THE LIABILITY OF THE SOLICITOR – TRUSTEE

1. INTRODUCTION.

The subject matter of this essay has not been directly considered by judicial authority, and the cases that we shall examine deal mostly with such problems as indemnity, gifts, costs, undertakings, and remuneration, in transactions between solicitor and client. From these cases we must attempt to find out whether there is any rule of stricter liability for the solicitor, who is acting as solicitor and trustee of the one estate, than for the lay trustee.

We are here concerned only with express trusts created either inter vivos or by will, and for convenience, we shall refer only to the trust created by will, although the propositions we shall attempt to formulate, will apply equally to trusts created inter vivos and by will.

Equity has not always adopted a fixed and definite standard to determine the liability of a trustee for breach of trust. During its history, equity has swung from a high standard to a higher and almost intolerable one. Statute law has relieved trustees from this responsibility in certain cases, and even courts of equity themselves have realized that the high standard they had set may defeat its own purpose by making the trust unpopular; nevertheless the precedent for the higher standard remains and may be revived in case of need; it will be the subject of this essay to suggest that the court would revive this higher standard in the case of the solicitor trustee.

The term "Breach of Trust" is an elastic one, what may be a breach of trust for one set of facts, may not be so for another. The confines of "Breach of Trust" are never closed. (1)

When a solicitor is acting only as a trustee and not also as solicitor of the trust estate, his liability will be the same as any other professional or business man, who suddenly finds himself appointed a trustee. The special case we are considering is that of the solicitor, who is acting as the solicitor of, and trustee to, the same trust, and who is advising his beneficiaries, and co-trustees of their rights, duties and responsibilities under the trust.

The relation between a solicitor and his client is confidential and fiduciary; so also is the relation between a trustee and his beneficiary. The position of a solicitor-trustee, must merit special consideration by courts of equity. Very often the solicitor will have drawn up the Will or other instrument creating the trust; thus a confidential and fiduciary relation will have preceded, and very often will have been responsible for the appointment of the solicitor as a solicitor trustee. This itself would be sufficient to demand the closer scrunity of the courts.

(1) *Hanbury – Modern Equity 3rd ed. p. 261*

A host of duties may be mentioned which, by their nature, must be fulfilled alike by lay and solicitor trustees. For example: the duty to render an account, to observe the rule in Howe v. Lord Dartmouth (2). No one can be compelled to assume the duties of a trustee but the courts will not permit anyone who has assumed these duties to say that he lacked business or professional experience. Stupidity or ignorance, as well as wilful default, may be a ground for liability. There are many such cases in the reports. The duties of a trustee are enfoced without regard to the personality or qualifications of the person acting.

The liability of the ordinary trustee may be both civil and criminal. The solicitor, being an officer of the court, is subject to a penal liability outside the scope of criminal law and unknown in other professions. A study of both the penal and the civil side of liability may reveal some general principle that will answer the enquiry of this essay.

II ARGUMENT

As a rule trustees are all equally responsible to the beneficiaries for any breach of trust. No trustee can set up as a defence that may amount to a breach of trust, and it has been laid down that a trustee is not entitled to any indemnity against loss brought about by following the advice of his co-trustee who happens to be a solicitor (3). The latter is protected in the same way as any other person who is carrying out an onerous duty. But when a trustee has relied innocently without negligence on the advice of his solicitor-co-trustee, the position may be different. There is no authority directly in point, but Hammond v. Walker (3) is authority when the solicitor is acting only as trustee and not as solicitor-trustee. The rule here suggested is that there may be a right to indemnity in the co-trustee where the solicitor trustee is acting qua solicitor in the trust administration.

There is some support for the proposition that a lay trustee may be entitled to indemnity from his co-trustee who is a solicitor-trustee. Reilly v. Lockhart (4) is an example. Here, a solicitor-trustee who had been entrusted with the management of the trust, was held liable to indemnify his co-trustee for the costs and expenses of proceedings arising out of his negligence. In a later case (5) this right of indemnity was extended to cover all loss arising by the solicitor- trustee's negligence. We must be cautious in our acceptance of this case as an authority for the broader liability. Cotton, L. J. felt that such a rule did exist but the authorities that he cited cannot be said to go as far as his Lordship contended. In the same case, Fry, L. J. emphatically and unequivocally refused to recognize any such rule even in the case of a solicitor-trustee. Bowen, L. J. diffidently agreed with Cotton, L. J.

