action. It cannot be said, therefore, that the judge has erred in dismissing the *caveat*, as to the part claimed under the pre-emption warrant.

But with respect to so much of the *caveat* as was supported by the survey on the settlement-right, no exception of form, or to the testimony, has been taken, and it ought not, therefore, to have been dismissed, but on the merits. On this point, therefore, there is error in the judgment of the district court, for which it must be reversed.

This cause came on to be heard, on the transcript of the record of the proceedings of the court for the district of Kentucky, and was argued by counsel, on consideration whereof, it seems to the court, that there is error in the judgment of the district court in this, that the *caveat* entered by the plaintiff was entirely dismissed, whereas, it ought to have been decided on its merits, so far as respected that part of the land which was claimed by the plaintiff, under his survey of four hundred acres. It is, therefore, considered *293] by the court, that the said judgment be reversed and annulled; *and that the defendant pay to the plaintiff, his costs. And the cause is remanded for further proceedings.

Buddicum *v.* Kirk.

Deposition.—Payment.—Accord and satisfaction.

Notice of the time and place of taking a deposition, given to the attorney-at-law of the opposite party, is not such notice as is required by the act of assembly of Virginia.[1]

But the attorney-at-law may agree to receive, or to waive notice, and will not afterwards be permitted to allege the want of it.

If notice be given, that a deposition will be taken on the 8th of August, and that if not taken in one day, the commissioners will adjourn from day to day, until it shall be finished; and the commissioners meet on the 8th, and adjourn from day to day until the 12th, and from the 12th to the 19th, when the deposition is taken, such deposition is not taken agreeable to notice.

Upon the plea of payment, to debt on bond, it is competent for the defendant to give in evidence, that wheat was delivered to the plaintiff, on account of the bond, at a certain price; and that the defendant assigned sundry debts to the plaintiff, part of which were collected by the plaintiff, and part lost by his indulgence or negligence.

An assignment of debts, and balances of accounts, cannot be pleaded as an accord and satisfaction, to an action of debt on a bond.

Error to the Circuit Court of the district of Columbia, in an action of debt against the defendant, as heir-at-law of the obligor, on a bond dated the 20th of September 1774, conditioned to pay 994*l.* 3*s.* 5*d.*, Virginia currency, in equal instalments, at six and twelve months from the date of the bond.

The defendant, being an infant, pleaded by Archibald McLain, his guardian. 1. Payment; to which there was a general replication and issue.

2. That after the execution of the bond, viz, on the ——— day of ——— 1784, at, &c., it was accorded and agreed, between the plaintiff and the said James Kirk (the obligor), in his lifetime, that the said James Kirk should assign and make over to the plaintiff, all the balances of money due to the said James Kirk and one Josiah Moffett, arising from a store kept by them in partnership, in the town of Leesburgh, in discharge and satisfaction

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[1] Wheaton *v.* Love, 1 Cr. C. C. 429.

of the said bond; and that the said James Kirk did, afterwards, on the day and year last mentioned, at the town aforesaid, pursuant to the said accord and agreement, assign and make over to the plaintiff, all the aforesaid balances, and the plaintiff did then and there receive the said assignment and transfer of the said balances, in satisfaction for the said bond; and this he is ready to verify, &c. This plea was adjudged bad, on general demurrer.

*3. That after the execution of the said writing obligatory, the plaintiff, by his certain deed of release, with his seal sealed, which [*294 said deed is lost and destroyed by time and accident, did release and discharge the said James, in his lifetime, and his heirs, of and from the payment of the said writing obligatory, that is to say, on the ——— day of ——— , in the year 1784, at the county aforesaid; and this he is ready to verify. To which plea, there was a general replication and issue.

Upon the trial, the jury found both the issues of fact for the defendant, and the plaintiff took two bills of exception.

1. The first stated, that the defendant offered in evidence the deposition of Patrick Cavan, tending to prove that wheat, to the amount of 166*l.* 8*s.* 10*d.*, had been delivered by the obligor to the plaintiff, on account of the bond, and sundry debts due to Kirk & Moffett had been assigned to the plaintiff, in full discharge of the bond; and that the plaintiff had indulged some of the debtors, until the debts were barred by the statute of limitations. That notice was given to the plaintiff's attorney, that the deposition would be taken on the 8th of August 1801, and if not taken in one day, that the commissioners would adjourn from day to day, until it should be finished, and that he agreed that it might be taken on that day, whether he attended or not; but did not assent or object to its being taken on any other day. That the commissioners, to whom the *dedimus* was directed, met on the 8th of August 1801, and adjourned to Monday the 10th, and from the 10th to the 11th, from the 11th to the 12th, and from the 12th to the 19th, when the deposition was taken. That the plaintiff's attorney did not attend on the 8th, or any of the other days, and had no notice of the several adjournments. That the defendant also offered to prove by Archibald McLain, that the plaintiff's attorney, after the deposition was taken, read it, but did not then object *to its being read in evidence; and that the said Patrick Cavan died before the trial. To the reading of this deposition, the [*295 plaintiff objected; but the court suffered it to be read.

2. The 2d bill of exceptions stated, that the plaintiff prayed the court to instruct the jury, that the defendant was not entitled, on the plea of payment, to discount the bonds and notes assigned to the plaintiff, as mentioned in the deposition of Cavan, unless it should appear to the jury that the same had been collected by the plaintiff; which instruction the court refused to give, but directed the jury, that the deposition was competent evidence to be offered in proof of a discount, on the plea of payment.

