer, from nine o'clock, A. M., to three o'clock, P. M. ; after which latter hour, the clerks and officers left the bank, and attended no more to banking business during the day. We find, that it is, and for a long time past, including the year 1829, has been, the usage of the Bank of Alexandria, and other banks in the town, to deliver out to the notary,

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on each day, at three o'clock, all notes and bills discounted by, or to be paid at such banks, which have become due on such day, for demand and protest; and for the notary to return such notes, with the protest for non-payment, to the said bank, on the morning of the succeeding day, soon after the bank opened. We find, that on the 25th day of August, being the third day of grace on the note in the declaration mentioned, it was, by Benjamin C. Ashton, teller of the said bank, and during bank-hours of that day, presented at said bank to James L. McKenna, cashier of the said bank, for payment; that the said McKenna examined the books of the said bank, and found that the said Humphrey Peake had no money or funds there, and stated that fact to the said teller; that neither the said Peake, nor any other person appeared for him at the said bank, to pay the said note; and that before the 28th day of August 1829, the said Peake had failed, and had left the town of Alexandria, where he had before that time resided. We find, that the said note having remained unpaid on the said 25th of August 1829, it was, on the closing of the bank on that day, taken out by the said Benjamin C. Ashton, who was also a notary-public, for protest, and was, on the morning of the 26th of August 1829, returned to the said bank, with the protest, which was drawn up on the said 26th of August 1829; and that the said note, in the said declaration mentioned, remained in the said bank as its property, from the said 23d day of June 1829, until about the 30th of October, in the same year, when it was delivered to their attorney for suit, with the exception only of the time it was in the hands of the said Benjamin C. Ashton, as notary as aforesaid.

"We find, that on the 26th day of August 1829, and long before the closing of the mail of that day, at Alexandria, Benjamin C. Ashton, on behalf of the said bank, put into the post-office at Alexandria a letter written by him, addressed to the defendant, at Washington, intended by the said letter to *give him notice of the non-payment of the said note, *38] which letter was post-marked at the post-office in Alexandria, 'Alexandria, D. C., August 26,' and is in the words and figures following :

'Alexandria, August 26, 1829.

Sir:—A note drawn by Humphrey Peake, for 1457 dollars, dated Alexandria, 23th of June 1829, payable to you, or your order, at the Bank of Alexandria, sixty days after its date, by you indorsed, and for payment of which you are held liable, is protested for non-payment, at the request of the President, Directors & Co. of the said bank.

Respectfully, your obedient servant,

BENJ. C. ASHTON, Not. Pub.

THOMAS SWANN, Esq., Washington City.'

"Which letter was received by the defendant, in due course of mail, on the 27th day of August 1829. We find the protest, before referred to, in the words and figures following :

'\$1457.

Alexandria, June 23, 1829.

Sixty days after date, I promise to pay to Thomas Swann, Esq., or order, for value received, fourteen hundred dollars, payable and negotiable at the Bank of Alexandria.

HUMPH. PEAKE.

Indorsed—THO. SWANN.'

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'United States of America, District of Columbia, county of Alexandria, to wit: On the 25th day of August, in the year of our Lord 1829, at the request of the President, Directors and Company of the Bank of Alexandria, I, Benjamin C. Ashton, public-notary in and for the county of Alexandria, by lawful authority duly appointed and qualified, dwelling in Alexandria, in the county and district aforesaid, demanded payment of a note, of which the above is a copy, of the cashier of the Bank of Alexandria, at the said bank, and he answered, that no funds were there for its payment; and on the 26th day of the same month, I *gave notice to the indorser, by mail, that the drawer of the said note had failed to pay it. Where- [39 upon, I, the said notary, at the request aforesaid, did protest, and by these presents do publicly and solemnly protest, as well against the drawer and indorser of the said note, as against all others whom it doth or may concern, for exchange, re-exchange, and all costs, charges and interest already incurred, or to be hereafter incurred, for the want of payment thereof. In testimony whereof, I have hereunto set my hand, and affixed my seal notarial, the day and year aforesaid.