(2) *(1802) 7 Ves 137*
(3) *Hammond v. Walker (1854) 3 Jur. N.S. 686*
(4) *(1856) 25 L.J. Ch. 697. See also in re. Linsley (1904) L.J. Ch. 841. and in re. Turner (1897) 66 L.J. Ch. 282.*
(5) *Bahin v. Hughes (1886) 55 L.J. Ch. p. 472.*

A distinction was drawn in Head v. Gould (6). A trustee who had participated with his solicitor-trustee in the trust management was held to have no right of indemnity whatever. As a general rule, equity will not recognize a passive trustee in an active trust. Where a solicitor is appointed trustee either by the court or the instrument and is entrusted with the management of the estate, the court will consider his co-trustee in the capacity of a passive trustee. This is borne out by the policy of indemnity. Since a distinction is made between an active and passive trustee in this case, we may say with some force that the court's policy is in favor of some indemnity for the passive but innocent trustee, otherwise it would be needless to draw any line at all. The authority of Bahin v. Hughes (5) must rest upon its age rather than its merits. Since it has never been overruled, we may take our stand that it represents the law. At any rate, it is a pointer, indicating the policy of the court, when the liability of the solicitor-trustee arises.

The strong language of Lord Haldane's speech in Nocton v Ashburton (7) cannot be overlooked. The ratio must necessarily be limited to the case of solicitor dealing with the client's own personal business. But the great authority of Lord Haldane, as an equity jurist, compels us to respect his wide dicta which may be said to cover all cases of solicitor and client even where both are trustees of the same estate. The result of all these cases is that a solicitor may be held liable qua solicitor to indemnify his client against loss in certain circumstances and, therefore, that a solicitor-trustee must indemnify his client trustee, where the solicitor is negligent, and the co-trustee is innocent. The co-trustee may be considered constructively the client of the solicitor because of the natural confidence which the former will place in the latter. The standard which is expected of the solicitor in all the foregoing cases is that of the prudent solicitor. When acting as trustee he must act as a prudent business man would act but he must also apply the prudent standard of the solicitor if he works professionally in the trust administration. Trustees empowered, for instance, to invest in the mortgage of real estate may consult and rely on their solicitor-trustee as did Lord Ashburton in his own personal business. Thus the rule in Nocton v. Ashburton (7) lends its support to the other. The solicitor's responsibility is clear and it can surely be no defence to the negligent solicitor that his co-trustee is under a fiduciary relation to another. Thus Nocton v. Ashburton (7) would support the proposition that a fiduciary relation will exist in a solicitor whose client is his co-trustee.

Were all this authority, we might justly hesitate to accept the principle of indemnity to which we have referred. There is, however, another line of cases covering a slightly different matter which throws some light on the attitude of the court to the dealings of a solicitor. These cases deal with the enforcement of what is called the "solicitor's undertaking". The climax of this series is Re. Hilliard (8) where it was

(6) *(1899) 2 Ch. 250.*
(7) *(1914) 83 L.J. Ch.784.*

held that a solicitor may be liable upon his undertaking, notwithstanding that such undertaking would not be enforceable as a contract or impose liability as an estoppel. In the course of his judgment, Coleridge J. said–"The court does so (i.e. enforces the undertaking) with a view of securing honesty in the conduct of its officers, in all matters which they undertake." Halsbury (9) dealing with the same matter, comments as follows – "The Jurisdiction (of the court to enforce undertakings) is based upon the right of the court to require its officers to a high standard of conduct." In United Mining & Finance Corp., Ltd. v. Becher (10) the trial judge held that the court would enforce these undertakings regardless of the lack of imputations of dishonesty. The process of the court may be used against a completely honest solicitor and in favor of a stranger who may not be his client and in cases where the solicitor has acted gratuitously. The solicitor must act in the capacity of a solicitor in relation to the undertaking.

All the authorities (11) are agreed on the high standard of professional conduct which the court requires. The rule is of universal application and is not limited to any particular class of business provided that the undertaking be made in the course of duty as a solicitor. There can, therefore, be no objection to its application between solicitor-trustee on the one hand and co-trustee, cestui que trust or strangers to the trust on the other, to render a solicitor liable where he has not been negligent.

These cases illustrate the general policy of the court in reviewing the conduct of solicitors: a policy suggestive of and consistent with a practice of strict scrutiny. There can be no room for doubt that the lay trustee is outside the application of this and equally no room for doubt that here exists a potential of increased liability to the solicitor-trustee.

