

services in winding up the affairs of the partnership, was not disputed by his counsel; but it was argued that the defendant was, in respect of these duties, a trustee, and therefore entitled to compensation under the provisions of the Trustee Act. I am unable to agree with that argument, and am of opinion that the defendant was not a trustee—not even an implied or constructive trustee. . . .

[Reference to *Knox v. Gye* (1872), L.R. 5 H.L. 656, 675, 676, 679; *Bank of Scotland v. Macleod*, [1914] A.C. 311, 324; *Farrars v. Farrars Limited* (1888), 40 Ch. D. 395, 410, 411; *Omnion Electric Palaces Limited v. Baines*, [1914] 1 Ch. 332, 347.]

That the duties of a surviving partner with regard to the realisation of the partnership assets are of a fiduciary character is undoubted, but he is not a trustee, and his position is analogous, I think, to that of the promoters in *Omnion Electric Palaces Limited v. Baines*.

If I had come to the conclusion that the defendant was an implied or constructive trustee, it would have been necessary to consider whether, as respects his services before the Trustee Act came into force (1st June, 1911), he was entitled to the benefit of the provisions of sec. 66 of that Act, for before that Act came into force the right of a trustee to a fair and reasonable allowance for his care, pains, and trouble, and his time expended about the estate, was confined to trustees "under a deed, settlement, or will:" R.S.O. 1897 ch. 129, sec. 40.

For these reasons, I am of opinion that the defendant's cross-appeal fails, and should be dismissed.

The result is, that the appeal of the plaintiffs as to the Yale business and the oil mill property is dismissed with costs, and their appeal as to the Wuerth Haist & Co. business is allowed with costs here and below; and that the defendant's cross-appeal is dismissed with costs.

MACLAREN and MAGEE, J.J.A., concurred.

HODGINS, J.A., was of opinion, for reasons stated in writing, that the appeal of the plaintiffs should be allowed with costs as to the Yale and Wuerth Haist & Co.'s businesses; that the order of Middleton, J., should be affirmed as to the oil property without costs; and that the cross-appeal of the defendant as to the question of remuneration should be dismissed with costs.

Order as stated by MEREDITH, C.J.O.; HODGINS, J.A., dissenting in part.