

TYRRELL v. TYRRELL—RIDDELL, J.—OCT. 18.

Executors—Fraud—Failure to Prove—Claim to Moneys Found Due by Surrogate Court—Forum—Credibility of Witnesses.—An action against two brothers of the plaintiff, who were executors of the will of their father, for an account of their dealings with the proceeds of the plaintiff's share of the residue of the father's real estate. The plaintiff alleged that, by misfeasance, misrepresentation, pressure, and fraud, the defendants obtained from the plaintiff a deed of his share, sold it to an innocent purchaser, and laid out the proceeds in other land, on which they had made a profit. The plaintiff also claimed one-fourth of a sum of \$5,024.11 found by a Surrogate Court to be in the hands of the defendants as executors. The defendants denied all fraud and improper conduct on their part, and claimed the benefit of secs. 46, 47, and 48 of the Limitations Act, R.S.O. 1914 ch. 75. The action was tried without a jury at Toronto. RIDDELL, J., in a written judgment, said that the proper course to pursue was to strike out all reference in the pleadings to the \$5,024.11, without prejudice to the plaintiff bringing a new action in the premises, if so advised; the defendants then may place the proper pleadings on the record; and, if this Court, and not the Surrogate Court, should deal with it, the whole question may be tried. If, however, the question should have been, in the opinion of an appellate tribunal, disposed of by RIDDELL, J., he found that the evidence of the plaintiff was wholly unreliable and that of the defendants to be accepted. The plaintiff wholly failed in his attempt to prove fraud or improper conduct on the part of the defendants or either of them, and the action (subject as above) should be dismissed with costs. W. Laidlaw, K.C., for the plaintiff. W. D. McPherson, K.C., for the defendants.