It is a general principle of equity that a trustee cannot make a profit out of the estate. This is a corollary of another rule approved by Fullerton, J. A. in McLellan v. Newton (12) that "it is a rule of universal application that no trustee shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly conflict, with the interests of those whom he is bound by fiduciary duty to protect.....So strictly is this principle adhered to that no question is allowed to be raised as to the fairness or unfairness of the transaction; for it is enough that the parties object."

(8) (1845) L.J. Q.B. 225.
(9) Laws of England Vol. XXXI P. 1008.
(10) (1910 79 J.J. K.B. 1006 and at P. 1008
(11) See also Res a solicitor exp. Hales (1907) 76 L.J. K.B. 931 where it was held that lapse of time is no bar. These undertakings are enforced summarily in England under R.S.C. O.52 r. 25.
(12) (1928) I.D.L.R. 189 (C.A. at P. 191.

There can be no doubt of the soundness of such a rule nor of the urgency of its strict application. Its importance here must be tested by its application to solicitor-trustee.

The rule is so wide and emphatic that it might be expected to apply to lay and solicitor trustees alike. Thus it would appear that equity made no distinction. There is some authority that in the case of the solicitor-trustee the foregoing result is obtained by another line of reasoning showing the particular disfavour of the court towards the solicitor trustee. In New v Jones (13) the court held that it was an incapacity in a solicitor-trustee to receive costs and that this incapacity was passed on to his firm. Where an instrument entitles the solicitor to his costs and charges, it will be strictly construed (14). Any claim under a testamentary instrument will be construed as a legacy and the solicitor will be entitled to nothing if the estate is insolvent (15). The claim will be subject to legacy duty (15). Thus lay trustees may receive remuneration under the trust instrument without the imputation of a gift. If the settlor or testator has seen fit to reimburse them in this way, the court will take no objection. The solicitor-trustee takes such a benefit grudgingly granted by the court as a mere gift of the privilege to charge for his fees and costs.

It may be well to interrupt the argument at this point with a few words on the court's policy towards a gift inter vivos from a client to his solicitor. Kindersley, V. C. reviewed the authorities in Tomson v. Judge (17)where he laid down the firm rule that a gift by a client to his solicitor cannot be sustained while the fiduciary relation continues to exist. It does not cease to exist simply because the solicitor is acting gratuitously or because the client is no longer consulting the solicitor in legal business but continues as long as the confidence naturally arising from the old relation continues (18). The onus of proving the discontinuance is always upon the solicitor. What is the difference between a gift inter vivos and a gift by will? It is submitted that the legal position of both when they are accepted by a solicitor is the same. In the case of a will, there may be a period between its making and the death where no fiduciary relation will exist. This is the solicitor's burden to prove and until this is done the gift should be construed as invalid. Although there is no authority for this proposition it has the merit of being consistent with principle.

It is therefore possible to elicit a completely different reasoning in dealing with the costs of the solicitor-trustee. It springs from the complete incapacity in the solicitor to accept payment; an incapacity that is relaxed only occasionally.

(13) *(1833) 41 E.R. 1429.*
(14) *Harbin v. Darby (1860) 28 Beau. 325.*
(15) *White, re Pennell v. Franklin (1898) 67 L.J. Ch. 502.*
(17) *(1850) 19 L.J. Ch. 107.*
(18) *Demerara Bauxite Co. v. Hubbard (1923) AC 673.*

This argument is not altogether without support. Vice-Chancellor Turner in Lincoln v. Windsor (19) laid it down that a solicitor-trustee is entitled only to out-of-pocket expenses whether he is a sole trustee or is acting with others. The reason given is that these costs (in non-contentious matters) are not automatically subject to the scrunity of the court and would be so subject only if the beneficiaries should object to them. In Craddock v. Piper (20), Lord Cottenham remarked that a solicitor-trustee is very likely to be entrusted with the exclusive management of suits concerning trust property and with a large discretion. This case dealt with the allowance of costs in contentious matters and His Lordship decided after reviewing the authorities that a solicitor was, in such a case, entitled to costs only when acting for himself alone or for himself and co-trustees. They are allowed if they are not increased by the action of the solicitor. The reason that costs such as the above are permitted is that they must be taxed and are therefore strictly supervised by the Court. Our interest in this case is not so much a concern with the allowance of costs as with the fact that it should have been so long unsettled that such costs would be allowed. It is almost as though the accepted principle of practice had been that a solicitor-trustee was not entitled to any costs at all. The very strict and parsimonious allowance to solicitor-trustees in such a case even where court supervision is automatic leads to the general principle that the position of a solicitor-trustee involves the very highest standard – one that will ensure by every means that no conflict of interest and duty will arise.

