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Gifts - Mistake-Rights of the Doner, Donee and Their Successors in Interest to Relief

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COMMENTS

GIFTS—MISTAKE—RIGHTS OF THE DONOR, DONEE AND THEIR SUCCESSORS IN INTEREST TO RELIEF—The right to relief for mistake, one of the traditional grounds of equity jurisprudence, has been most often discussed in connection with bargain transactions. Only infrequently has attention been directed toward the effect of mistake in the gift area and the consequent results on the rights of the parties involved. The presence of mistake in the setting of gift transactions will often give rise to an inquiry as to the right of the donee to obtain perfection of the gift, or conversely, the right of the donor to obtain cancellation or reformation. In addition, the mistake may necessitate a somewhat more complex inquiry if the subject of the intended gift has been mistakenly transferred to a third party, so that the relative rights of the intended donee as against the donor or his successors to reacquire the corpus of the gift must be determined. In order to direct attention to these problems, it will be assumed throughout the comment that the formal requirements of transfer of title have been effected. Thus the mistake here discussed will relate either to the quantum of the gift, the identity of the subject of the gift, or the identity of the donee, rather than to mistake which would cause no interest in the property to pass out of the donor.¹ So as to focus on those aspects relatively peculiar to gift transactions, it will be assumed that the kind or type of mistake is such that in non-gift transactions relief would be given.²

Illustratively, mistake as to the quantum of the gift occurs when the donor, intending to give twenty acres of land, by mistake gives either more or less, or, intending to give a life estate, by mistake

¹ When the result of the mistake is that no effective transfer occurs, somewhat different considerations are involved. The abortive gift does not occasion any loss to the donor, since he continues to retain all the property rights in the subject matter which he had prior to the attempted gift. Thus the problem of restitution in favor of the donor does not arise. Further, the donee is unable to point to the necessary legal acts which are required for transfer, i.e., delivery with an intention of finality, and a properly executed deed if the transfer is by instrument. A compliance with the formalities for transfer may be necessary before the donee can obtain perfection of his gift. *Dowding v. Dowding*, 152 Neb. 61, 40 N.W. (2d) 245 (1949). *RESTITUTION RESTATEMENT* §164 (1937) makes no such distinction. See also "Reformation in Favor of an Intended Donee" in *DAWSON AND PALMER, CASES ON RESTITUTION* 865 (1958).

² Commonly a distinction is made between mistake of fact, for which relief is allowed, and mistake of law, for which relief has frequently been denied. However, the distinction seems to be of diminishing importance in recent cases. See 3 *POMEROY, EQUITY JURISPRUDENCE*, 5th ed., §§842, 851 (b) (1941). *RESTITUTION RESTATEMENT* §49 takes the position that in gift transactions, restitution for mistake of law will be given as readily as for mistake of fact.

conveys the fee. An example of mistake in the identity of the subject of the gift would be the mistaken conveyance of plot *A* when the donor intends plot *B* to pass. Mistake as to the identity of the donee arises when the donor intends to give plot *A* to *X*, but by mistake conveys it to *Y*. The subject of the gift may be property or services.

The comment will deal first with three topics, (1) donor's rights against the donee or mistaken transferee, (2) donee's rights against the donor, and (3) rights of an intended donee against the mistaken transferee. This will be followed by a discussion of the problem which arises when the relative rights of more than two parties are involved.

I. Donor's Rights

Frequently the mistake results in either the donee receiving more than the donor intended he should receive or a stranger receiving property not intended for him at all. In such situations the general rule is well established that with the exception of gifts to indigents, the donor has a right to restitution from the donee or a stranger.³ Unlike the situation with respect to bargain transactions, a showing of mutual mistake is not required in gift transactions generally, and it is only the state of mind of the donor that is germane.⁴

The reasons for allowing restitution in favor of the donor are fairly clear. In contrast to the bargain transaction, the donee or transferee has sacrificed nothing to obtain the bounty he has received. To permit successful resistance to the donor's attempt

³ See notes 6 through 11 *infra* for authority in support of the general rule. In the so-called "pauper cases," i.e., charitable gifts to indigents, restitution frequently has been denied. See SEAVEY AND SCOTT, NOTES TO THE RESTATEMENT OF RESTITUTION §26 (1937). There seems to be little, if any, rational basis for the exception, however. For a discussion of the problem of restitution from paupers, see comment, 41 MICH. L. REV. 149 (1942).

⁴ E.g., Tyler v. Larson, 106 Cal. App. (2d) 317, 235 P. (2d) 39 (1951); Mitchell v. Mitchell, 40 Ga. 11 (1869); Crockett v. Crockett, 73 Ga. 647 (1884); Matter of Clark, 233 App. Div. 487, 253 N.Y.S. 524 (1931). See also Pickslay v. Starr, 149 N.Y. 432, 44 N.E. 163 (1896); Ferrell v. Ferrell, 53 W. Va. 515, 44 S.E. 187 (1903). But see Maxwell v. Maxwell, 12 Wash. (2d) 589, 123 P. (2d) 335 (1942).

