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.

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## 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

manded the flour of the defendants, on the 14th of October 1803. No final answer was made by the defendants to the demand, until the 19th of November; but the intermediate time was given to them to consider of the demand and make propositions of compromise. No compromise being made, and the flour not being delivered, this action was commenced, on the 21st of the same month. It did not appear, that any answer was given to the plaintiff's demand.

At the trial, the plaintiff offered evidence to the jury of the price of flour on the 19th and 21st days of November, the price being the same on both days, and contended to the jury only for that price. Whereupon, the counsel for the defendants prayed the court to instruct the jury, that in estimating the compensation for the non-delivery of the said flour, they should be governed by the price of that article on the day the plaintiff signified his option, and made his demand under the contract, to have the flour specifically delivered to him; and further prayed the court, in case the aforesaid instruction was not given, to direct the jury by what rule, in point of time, they are to take the price of flour in the estimation of the damages, sustained by the plaintiff, by reason of the breach of the contract. But the court being divided in opinion upon those points (two judges only being present), did not give the instructions as prayed, wherefore, the defendants excepted, &c.

The jury found a verdict for the plaintiff, for $2159.48, upon which judgment was rendered accordingly, and the defendants brought their writ of error. The question before this court was, whether the court below ought to have given the instructions prayed for by the plaintiffs in error.

This question was submitted, without argument, by *Swann*, for the plaintiffs in error, and *E. J. Lee*, for the defendant.

*300] *February 17th, 1806. MARSHALL, Ch. J.—The error complained of is, that the circuit court did not give an opinion on a point proposed. The court was certainly bound to give an opinion, if required, upon any point relevant to the issue.

It appears, from the facts stated, that the cause of action did not accrue until the 19th of November, when the negotiation for a compromise was broken off. A tender of the flour at any time after the 14th, and before the 19th, would have been a compliance with the contract. As the plaintiff claimed no more than the price of the flour on the 19th, and as the refusal of the court to instruct the jury did not alter the verdict, which was for the price on that day, and was for the same amount as if the opinion had been given, there is no error of which the defendants could complain.

Judgment affirmed, with costs.