Under the Trustee Act (21) a trustee whether appointed by deed, settlement or will is permitted such an allowance for his care, pain and trouble as may be granted by the court. This section includes solicitor- trustees as well as others. Under a Nova Scotia Statute (22) it is enacted that a solicitor will be entitled to charge for his professional services as a trustee, provided no charges shall be made for any service which an executor or trustee must render without the intervention of a solicitor. There is no similar provision in New Brunswick, but in Nova Scotia there is a section similar to our Sect.49. The inference we must draw from this is that Sect.49 does not give the right to a solicitor to charge for his professional services (23). In a Manitoba case Turriff v. McDonald (24), it is laid down that where a statute gives a solicitor a right to remuneration for his care, pains and trouble, he should be made such allowance only as the court thinks fair. He is not entitled as of right to be remunerated as a solicitor.

(19) (1851) 20 L.J. Ch. 531 See also Stanes v. Parker (1866) 50 E.R. 392.

(20) (1850) 19 L.J. Ch. 107.

(21) Section 49 Ch. 175 R.S.N.B.

(22) Ch. 212 Section 56 R.S.N.B. 1923.

(23) See Huggard v. Prudential Ins. Co. 1924 IWWR 642, Which was a case dealing with R.S.M. 200, and a solicitor director in circumstances similar to a solicitor-trustee.

(24) (1901) 13MAN R 577

There are many cases in the reports where the court has declined to appoint a solicitor as trustee. In re. Kemp's Settled Estates (25) Cotton, L. J. condemned the appointment of the tenant for life, or his solicitor. The ratio decidendi is simply that the court will not appoint as a trustee anyone, who is interested in the trust, or his agent. Doubtless the learned judge was applying the rule mentioned above (26) as to conflict of duty and interest, and nothing more. It does not appear from the judgment that he was laying down any principle on the appointment of solicitors. Although the court may have wide power of appointing new trustees it will never make any appointment which it considers undesirable. Since he will usually be associated professionally with some of the parties to the trust, the solicitor will, therefore, be an objectionable appointment. The guiding principle of the court is the interest of all the beneficiaries, and the efficient management of the trust. (27)

Although the English courts have not completely avoided solicitors when appointing trustees, they have adopted a practice which illustrates their caution, and it may be said, their disfavour. An undertaking by the solicitor appointed is inserted in the order to the effect that he will immediately seek the appointment of a new and independent trustee, should he himself become sole trustee (28). This is the only suggestion we are given as to the policy of the courts. It is submitted that, once the appointment has been made, the court will exercise its vigilance more strongly against the solicitor-trustee, in accordance with the general principle which is being formulated here.

The Supreme Court has an inherent jurisdiction to review the conduct of its officers. This conduct must be in keeping with the public office which a barrister or solicitor is called upon to fulfil. The Corpus Juris gives a brief outline of the important duties which these legal functionaries are required to carry out. Under the Barristers' Society Act, Sect. 19 (29), the council of the Barristers' Society may, of its own motion and shall on the application of any person, enquire into complaints. There are several grounds set out in the Act on which a complaint may be made, but the most important one for our purpose is the simple ground that the barrister or solicitor has been guilty of conduct unbecoming a solicitor. These words do not necessarily impute any dishonesty to a solicitor. It has ever been held that a

(25) *(1883 24 Ch. D. 485 and see generally Annual Practice (1941) P. 1168*

(26) *Vide note (12) Supra.*

(27) *Re Tempest (1886) I.R 1 Ch. 485.*

(28) *See Annual Practice (1941) p. 1168; also re Cotton, Jennings v. Nye (1915) 1 Ch. 307 and other case to which Annual Practice refers.*

(29) *Ch. 50 Acts of the Legislature (1931) and see the Corpus Juris vol. 6 p. 568 "Nature of the Office."*

solicitor becomes subject to the council's enquiry if he has not fulfilled an undertaking given in the course of his professional duty. Accepting as we must the general high standard required of solicitors by the court, we may assume that a very large sphere of activity which would be quite innocent in a layman, will be subject to censure by both the court and the council established under the Act.

Recent legislation in England is of some interest to show the concern with which the British legislature regards the position of solicitor trustees. This act (30) provides, inter alia, strict provisions for the solicitor to keep separate accounts of all trust funds which come into his hands, as solicitor-trustee. The council under the act is empowered to ensure compliance, and may require a solicitor to produce his accounts. Furthermore, a solicitor must pay over all money received (with some practical exceptions) into separate bank accounts. The rules further require that he shall obtain the authority of the council set up by the Act, before any sums are withdrawn. In some cases, mainly concerned with routine amounts, the money may be withdrawn without this authority.