The reasons that only the donor's intention is relevant are grounded in our concept of private property. The property concept assumes that a person has control over what he owns. A necessary incident to that control is an *ius disponendi*, and this right of disposal in accordance with his wishes should not be overridden unless there is justification for doing so. The threat of loss of bargained-for rights in another party may be sufficient to override the right to dispose (e.g., contract); public purposes may also override the right to dispose (e.g., eminent domain). No such overriding reasons are thought to exist, however, for the protection of a mistaken voluntary transferee. See generally POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW, rev. ed., 107-132 (1954).

to adjust the property rights between the parties so as to comply with the only relevant intention involved in the transaction, that of the donor, would be to sanction an unjust enrichment. Further, underlying considerations of certainty and finality which are entitled to full weight in business situations are not as significant in gift transactions. As long as the supposed donee is afforded some protection for his reliance or change of position as a result of the gift,⁵ there is little to be said for allowing him to keep the property, while considerations of fairness would seem to call for restoration to the donor of that which he did not intend to give.

The particular relief which the donor seeks will vary with the circumstances of the case and the nature of the subject matter of the gift. When the donor intends to give some interest in land, but by mistake gives too much, reformation of the deed is available to correct either the description of the property⁶ or the quantum of the estate.⁷ If the mistake is such that to accomplish the donor's true intention the donee should receive no interest in the land at all, then cancellation is possible.⁸ When the subject of the gift is personalty, the donor may obtain specific restitution,⁹ through the imposition of a constructive trust,¹⁰ or cancellation of the instrument of transfer if one is involved.¹¹

⁵ See Scott, "Restitution from an Innocent Transferee Who Is Not a Purchaser for Value," 62 HARV. L. REV. 1002 (1949), for a discussion of change of position as a partial or complete defense by the transferee.

⁶ E.g., *Mitchell v. Mitchell*, 40 Ga. 11 (1869) (description reformed to decrease acreage given).

⁷ E.g., *Tyler v. Larson*, 106 Cal. App. (2d) 317, 235 P. (2d) 39 (1951) (reformation to tenancy in common rather than joint tenancy); *Schrieber v. Goldsmith*, 39 Misc. 381, 79 N.Y.S. 846 (1902) (reformation to reserve life estate to the donor); *Delap v. Leonard*, 189 App. Div. 87, 178 N.Y.S. 102 (1919) (reformation to include a contingent remainder in favor of the donor); *Day v. Day*, 84 N.C. 408 (1881) (reformation to reserve a life estate to the donor).

⁸ See, e.g., *Hutson v. Hutson*, 168 Md. 182, 177 A. 177 (1935) (cancellation of deed to putative wife given by mistake); *Mulock v. Mulock*, 31 N.J. Eq. 594 (1879), revd. in part on other grounds, 32 N.J. Eq. 348 (1880) (cancellation of deeds to son when given by mistake).

⁹ *Tuttle v. Doty*, 203 Mich. 1, 168 N.W. 990 (1918) (restitution of stock certificates in favor of donor showing mistake).

¹⁰ *Andrews v. Andrews*, 12 Ind. 348 (1859) (donee holds proceeds from sale of land given to her by mistake on constructive trust for donor); *Ferguson v. Deuble*, 27 Ohio Law Abst. 533 (1938) (donee who is given joint and survivorship rights in a bank account by mistake holds as a constructive trustee for the donor). Contra to the cases allowing the donor relief for mistake is *Pickslay v. Starr*, 149 N.Y. 432, 44 N.E. 163 (1896).

¹¹ *Lady Hood of Avalon v. McKinnon*, [1909] 1 Ch. Div. 476 (gratuitous deed of trust corpus cancelled on ground of mistake); *Lister v. Hodgson*, [1867] L.R. 4 Eq. 30 (deed of gift of a moneyed fund cancelled); *Matter of Clark*, 233 App. Div. 487, 253 N.Y.S. 524 (1931) (assignment of an interest in an estate cancelled).

Where the gift is one of services, however, the courts have not agreed on whether the donor can get relief. This situation frequently arises when the donor intends to give his services gratuitously, but in the mistaken belief that the donee is destitute or that the parties are validly married. A suit by the donor on a theory of implied *in fact* contract has generally been unsuccessful,¹² and possibly this line of authority has had an adverse influence when the donor's theory is quasi-contractual, or implied *in law* contract, for the donor has not always recovered in quasi-contract.¹³ Nonetheless, relief has been given to the mistaken donor in several instances on the quasi-contractual theory,¹⁴ and this seems to be the sounder view.