E. J. Lee, for the plaintiff in error, contended, 1. That the deposition was irregularly taken, inasmuch as a notice to take a deposition on the 8th, is not notice to take it on the 19th; and although notice was given, that if the deposition was not taken on the 8th, the commissioners would adjourn from day to day, yet in this case, they adjourned over from the 12th to the 19th, without giving new notice. Besides, the notice in this case is to the

attorney-at-law, and not to an attorney in fact. If it be said, that an attorney-at-law may bind his client, by an agreement relative to any matter in the proceedings, or trial of a cause, yet, the assent of the attorney only went to the taking the deposition on the 8th of August, and not on any subsequent day.

2. It was not competent for the defendant to prove that assent, by the testimony of Archibald McLain, who was his guardian of record, and answerable for costs.

3. The matter contained in the deposition was not competent evidence, upon either of the issues. It certainly was not evidence of a release under seal; and the assignment would not be a payment, unless it produced the money to the plaintiff. If anything but money is relied upon as satisfaction of a bond, it must be pleaded by way of accord and satisfaction, and not
*296] *as payment. One bond cannot be pleaded in discharge of another, *à fortiori*, cannot an assignment of a bond. *Rhodes* v. *Barnes*, 1 Burr. 9.

Simms, for the defendant.—1. If the plaintiff had not notice of the time of taking the deposition, it was his own fault, or that of his attorney. The attorney, having received and acknowledged notice for the 8th of August, was bound to attend; and if he had attended, he would, of course, have had notice of the adjournment. This want of notice, therefore, is to be attributed to his own negligence. But if the notice was insufficient, the court, under the circumstances of the case, did not err in admitting the deposition. When the plaintiff's attorney read the deposition, he did not object. By his silence, he lulled the defendant into security, at a time when, if the objection had been made, he might have corrected the mistake, by giving new notice, and taking the deposition *de novo*. But instead of that, he concealed his objection, until the deponent was dead, and when he knew that the defendant would totally lose the benefit of his testimony. In such a case, the court will say, that the silence of the attorney, when he read the deposition, was a waiver of the notice.

2. As to the second objection, that Archibald McLain was not a competent witness, because he was the guardian of the defendant. It does not appear upon the record, that the witness was the same Archibald McLain, who was the guardian. And besides, it appears, that before the trial, the defendant himself was of age, and had leave to appear by attorney.

3. As to the objection, that the matter of the deposition was not competent evidence on the issues. The court did not say it was complete proof of payment, but that it was matter proper to be left to the jury, upon the plea of payment, and from which a payment might be inferred.

*297] *March 1st, 1806. MARSHALL, Ch. J., delivered the opinion of the court to the following effect:—This case comes up on two bills of exception, 1st. As to the notice of taking the deposition; and 2d. As to its applicability.

1. As to the notice. There are two modes of taking depositions, under the act of congress. By the first, notice in certain cases is not necessary, but the forms prescribed must be strictly pursued. This deposition is not taken under that part of the act. By a subsequent part of the section, depositions may be taken by *dedimus potestatem*, according to common usage. The laws of Virginia, therefore, are to be referred to on the subject of notice.

Those laws do not authorize notice to an attorney-at-law. The word attorney, in the act of assembly, means attorney in fact. An attorney-at-law is not compellable to receive notice; but he may consent to receive, or he may waive it, and shall not afterwards be permitted to object the want of it. But this deposition was not taken agreeable to the notice received. The commissioners did not adjourn from day to day; but passed over the intermediate time between the 12th and the 19th of August.

This circumstance, however, is not, by the court, deemed fatal, under the particular circumstances of this case, though, without those circumstances, it might, perhaps, be so considered. The agreement that the deposition might be taken, whether the attorney were present or absent; his subsequent examination of the deposition, without objecting to the want of notice, and the death of the witness, were sufficient grounds for the defendant to believe that the objection would be waived.

2. The objection to the competency of McLain is totally unfounded, as it does not appear upon the record *that he was the guardian; and especially, as the defendant became of full age before the trial. [*298

3. The objection to the applicability of the deposition is also void of foundation. For although it was not conclusive evidence, it was still admissible.

The court is, therefore, of opinion, that there is no error in the judgment below.

Judgment affirmed.

Douglass & Mandeville *v.* McAllister.

Charge of the court.—Damages.

The court, upon a jury trial, is bound to give an opinion, if required, upon any point relevant to the issue.

Semble. In estimating damages for the breach of a contract to deliver flour, the jury are to ascertain the value of the flour on the day when the cause of action arose.

McAllister *v.* Douglas, 1 Cr. C. C. 241, affirmed.

Error to the Circuit Court of the district of Columbia, in an action of *assumpsit*, for not delivering flour according to contract.

The transcript of the record contained a bill of exceptions, which stated, that the plaintiff offered in evidence the following writing, addressed by the plaintiff below, to the defendants, the present plaintiffs in error, viz:

"Will you receive my flour on the following terms, viz., whenever a load of flour is delivered, should any cooperage be wanting, you charge it to the wagoner, and deduct it from the carriage. You will credit me with the highest market price, at the time of delivery, and note it on the receipt; and any balance of flour that may remain in your hands, unpaid as it is delivered, you will pay me, when I send for it, or deliver as much flour as is coming to me, at my option. It is understood, that in case the flour is delivered, storage is to be allowed or charged at six pence per barrel.

"Agreed. Given under our hands, Alexandria, April 27th 1803.

(Signed) Douglass & Mandeville.
John McAllister."

*The defendants had received from the plaintiff 408 barrels of flour, under that contract, and the plaintiff made his election, and de- [*299