[L. s.]

BENJ. C. ASHTON, Notary Public.

Protesting—\$1.75.'

"We find, that no part of the said sum of \$1400, of the note in the declaration mentioned, has been paid. We find, that the said Bank of Alexandria kept a book called an offering-book, in which the different sums and notes offered for discount were entered; and that this book was always laid before the board of directors, on the discount days in the bank, and the discounts agreed to be made by the board regularly entered in the said discount book. We find, that the 23d day of June 1829, was one of the regular discount days in the said bank; and on that day, the said book was laid before the board of directors, and, among the other entries made for discount on that day, was one in the following words and figures: 'Humphrey Peake, Thomas Swann, Humph. Peake. June 23, August 22, 1457, 15.54, 1441.46.'

"We find, that the said entry was intended to mean that the said Humphrey Peake, had offered for discount his note for \$1457, indorsed by the said defendant, and payable sixty days thereafter. We find, that no note for \$1457, drawn by the said Humphrey Peake, and indorsed by the said defendant, had been offered for discount to the said bank, on the said 23d of June 1829; but that the note in the declaration mentioned, was, on that day, offered to the said bank for discount, and for the purpose of renewing for that amount the note of \$1457, then due at the said bank. We find, that no note for \$1400, drawn by the said H. Peake, and *indorsed [40 by the said defendant, was ever entered on the books of the said bank for discount; nor is there any entry made upon the books of the said bank, that any such note had ever been discounted by the said bank. We find, that, upon the offering for \$1457, before stated, the board of directors agreed to make a discount for that sum, and the same was entered in the discount book, as discounted, and the proceeds carried to the credit of the said Humphrey Peake. We find, that the said discount was intended by the board as a renewal of the note of \$1457, then due to the said bank; and that the note in the declaration mentioned, was intended to be designated in

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the offering book, by the said description of a note drawn by the said Peake, and indorsed by the defendant as a note for \$1457.

"If, on the whole matter aforesaid, the law be for the plaintiffs, then we find for the plaintiffs, and assess their damages to the sum of \$1400, being the principal sum due, to bear interest from the 26th day of August 1829, till paid; and if the law be for the defendant, then we find for the defendant."

Upon this verdict, the circuit court gave judgment for the defendant, and the plaintiffs prosecuted a writ of error to this court.

Swann objected to the plaintiffs' proceeding in this case, as it did not appear on the record from the circuit court, that a bond had been given to the clerk of that court to prosecute this writ of error. The court continued the case to enable the parties to ascertain, by a reference to the clerk of the circuit court, if a bond had been given. On the subsequent day of the term, a certified copy of the appeal bond was filed in this court, and the argument in this case proceeded.

Jones, for the plaintiff in error.—The first objection is to the notice of protest, that it was not expedited by the notary from Alexandria in due time. The facts were, that the last day of grace expired on the 25th of August, and at the closing of the bank, on that day, at three o'clock, P. M., the note, after having been duly presented and demanded at the bank, was given out to the notary *for protest, was duly protested the same *41] day, and on the next, at the opening of the bank, at nine o'clock, A. M., was returned by the notary into bank, under protest; and by the regular mail of the same day (26th of August), the notice in question was sent to the indorser in Washington. The bank, as usual, remained closed, without having any of its officers present, or any business transacted there, from three o'clock, P. M., on the 25th, to nine o'clock, A. M., on the 26th. The daily mail, from Alexandria to Washington, was closed at half-past eight o'clock, P. M., was sent on the same evening, and opened next morning at eight o'clock. And the precise objection is, that the notice was not expedited by the mail that closed at half-past eight o'clock, P. M., the same day the note fell due and was protested.