One problem arising only infrequently when the donor seeks restitution is whether he must "do equity" by transferring to the donee the property which he actually intended the donee to have. In one case an equitable decree of cancellation in favor of the donor was conditioned on the execution of a deed which did conform to his proven intent;¹⁵ in another case the donor's prayer for cancellation of the deed of gift was denied, but his alternate prayer for reformation granted when the findings indicated an intention to give some lesser interest in the property.¹⁶ In contrast to these decisions, an unconditional decree of cancellation was given where the donor merely demonstrated that a greater estate had been given by mistake than was intended,¹⁷ and in an English case, cancellation rather than reformation was thought to be the proper remedy on the stated ground that equity will not give effect to an imperfect voluntary conveyance.¹⁸ In situations where the donee was meant to receive some interest in the property transferred to him, it would seem that the better view is to require the donor to leave the donee with the intended interest.¹⁹ Effective transfer to the donee has been achieved in these cases, and the donor, in presenting clear proof of the mistake in order to get

¹² E.g., *Frain v. Brady*, 48 R.I. 24, 134 A. 645 (1926). Cf. *Spencer v. Spencer*, 181 Mass. 471, 63 N.E. 947 (1902); WOODWARD, QUASI-CONTRACTS §46 (1913). But see *In re Agnew's Will*, 132 Misc. 466, 230 N.Y.S. 519 (1928), noted 42 HARV. L. REV. 283 (1928).

¹³ *Cropsey v. Sweeney*, 27 Barb. (N.Y.) 310 (1858).

¹⁴ *Lazzarevich v. Lazzarevich*, 88 Cal. App. (2d) 708, 200 P. (2d) 49 (1948); *Sanguinetti v. Sanguinetti*, 9 Cal. (2d) 95, 69 P. (2d) 845 (1937). See also *Dusenka v. Dusenka*, 221 Minn. 234, 21 N.W. (2d) 528 (1946).

¹⁵ *Murphy v. Steel*, 169 Ark. 299, 274 S.W. 6 (1925).

¹⁶ *Papke v. Pearson*, 203 Minn. 130, 280 N.W. 183 (1938).

¹⁷ *Manfredo v. Manfredo*, 191 Ala. 322, 68 S. 157 (1915).

¹⁸ *Lister v. Hodgson*, [1867] L.R. 4 Eq. 30.

¹⁹ This view is adopted by the RESTITUTION RESTATEMENT §26 (2) (1937).

relief, must of necessity prove his actual intention. If actual intent is established and there is an effective transfer, it seems capricious to allow the donor to recover all the property. If no mistake was present, presumably the donee's right to the property would be unassailable;²⁰ yet when an additional increment passes to the donee by mistake, one view allows the whole transfer to be set aside. The relief given to the donor should be tailored to his injury.

Successors to the donor's interest usually may obtain restitution from the donee upon establishing the donor's mistake. Thus restitution has been given to a grantee of the donor's reversionary interest in the property as against a donee who received a greater bounty than was intended, the mistake being discovered after the reversion was conveyed.²¹ Apparently the presence or absence of consideration in the subsequent grant by donor is not material.²² Similarly, the estate of a deceased donor generally has a right to restitution against a donee who has received more than was intended.²³

II. *Donee Against Donor*

Just as mistake may cause the donee to receive more than was intended, it is also possible for the mistake to cause the donee to receive less than was intended. In such a situation what rights does the donee have against the donor to obtain all the property intended to be given? It is in this setting that the maxim "equity will not aid a volunteer" has a decisive effect (the word "volunteer" meaning the recipient of a benefit conferred for no consideration).²⁴ It appears to be virtually the universal rule that an intended donee may not perfect his gift against a living donor.²⁵ If the donor wishes to increase the donee's bounty so as to comply

²⁰ Dawson v. Dawson, 16 N.C. 93 (1827).

²¹ Jones v. McNealy, 139 Ala. 379, 35 S. 1022 (1904).

²² Adair v. McDonald, 42 Ga. 506 (1871); Miles v. Miles, 84 Miss. 624, 37 S. 112 (1904).

²³ See, e.g., Tyler v. Larson, 106 Cal. App. (2d) 317, 235 P. (2d) 39 (1951); Johnson v. Austin, 86 Ark. 446, 111 S.W. 455 (1908). But see Lathrop v. Sandlin, 223 Ark. 774, 268 S.W. (2d) 606 (1954).

²⁴ "Volunteer" is defined by Bouvier as "one who receives a voluntary conveyance." 3 BOUVIER'S LAW DICTIONARY, 8th ed., 3409 (1914). Frequently the word has been applied also to one who confers an unsolicited benefit.

