

The defendant bank denied liability, and claimed over against the Canadian Surety Company, made a third party, upon an indemnity bond issued by the third party.

The action and the claim against the third party were tried without a jury at Hamilton.

G. Lynch-Staunton, K.C., and C. W. Bell, for the plaintiff company.

W. B. Raymond, for the defendant bank.

A. E. Knox, for the third party.

CLUTE, J., in a written judgment, said that on the 1st August, 1914, the plaintiff company issued to the defendant bank two surety bonds protecting the bank against loss through the fraud or dishonesty of its employees. On the 23rd September, 1914, the bank discovered that M., manager of its eastern branch in the city of Hamilton, had stolen money from it. A package containing \$6,750 was said by M. to have been made up by him at his branch and delivered to the main office at Hamilton, between the 31st August and the 3rd September, 1914. At the main office it was said that this package had never been delivered. M. was convicted of the theft of the \$6,750; and about the 5th March, 1915, the plaintiff company paid that sum to the bank. About the 10th September, 1915, it was discovered that M. had not stolen the package of \$6,750, but that it had in fact been stolen by one D., teller at the main office. D., being placed upon trial, pleaded "guilty" to the theft of this money, and stated that it had been applied by him in covering shortages of his own in his dealings with the bank's funds, and shewed that on the 3rd September, 1914, the day on which he took the package, he was in default to the extent of \$2,010, and that he had been in default to that amount and more since before the bonds of the plaintiff company came into being. On the 3rd September, D. applied \$2,010 of the moneys in the package to cover his shortage of that amount, and converted the balance, \$4,560, to his own use; and so the loss to the bank during the life of the bonds was \$4,560 only.

By its bonds, the plaintiff company guaranteed to pay the bank, the employer, "such pecuniary loss as the employer shall sustain by theft" etc. Although the theft was complete when D. appropriated the \$2,010, there was no pecuniary loss by reason of the theft, for the money never in fact left the custody of the bank. It made no difference, as between the plaintiff company and the bank, that D. applied it to cover a shortage. The