It is considered to have been fully settled as the law, and this is the known custom with all the banks in the district of Columbia, that notice of the dishonor of a note shall be given the day after the dishonor of a note. On the strict principles of the common law, the notice could not be sent until the following day; as, according to those principles, the party to the note had the whole of the day on which it became due to pay it. The cases to show that the notice to the indorser is properly sent on the day following the non-payment, are in *Chitty on Bills* 225, 303; *Lenox v. Roberts*, 2 Wheat. 373.

The second objection goes to the certainty of the letter of notice, addressed by the notary to the indorser; which, it is said, gave a wrong description of the note, as being one for \$1457, instead of \$1400; the latter sum being that inserted in the body of the note. In point of fact, it is found, that \$1457 was the true and proper amount for which the note ought to have been drawn, and was intended to have been drawn, and that was the amount set down in figures on the margin of the note; but by a mistake

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committed by the maker himself, in writing out the note, and overlooked by the officers of the bank, when it passed for discount (and in fact discovered for the first time when the objection was taken at the trial), the sum was written "fourteen hundred, omitting the fifty-seven," in the body of the note. The original discount, commencing in March 1826, *had been [*42 of a note for \$1457.60, and ran on, by renewals of the note, every sixty days, for the same amount, till February, 1828; when it was renewed and continued for the precise amount of \$1457, and so ran to the time of putting in the note now in question; which was discounted in June 1829, as a renewal and continuation of the same standing accommodation, and "as and for a note of \$1457;" which was the precise amount of the next preceding note replaced and taken up by it. The verdict expressly finds that no note made by Peake and indorsed by the defendant, as a note for \$1400, was ever discounted, or offered for discount, at the said bank; but that all the entries in the books of the bank import the discount on the 23d day of June 1829, when this note was discounted, as a note so made and indorsed, for \$1457, and for no other sum.

The object of the law is, that the party to the note, who is to be held responsible, shall have substantially a notice of its dishonor—sufficient notice to enable him to act for his own protection. This was done. The letter from the notary accurately described the note which the defendant supposed he had indorsed, with the exception of the amount of the same. The parties to the note supposed it to have been given for \$1457, as it was intended to renew a note due at the bank for that sum. He cited *Mills v. Bank of the United States*, 11 Wheat. 431, to show that no form of notice to the indorser of a promissory note is required, if the party has, from the notice given, sufficient knowledge of the particular note which has been dishonored.

As to the form of the declaration, it was contended for the plaintiffs in error, that it is not necessary to state anything but that a demand and refusal took place; no particulars of the demand need be stated. *Chitty on Bills* 248, 252; 3 *Wend.* 456; 8 *Cow.* 424.

Core and *Swann*, for the defendant.—If the case was one of a demurrer to the evidence, the court could infer everything against the party demurring; but it is that of a special verdict, and no other than the facts found can be considered by the court. The jury do not say that, substantially, notice was given; but that the notary intended to *give notice. The [*43 case of *Mills v. Bank of the United States*, does not therefore apply. They cited also, 2 *Johns. Cas.* 337. Upon the insufficiency of the notice, as found in the special verdict, they cited, 1 *T. R.* 167; 6 *East* 3; 12 *Mass.* 404; 14 *Ibid.* 116; 5 *Cow.* 303.

I. To sustain this action, the bank must show that they were entitled to this note. It is said, they discounted it, and therefore, it belonged to them. Was it discounted? The finding upon this question is contradictory. The note for \$1400 was never offered for discount, and acted upon by the board. The offer for discount was for \$1457, and that was granted. There was no action of the board upon any note, after this. The officers of the bank kept the note for \$1400, and considered that as the discounted note. Had they a right to do so? It was, to be sure, a benefit to the indorser; but

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was it in the power of the officers to do it? Would the bank be bound by it? If they could take a note for \$1400, they might for \$100. If the bank had a right to reject this note, the indorser had the same right to do so. If so, it was not a discounted note; and the bank had no right to it.

