1909

*Oct. 12.
*Dec. 13.

RICHARD B. ANGUS, THOMAS G. SHAUGNESSY AND THE COLUMBIA AND WESTERN RAILWAY COMPANY (PLAINTIFFS) ..... } APPELLANTS;

AND

F. AUGUST HEINZE (DEFENDANT) ... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Agreement for sale of lands—Construction of contract—Right of action—Partition—Administration by co-owners—Trust—Interim account—Partial discharge of trustees.

A. and S., being holders of the entire capital stock of the C. and W. Rway. Co., agreed that they would cause a moiety of the company's lands to be vested in H. by a valid instrument to be executed by the company at the request of H. and in such form as he might require. During some years the lands were administered by A. and S., but H. never requested nor received any conveyance of his moiety, and the title to the lands, in so far as they had not been disposed of, remained in the company. In an action by the plaintiffs against H. for partition of the lands and to have an order for an interim account by and partial discharge of A. and S. as trustees:

Held, that as, at the time of action, the title to the lands was still vested in the railway company which was not a party to the agreement, the order for partition could not be granted, and that, independently of partition or other final determination of their trust, the plaintiffs were not entitled to the relief of an interim accounting and partial discharge as trustees.

Judgment appealed from (14 B.C. Rep. 157) affirmed.

APPEAL from the judgment of the Supreme Court of British Columbia(1), reversing the judgment of Cle-

*PRESENT:—Sir Charles Fitzpatrick C.J. and Girouard, Davies, Idington and Anglin JJ.

(1) 14 B.C. Rep. 157.

ment J., at the trial, and dismissing the plaintiffs' action with costs.

The circumstances of the case are stated in the head-note and the judgment of Mr. Justice Anglin now reported.

Armour K.C., for the appellants.
Lafleur K.C., for the respondent.

THE CHIEF JUSTICE.—I would dismiss this appeal with costs.

GIROUARD, DAVIES and IDINGTON JJ. agreed in the reasons stated by Anglin J.

ANGLIN J.—On the short ground that the parties to the agreement on the 11th Feb., 1898, between whom partition is sought, have neither a legal nor an equitable interest in the lands in question, but are merely interested in the performance of certain mutual covenants in respect to such lands, the entire title to which, equitable as well as legal, is outstanding in the Columbia and Western Railway Company, which is not a party to the agreement, I am of opinion that the plaintiffs are not entitled to succeed in their claim for partition.

They also claim, apparently as incidental relief, an account in respect of such of these lands as have been taken for the right-of-way of the railway, and of such as have been sold and disposed of. At bar counsel for the plaintiffs pressed that, if denied a decree for partition, the relief of an interim accounting should nevertheless be given the plaintiffs, in order that they may obtain a *pro tanto* discharge as trustees

1909

ANGUS v. HEINZE.

Anglin J.

in respect of the lands so taken and the proceeds in their hands of the lands so disposed of. A very large proportion of the lands covered by the agreement remains vested in the railway company.

In the judgments in the provincial appellate court no allusion is made to this claim for an accounting. It was apparently treated as purely incidental to the claim for partition. No authority has been cited by counsel for the appellants either in his factum or at bar in support of the view that, independently of partition or other final determination of any trust which may subsist as to the lands in question or their proceeds, the plaintiffs are, as trustees, entitled to the relief of an interim accounting and to a partial discharge. I have been unable to find any case in which trustees have been granted such relief. It may be that, in a proper case, trustees would be entitled to some such relief in the form of a declaratory order or judgment. This they have not asked; and I should much doubt that to accord it in the circumstances of the present case would be a sound exercise of the discretion conferred on the court to pronounce declaratory judgments.

In the Province of Ontario by virtue of special legislation (63 Vict. ch. 17, sec. 18), which has no counterpart in British Columbia, "a trustee appointed by a deed, will, or other instrument in writing," would appear to be entitled to the relief of an interim accounting by proceedings in the Surrogate Court. In the absence of such legislation in British Columbia, my view is that trustees have not the right to obtain such relief.

For these reasons I would dismiss this appeal with costs.

1909

ANGUS
v.
HEINZE.

Appeal dismissed with costs.

Solicitors for the appellants: *Davis, Marshall & Macneill.*

Solicitors for the respondent: *Bowser, Reid & Wallbridge.*