

negotiability, or of giving notice of a trust. The cheques on the \$5,000 were as properly received by the bank on their debt as any other moneys of the firm, or of a partner in the firm, and, after so receiving them, and when still in ignorance of any claim in respect of them, the bank altered their position by releasing Andrew. The bank, therefore, are not liable to repay plaintiffs the money received out of plaintiffs' money on the bank's debt.

But plaintiffs contend that, even if the bank are not liable to do that, plaintiffs are entitled to have any surplus in their hands, after the bank's claim has been paid, and a reference to the Master to ascertain such surplus is asked.

Now, in the first place, that is based on the assumption that the \$5,000 were moneys held upon trust or in a fiduciary character, and that they remained impressed with that character when at the credit of the banking firm in the Ontario Bank. They were undoubtedly so impressed while at the credit of Howarth in the bank, but it was never intended that they should be so in the hands of Andrew & Howarth, and they were, at the instance of plaintiffs themselves, discharged of the trust when they went to the firm's credit. They were simply to be an ordinary deposit with a banker, which within five minutes after their receipt might be paid out to some previous depositor or in discharge of other debts of the bank, or lent or dealt with as the bankers might deem proper. The doctrine of *In re Hallett's Estate*, 13 Ch. D. 696, does not apply, and I need only refer to the observations in that case to shew the distinction.

But, in the second place, even if they were impressed with the character of trust or fiduciary moneys while at the firm's credit, they were paid out and the whole fund dissipated. They did not pass into other property, which plaintiffs might claim or have a charge upon. There is no opportunity of applying for plaintiffs the rule of appropriation of payments out of a mixed fund which was adopted in *In re Hallett's Estate*, for here the whole mixed fund was gone at Howarth's death. Even assuming that where trust moneys have been misapplied to the payment of a trustee's mortgage, and the relief thereby of his lands or property, the beneficiaries should have a charge upon that property so relieved—it is not here shewn that any of the collaterals now held by the bank were held also as security for the \$5,000 paid, and from some correspondence put in it would seem that, in some cases at all events, specific collaterals accompanied specific notes, and were given up on payment of these notes.

The action must be dismissed as against the Ontario Bank with costs.