II. If it was a discounted note, the next inquiry would be, whether the notice of protest was properly given?

1. Was the note truly described? If not, then it became necessary to satisfy a jury, that it was intended to be truly described, and that it was known by the indorser to be the same note. 12 Mass. 6; 2 Johns. Cas. 337. The question whether the indorser knew that the note alluded to in the notice was the same with that produced in evidence, was left to the jury. The court say, in the case in Johnson, that it was a fact proper for the decision of the jury. In this case, the jury have not found this fact. They say, that the notary intended to refer to the note in question; but they do not say, that the indorser knew that the notice alluded to the same note. The knowledge of the indorser is the most material fact. The intention of the notary is of no moment; and in this case, it is clear, that he never intended to allude to a note of \$1400. *The verdict then has
*44] not found what was necessary to make this good notice. Can the court intend it? Can the court say that the indorser knew that this notice alluded to the note of \$1400? This was decided in both the above cases to be a question for the jury, and not the court.

2. Was the notice given in time? The court will look at the facts found by the jury. If the indorser had lived in Alexander, he would have been entitled to notice that evening. If so, was he not entitled to have the notice put into the post-office that evening? In the case of the *Bank of the United States v. Carneal*, 2 Pet. 551, the court say, it is difficult to lay down any universal rule as to what is due diligence in respect to notice to indorsers. Many cases must be decided upon their own particular circumstances, however desirable it may be, when practicable, to lay down a general rule. In *Lenox v. Roberts*, 2 Wheat. 373, the court say, that the demand should be made on the last day of grace, and the notice of default put into the post-office early enough to be sent by the mail of the succeeding day. This opinion was founded upon the special facts of that case. What would be the next mail in this case? This notice, then, upon these grounds seems to be defective. Upon this view of the case, judgment cannot be rendered for the bank.

Now, let us look at the declaration. It counts upon a note, negotiable and payable at the Bank of Alexandria, on the 25th day of August. To charge an indorser upon such a note, a demand must be made at the Bank of Alexandria, on the day of payment, within the banking-hours. 2 Pet. 549. The declaration then must state a demand, at the time limited for the payment. The demand by a holder may be made at any time within the banking-hours. If the bank possesses the paper, this demand will be considered to have been made, by showing that the paper was there; so that a demand, or that which amounts to a demand, must be shown in the declaration. How then does this declaration stand? The demand is alleged to have been made at the bank, upon Peake, after the expiration of the time of payment. It may have been at four, six, eight or ten o'clock.
*45] *Of what avail is a demand upon Peake anywhere? Of what avail

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is a demand at the bank, after the banking-hours? The declaration then is defective, and the defect not cured by the verdict. *Slacum v. Pomey*, 6 Cranch 221; *Rushton v. Aspinall*, 2 Doug. 679. But if not defective, the proof does not support it.

THOMPSON, Justice, delivered the opinion of the court.—This suit was brought in the circuit court of the district of Columbia, for the county of Alexandria, upon a promissory note made by Humphrey Peake, and indorsed by the defendant in error. Upon the trial, the jury found a special verdict, upon which the court gave judgment for the defendant, and the case comes here upon a writ of error. The points upon which the decision of the case turns, resolve themselves into two questions. 1. Whether notice of the dishonor of the note was given to the indorser in due time? 2. Whether such notice contained the requisite certainty in the description of the note?

The note bears date on the 23d day of June 1829, and is for the sum of \$1400, payable sixty days after date, at the Bank of Alexandria. The last day of grace expired on the 25th of August, and on that day, the note was duly presented and demand of payment made at the bank, and protested for non-payment; and on the next day, notice thereof was sent by mail to the indorser, who resided in the city of Washington.