This legislation came as an aftermath of a series of frauds which had been committed by solicitors who were both express and constructive trustees. These criminal practices had, in many cases, left the clients and beneficiaries in pecuniary difficulties, a state of affairs for which the bench vigorously demanded suitable and adequate remedies. In the criminal proceedings which resulted, the courts did not hesitate to mete out to the offender the severest penalties of the law.

The record of the legal profession in this Province is unblemished in comparison with the pre-war defalcations in England, and although we do not have the same disciplinary machinery, we have a valuable protection to the public in the Barristers' Society Act (31). Provisions of Sect. 30 are wide enough to ensure that any conduct falling short of that of a gentleman in the exercise of his profession will render a solicitor liable to account for himself and perhaps to suffer the ignominy of being struck off the rolls, when he has failed to meet the standard. What will amount to professional conduct unbecoming a solicitor in order to found an application to strike off the rolls? Darling J. in the case of in re - A Solicitor,ex parte Law Society (30) approved a definition, which was again approved in a later case (33), that any conduct disgraceful in the eyes of his fellow solicitors would be sufficient

(30) *Solicitor's Act (1941) In particular Sect. 18 and the regulations made thereunder, namely: Solicitors Trust Accounts Rules — 1945.*
(31) *Act of Legislature N.B. C50 — 1931.*
(32) *(1912) 81 L.J. K.B. 245 and*
see definition given in Allison v. General Council of Medical Education and Registration (1894) 631 L.J.Q.B. 534 at 540.
(33) *Re A Solicitor (No. 2) (1924) 93 L.J. K.B. 461.*

to warrant the action of the council in striking him off the rolls. The court may, of its own motion, order that a solicitor be struck off. Thompson v. Flinch (34) is an example. Here the solicitor-trustee wrongly invested trust money. No fraud was alleged, and the Law Society had taken no action. Nevertheless, the court ordered, ex mero motu, that such action be taken.

The criminal liability of the solicitor exists quite independently of any disciplinary action by the court or the Barristers' Society.

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III CONCLUSION

A solicitor-trustee, as he is understood here, must fulfill a double function. He is trustee and solicitor in the administration of the one trust. Thus, he must fulfill the duties of both at once. It may be, however, that the sphere of duty of both, coincide, so that the ordinary relation of solicitor and client involves the same responsibility as trustee and cestui que trust. Should this be the case, then there would be no increased liability when the solicitor becomes a trustee. Such an argument is clearly a non-sequitur for even if the duties do coincide, it does not follow that the court will not distinguish classes of trustees. On the other hand, the duties of the two functions may merely overlap. The situation then will be that certain duties will be peculiar to the solicitor qua solicitor. That this is so is obvious from the unique liability flowing from the solicitor's undertaking.

Apart from authority, it seems logical to expect that the solicitor trustee would be under a greater liability than a lay trustee. The office of trustee is an onerous one for which the courts have from time to time relaxed their severity. However, this leniency is reserved for particular cases and is the exception, not the rule. Although the excepted cases may be more numerous than instances of the rule itself, we should not lose sight of the very high standard formerly required. A standard which seems to be taken for granted by most text book writers for they cite no authority for it.

We have considered liability in a general way, now we must refer to particular parties, namely: co-trustees, beneficiaries and strangers to the trust. The enforcement by the summary jurisdiction of the Supreme Court of the undertaking of the solicitor is not only unique to the legal profession but it pervades every aspect of its activities. The undertaking must be made while the solicitor is acting professionally (36). It must be clear in its terms so that the damages are capable of measurement (37).

(34) (1856) 25 *L.J. Ch. 681.*
(36) *United Mining and Finance Corp. Ltd. v. Becher* (1910), 79 *L.J. K.B. 1006. See also Re. Phillips* (1880) 6 *Man. LR 108.*
(37) *Thompson v. Gordon* (1846) 15 *L.J. Ex. 311.*

Take the case of the trustee in Low v. Bouverie (38) where Lindley, L. J. gave the opinion which was approved by Lord Haldane in Nocton v. Ashburton (39) ,that a trustee may become liable if what he has said would amount to a cause of action. In this case, a trustee had given information about charges and encumbrances on the trust fund but he did not mention all of them. Insofar as a solicitor's undertaking is more in the nature of a cause of action, it is submitted that a solicitor-trustee would be liable, where a lay trustee would not. The enforcement of an undertaking defeats such defences as the Statute of Frauds and nudum pactum which would be open to the lay trustee against a stranger. This is one example of a fertile source of liability, and cases could be multiplied. It would be difficult indeed for a solicitor-trustee to show that his undertaking was not given in a professional capacity. In most cases in which a solicitor would be consulted about the trust fund, his undertakings would involve the legal part of his office of solicitor-trustee. Thus, the liability to third parties may be greater than in the case of the lay trustee.

