

feat such a motion by swearing to a sufficient number of witnesses to displace the preponderance alleged by the defendant, it would be idle to move at all, unless the Court can deal with the case on what appears to be reasonable and likely from the pleadings and the examinations for discovery.

Here it appears from the defendant's depositions that the personal articles of the testatrix were to be divided, by three ladies named by her for that purpose, among certain beneficiaries, and that they set aside "some rose point lace for Miss Curlette." Another article called fichu or berthia was given to the defendant's wife and produced by him at the examination. Apparently this is what the plaintiff now seeks to recover as being left to her by the testatrix specifically.

It is suggested that many of the articles belonging to Mrs. Mendell were lost in a fire before her death, and it is argued that, if there was any such fichu as the plaintiff claims, it must have been destroyed at that time.

There would seem then to be only two substantial questions in this action. The first, was there a specific chattel known to experts as "a rose point fichu" bequeathed to the plaintiff, and which came into the hands of the executors of the testatrix? Secondly, if not, did what was tendered to the plaintiff answer that description, or was it the only article among the assets of the testatrix which could be said to be a "rose point fichu"?

The evidence on both these points must be at or near Belleville, where the testatrix resided, except that of such experts as may be called on either side. But they can be got as easily at that place as here or elsewhere.

The present would thus seem to be a case within the principle laid down by Osler, J.A., in *Macdonald v. Park*, 2 O. W. R. 972, and which was apparently approved by a Divisional Court in the subsequent case of *Saskatchewan Land and Investment Co. v. Leadlay*, 9 O. L. R. 556.

If I am right on this point, it will be unnecessary to consider the question raised under the County Courts Act. But, in case I am wrong, it will be well to deal with that point also, as it was apparently relied on by the defendant on the argument, and seems to be indicated also in the statement of defence, which alleges that the action should have been brought against the executors, and not against the defendant personally.

Section 23 provides that the County Court shall have jurisdiction . . . (10) "in actions by a legatee under the will of any deceased person, such legatee seeking payment or delivery of his legacy . . . ." And sec. 36 (1) provides that actions under