The general rule, as laid down by this court in *Lenox v. Roberts*, 2 Wheat. 373, is, that the demand of payment should be made on the last day of grace, and notice of the default of the maker be put into the post-office, early enough to be sent by the mail of the succeeding day. The special verdict in the present case finds, that according to the course of the mail from Alexandria to the city of Washington, all letters put into the mail before half-past eight o'clock, P. M., at Alexandria, would leave there some time during that night, and would be deliverable at Washington the next day, at any time after eight o'clock, A. M.; and it is argued on the part of the defendant in error, that as demand of payment was made before three o'clock, P. M., notice of non-payment of the note should have been put into the post-office on the same day it was dishonored, *early enough to have gone with the mail of that evening. The law does not [*46 require the utmost possible diligence in the holder, in giving notice of the dishonor of the note; all that is required is ordinary, reasonable diligence; and what shall constitute reasonable diligence ought to be regulated with a view to practical convenience, and the usual course of business. In the case of the *Bank of Columbia v. Lawrence*, 1 Pet. 583, it is said by this court, to be well settled at this day, that when the facts are ascertained, and are undisputed, what shall constitute due diligence is a question of law; that this is best calculated for the establishment of fixed and uniform rules on the subject, and is highly important for the safety of holders of commercial paper. The law, generally speaking, does not regard the fractions of a day; and although the demand of payment at the bank was required to be made during banking-hours, it would be unreasonable, and against what the special verdict finds to have been the usage of the bank at that time, to require notice of non-payment to be sent to the indorser on the same day. This usage of the bank corresponds with the rule of law on the subject. If the time of sending the notice is limited to a fractional part of a day, it is well observed by Chief Justice HOSMER, in the case of the *Hartford Bank*

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v. *Stedman*, 3 Conn. 495, that it will always come to a question, how swiftly the notice can be conveyed. We think, therefore, that the notice sent by the mail, the next day after the dishonor of the note, was in due time.

2. The next question is, whether, in the notice sent to the indorser, the dishonored note is described with sufficient certainty. The law has prescribed no particular form for such notice. The object of it is merely to inform the indorser of the non-payment by the maker, and that he is held liable for the payment thereof. The misdescription complained of in this case, is in the amount of the note. The note is for \$1400, and the notice describes it as for the sum of \$1457. In all other respects, the description is correct; and in the margin of the note is set down in figures \$1457, and the special verdict finds that the note in question was discounted at the bank, as and for a note of \$1457; and the question is, whether this *was *47] such a variance or misdescription as might reasonably mislead the indorser as to the note, for payment of which he was held responsible. If the defendant had been an indorser of a number of notes for Humphrey Peake, there might be some plausible grounds for contending, that this variance was calculated to mislead him. But the special verdict finds that from the 5th day of February 1828 (the date of a note for which the one now in question was a renewal), down to the day of the trial of this cause, there was no other note of the said Humphrey Peake, indorsed by the defendant, discounted by the bank, or placed in the bank for collection, or otherwise. There was, therefore, no room for any mistake by the indorser as to the identity of the note. The case falls within the rule laid down by this court in the case of *Mills v. Bank of the United States*, 11 Wheat. 376, that every variance, however immaterial, is not fatal to the notice. It must be such a variance as conveys no sufficient knowledge to the party of the particular note which has been dishonored. If it does not mislead him, if it conveys to him the real fact, without any doubt, the variance cannot be material, either to guard his rights or avoid his responsibility. In that case, as in the one now before the court, it appeared, that there was no other note in the bank, indorsed by Mills; and this the court considered a controlling fact, to show that the indorser could not have been misled by the variance in the date of the note, which was the misdescription then complained of.

The judgment of the circuit court is accordingly reversed, and the cause sent back, with directions to enter judgment for the plaintiffs, upon the special verdict found by the jury.

THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Alexandria, and was argued by counsel: On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby reversed, and that this cause be and the same is hereby sent back to the said circuit court, with directions to that court to enter judgment for the plaintiffs, upon the special verdict found by the jury.