

OSLER, J.A.—I think the appeal must be dismissed. I rest my judgment on the ground that the plaintiff's testimony has not been corroborated as required by sec. 10 of the Evidence Act, R. S. O. 1897 ch. 73. . . .

MACLENNAN, J.A.—If the gift in question were claimed as absolute, and not one *causa mortis*, and therefore revocable, the case of *Walsh v. Studdart*, 4 Dr. & War. 171, on which the Chief Justice rested his judgment, would be conclusive. It was not a case of *donatio mortis causa* at all, although indexed as such in the report, and treated as such in 1 W. & T. L. C. 406, 413. [Discussion of that case.]

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A *donatio mortis causa* being revocable *ab initio*, and being conditional upon the death of the donor, resembles a legacy in most respects, and the equities applicable cannot be different. I, therefore, think that the law applicable to wills is that which is to be applied to such gifts, and not that which is applicable to gifts *inter vivos*. [*Collins v. Kilroy*, 1 O. L. R. 503, referred to.] It was there pointed out that a person standing in a fiduciary relation may lawfully exert his influence to obtain a legacy, and unless there has been something amounting to coercion or fraud, such legacy is good: *Huguenin v. Basely*, 1 W. & T. L. C., 7th ed., p. 287, and cases there cited; *Kerr on Fraud*, 3rd ed., pp. 274-9. Nothing of the kind has been proved here. There is, however, the other rule stated by Lord Hatherley in *Fulton v. Andrew*, L. R. 7 H. L. 471, that a person who is instrumental in the framing of a will, and who obtains a bounty by that will, has thrown upon him the onus of shewing the righteousness of the transaction. If the plaintiff is to be regarded as having been instrumental in procuring this donation, then I think he has discharged that onus. . . . If it is proved, as I think it is, that the donor and the plaintiff and his family had for a long time been intimate friends, that she had for some time an intention of giving him her property at her death, that without any request or solicitation on his part she came to his house, and while there made these gifts to him in the manner he has described, I think the plaintiff has shewn, that the transaction was righteous, and that it is valid.

I therefore think the appeal should be allowed with costs, and that there should be judgment for the plaintiff with costs.

Appeal dismissed with costs; MACLENNAN, J.A., diss.