

1803.

The Commonwealth *versus* Baynton *et al.*

DEBT, on the official bond of *Peter Baynton*, as state treasurer, dated the 11th of *January* 1797, against him, and his sureties, *David Lenox*, *William Hall*, and *Joseph Bullock*. It was admitted, that there was a considerable balance due from *Baynton* to the state; but the defence taken for *his sureties* was on two distinct grounds: 1st. That the treasurer is elected annually; he is required to give bond on every election; and that *his sureties* in the present bond, are only liable for any *deficit*, actually incurred, during the year, commencing in *January* 1797, and ending in *January* 1798. 2d. That by the conduct of the legislature, in frequent subsequent re-appointments of *Baynton*, as treasurer; and by the conduct of the accounting officers, who had the legal examination and controul of his accounts; the *sureties* were virtually discharged. On the *first* point, were cited, *Const. Penn. art. 6. s. 5. 3 vol. State Laws, 221. 2 Ibid. 756. 2 Saund. 411. Styl. 18. Al. 10. Park, 277. Leon. 240. Moor, 126. 274. 2 Vern. 518.* On the *second* point, there was a general reference to the Acts of Assembly, and to the public records, in relation to the state treasurer's accounts, and to the repeated elections of Mr. *Baynton*; and the following authorities were cited: *Co. Litt. 206, 7. 1 Roll. Abr. 457. 463. 2 Vez. jun. 540. 4 Vez. 824. 2 P. Wms. 542. 1 T. Rep. 291. 2 Bous. & Pull. 62. 3 Br. Ch. 1. 3 State Laws, 132. Comb. 464. Vern. 24. 2 Brownl. 107. 12 Mod. 559.*

On the part of *the Commonwealth*, a strict scrutiny was made into the bank deposits and drafts of *Baynton*, to ascertain the period when the deficit arose, and its subsequent fluctuations: And it was contended, 1st. That from the nature and extent of the obligation, the sureties were bound to indemnify the state, unless they could show, that there was an express release; that the recovery was barred by lapse of time; or that a settlement with the principal, had extinguished the claim upon the sureties. 2d. That the indemnity of the bond extended to the general duty of the treasurer, as well as to his fidelity in pecuniary transactions; and as soon as he ceased to make the bank of *Pennsylvania* the depositary of the public money; or as soon as a false estimate of accounts was exhibited; the bond was forfeited. 3d. That from the very nature of the indemnity, its obligation is co-extensive with the continuance of the *person*, in the office; and the only questions are, whether the sureties could so engage? and whether they have so engaged? That on the facts (even supposing the indemnity of the bond to be limited, by an implied connexion with the annual tenure of the office) there was a deficit of inactive public money, at the end of the

the year 1798; not found in the bank, nor accounted for in any public deposit, or application. On these several points, the following authorities were cited: 3 *State Laws*, 132. 4 *Ibid.* 301. 4 *Veaz. j.* 829. *Sayre*, 115. 2 *P. Wms.* 287. 1 *Bous. & Pull.* 419. 422, 3 *State Laws*, 222. s. 9, 10. 2 *State Laws*, 753. s. 6, 7. 6 *State Laws*, 490. 3 *Dall. Rep.* 500. 2 *Saund.* 411. 1 *T. Rep.* 295. 293. *Bunb.* 275. 337. *Hardr.* 424. 3 *Leon.* 240. *Moor*, 126. 274. 2 *Cha. Ca.* 84. *Show.* 216. 1803.

The COURT, in the charge, directed the jury, in point of law, to confine the responsibility of the sureties, to a deficit occurring during the year, ensuing the date of the bond. But if, from the evidence, they were satisfied, that there was a deficit, during that year, they thought, that a verdict should be in favour of the commonwealth for the amount.

Verdict for the defendants. (1)

M. Kean, (attorney-general) and *Dallas* for the commonwealth.
Rawle, for the defendants.

Watson et al. versus The Insurance Company of North America.

THIS was an action on a policy of insurance, in which the declaration was for a total loss. On the trial, it appeared, that the assured had demanded payment of a total loss, which the defendants refused to pay; but there was no evidence of an actual abandonment, or offer to abandon, to the underwriters, before the suit was instituted; and the proof was of a loss in its nature total. The jury gave a verdict, in favour of the plaintiff, finding damages, as for a partial loss; subject to the opinion of the Court, upon a motion for a new trial, to consider two points reserved: 1st. Whether a previous abandonment, or offer to abandon, was indispensably necessary, to enable the plaintiff to recover in this suit? And, 2d. Whether, on a declaration for a total loss, and proof of a loss in its nature total, the jury can give damages for less than a total loss?

After argument by *M. Levy* and *Lewis*, for the plaintiffs; and by *Moylan*, *E. Tilghman*, and *Ingersoll*, for the defendants, the COURT (consisting of SHIPPEN, *Chief Justice*, and YEATES and SMITH, *Justices*) were of opinion, that the jury might find damages for a partial loss; although the declaration claimed for a total loss; and although there was no proof of an actual abandonment, or an offer to abandon, to the underwriters.

(1) It may be proper to observe, that Mr. *Baynton* did not appear, nor take defence, in this suit: the proceedings to recover from him having been instituted on the settlement of the comptroller.

But