The court is given a discretion under Sect.49 of the Trustee Act (40) to relieve a trustee who has committed a breach of trust, provided he has acted honestly and reasonably. In National Trustee Co. of Australia v. General Finance etc. Co. (41) the Privy Council held that honesty and reasonableness were matters that the court must consider before granting relief. Other circumstances must also be taken into account and special matters affecting the relationship between the beneficiaries and the trustees are most important. In this case, the trustee was a Trust Corporation and was accepting a fee. The court held that remuneration was such a matter affecting the relation of trustee and cestui-que trust and refused to grant relief.

This was an Australian case but the legislative provisions under review were the same as our own (42). The ratio of the case seems to be that when some special situation exists between the fund, the beneficiary and the trustee of which remuneration is an example, the court will not exercise its discretion. When a solicitor is appointed trustee, it is usually because of natural confidence which the parties repose in him. This is a circumstance which the court would be entitled to notice before granting relief. We have seen how cautiously the court supervises the charges and costs allowed to a solicitor-trustee and we have analyzed the principle involved in the enforcement of undertakings. These rules converge to require of the members of the legal profession a standard of conduct which must be unassailable and which will make it difficult to excuse a breach of trust under any circumstances. It would be illogical to set up such a high moral and legal standard on the one hand and to relieve the solicitor-trustee on the other hand simply

(38) *(1891) 60 L.J. Ch. 594 at P. 596.*
(39) *(1914) 83 L.J. Ch. 784.*
(40) *R.S.N.B. (1927) C 175.*
(41) *(1905) 74 L.J. P. 73.*
(42) *R.S.N.B. C 175 See 49.*

because he is honest. It is true that he may satisfy the court of his honesty but reasonableness is relative to the standard by which it is judged. From this point of view, also, a solicitor-trustee would find it difficult, if not impossible, to justify himself. Section 49 of the Trustee Act contemplates relief from the liability for breach of trust and it would render nugatory the undoubted principles referred to above if we found that a solicitor-trustee could exonerate himself by pleading this section.

Following the maxim "Equality is Equity," the courts will usually permit contribution between co-trustees who are "in pari delicto." This is not the case with indemnity because equity does not recognize a passive trustee. All trustees must be active in an active trust. However, there is authority to show that when a solicitor is one of the trustees,the others may be able to claim an indemnity (44). It would be a case of circular argument to suggest that because an indemnity is so awarded, a solicitor's co-trustees must be looked upon as passive and that since they are passive trustees then they should be awarded an indemnity. It is submitted that the court has applied, in these cases, the rule laid down in Nocton v. Ashburton (45) and has thus set up and confirmed its separate and special treatment of solicitor-trustees.

There is one matter in which the solicitor-trustee would seem to fare equally with the lay trustee. In re. McM. Trust (46) where a solicitor trustee had delegated the receipt of rents to his clerk who subsequently absconded with a considerable portion of the trust income, the solicitor was held not liable for breach of trust. This case purported to apply the rule in Speight v. Gaunt (47)., the leading authority on delegation by trustees. While we may admit the principle permitting even solicitor-trustees to delegate certain functions, it would be illogical to regard the standard of care required of the lay trustee in the matter of delegation as the standard of his legal confreres. Here too the solicitor-trustee must be taken on the same footing as he is in other transactions.

The court is the final arbiter of liability and this article has attempted to point out the high standard of the legal profession enforced by sanctions of a special nature.

We may conclude with a quotation from Hanbury in which he adopts a statement in Maitland's famous work (48) that sums up and confirms our conclusions — "Equity is hard upon a trustee and it is hard on a solicitor; in a case where the two functions are combined, it will be very hard indeed."

—by William A. Gibbon,
Barrister,
Saint John, N. B.

(44) *Vide supra* P. 6 *et seq.*
(45) (1914) 83 L.J. Ch. 781.
(46) 28 C.L.J. 502.
(47) (1883) 11 Q.B.D.
(48) Hanbury [illegible] p. 333 [illegible]