

MANITOBA.

COURT OF QUEEN'S BENCH.

TAYLOR, C.J.]

[March 18.

RE HAMILTON'S TRUSTS.

Principal and surety—Rights of surety to securities held by creditor—Further advance by creditor.

This was an application to the court for a decision as to who was entitled to a surplus arising from the sale of three parcels of land, two of which, namely, lots 28 and 29, stood in the name of James Hamilton, and the third in the name of his brother, John Hamilton, but John Hamilton was the beneficial owner of lot 13.

The two brothers mortgaged the three lots to a loan company for \$1,350, of which \$390 was received by James and \$960 by John. After the mortgage, John Hamilton borrowed \$200 from Drewry, who took a mortgage signed by both brothers upon the three lots as security for the loan. He was aware that James Hamilton was only a surety in respect of this mortgage. After that Drewry made a further advance to John Hamilton, and took a mortgage from him upon lot 13 in security therefor. It was after all these loans had been made that the first mortgagees sold the three properties as follows: Lot No. 28 for \$780; Lot No. 29 for \$600; Lot No. 13 for \$440. The amount of the surplus after the sale was \$503.56.

James Hamilton admitted that Drewry was entitled out of this sum to receive the full amount (\$189.20) due to him on the loan secured by the mortgage of the two brothers, but he claimed that he was entitled to the benefit of the security held by Drewry for the loan guaranteed by him, and now paid off out of his property, in priority to Drewry's subsequent advance, and to have the remainder of the surplus paid to him, because, as between him and his brother, he only owed \$196 of the money due to the first mortgagees.

Held, that it is only in cases where there is an agreement constituting for a particular purpose the relation of principal and surety, to which agreement the creditor thereby secured is a party, that the stringent equitable rules as to the duty of the creditor and the rights of the surety apply, and that the present case was not one of them, and, therefore, that Drewry was entitled to hold the security obtained by him from John Hamilton for his further advance in priority to the rights of James Hamilton as surety against the same security pledged for the first advance.

Duncan, Fox & Co. v. North and South Wales Bank, 6 App. Cas. 1, followed.

Held, also, that, after deducting Drewry's \$189.20 from the surplus, the remainder should be apportioned between the three parcels of land in the ratio of their values as determined by the sale, and that James Hamilton was only entitled to \$130.43, being the proportion attributable to his lot No. 28.

Howell, Q.C., and *Monkman* for James Hamilton.

Perdue for Drewry.