²⁵ Cases cited in notes 27 and 28 *infra* support this view. See also 23 R.C.L. 344 (1919); STORY, EQUITY JURISPRUDENCE, 14th ed., §982 (1918).

with the donor's original intention, he is free to do so;²⁶ if on the other hand the donor does not wish to fulfill his original intention, it is said that what the donor "is not bound to make he is not bound to perfect."²⁷ Apparently the underlying principle in this situation is that the donee should not "bite the hand that feeds him," and the courts will not lend their aid in order that he may do so.

When the donor is no longer living, a somewhat different situation is presented, for the reasons behind the rule denying the donee relief no longer exist. In the first place the donor is no longer available to perfect the gift if he should wish to do so. Second, when the donor's estate resists the suit of the donee, the real parties in interest are usually the residuary legatees or the heirs. The intended donee is not "biting the hand that feeds him," for neither the heirs or residuary legatees were the source of the intended bounty. One court has said, "The heir at law has given nothing. It was never his. The grantee does not even owe him thanks."²⁸ When the issue is framed in terms of what the donor would have done had he been living when the mistake was discovered, the court may be more willing to assume that the donor would prefer perfection of the gift rather than allow the mistaken grant to stand as made.²⁹ It is for these reasons that in recent years several courts have declined to follow the "no aid to a volunteer" rule when the donor is deceased, and have allowed the donee to compel completion of the intended gift against the donor's estate.³⁰ Nevertheless, a number of courts have followed a more mechanical approach in holding that the donee may not recover, principally

²⁶ In fact, a donor has been denied the aid of an equity court in such a situation. In *Langley v. Kesler*, 57 Ore. 281, 111 P. 246 (1910), it was held that equity will not supply those things which may be in the power or reach of an applicant.

²⁷ *Adair v. McDonald*, 42 Ga. 506 at 507 (1871).

²⁸ *Lawrence v. Clark*, 115 S.C. 67 at 81, 104 S.E. 330 (1920).

²⁹ *M'Mechan v. Warburton*, [1896] 1 I.R. 435.

³⁰ *Laundreville v. Mero*, 86 Mont. 43, 281 P. 749 (1929), noted 14 MINN. L. REV. 425 (1930), and 43 HARV. L. REV. 968 (1930); *Hazlett v. Bryant*, 192 Tenn. 251, 241 S.W. (2d) 121 (1951); *Green v. Votaw*, 192 Okla. 136, 134 P. (2d) 367 (1943); *O'Conner v. McCabe*, 42 S.D. 506, 176 N.W. 43 (1920); *Lawrence v. Clark*, 115 S. C. 67, 104 S.E. 330 (1920); *Dowding v. Dowding*, 152 Neb. 61, 40 N.W. (2d) 245 (1949). Cf. *Reina v. Erassarret*, 103 Cal. App. (2d) 258, 229 P. (2d) 92 (1951); Pound, "Consideration in Equity," 13 ILL. L. REV. 667 at 673 (1919). RESTITUTION RESTATEMENT §127 imposes an additional limitation, that the donee must be a natural object of the donor's bounty. This conforms to the facts of most cases cited above, but does not appear as an express requirement in any of them. Subsequent to the publication of the *Restatement*, one court did deny relief on the ground that the donee was not a natural object of the donor's bounty. *Sweeney v. Peterson*, 106 Colo. 287, 103 P. (2d) 1064 (1940).

on the theory that since the donee has no right against the donor, the donee can not acquire such a right simply because the donor's interest now rests in his successors.³¹

It also should be noted that the maxim calling for no aid to a "volunteer" can be avoided by a showing of the flimsiest sort of consideration, which as a practical matter allows a donee to obtain perfection of his gift, although in theory the transaction is not strictly one of gift. If the grant arises out of a family settlement,³² or if the donor stands *in loco parentis* to the donee,³³ there is "meritorious consideration" sufficient to allow the perfection of the gift. Also the slightest monetary payment, such as one dollar,³⁴ has been found sufficient to avoid the volunteer rule and permit the donee substantially to increase his bounty. The fact that the courts, especially courts of equity, are willing to indulge in this fiction of a bargain transaction indicates a sympathetic attitude toward the donee when he seeks reformation against the donor's representative. This sympathy is probably grounded in the realization that the opposing claimants are often heirs or legatees who are also "volunteers."

III. *Intended Donee Against Mistaken Transferee*

It is quite possible that the mistake may result in a transfer of the gift property to one who is not the intended donee. One such instance occurs when the donor is mistaken as to the identity of the

³¹ *Marvin v. Kelsey*, 373 Ill. 589, 27 N.E. (2d) 469 (1940); *Stanforth v. Bailey*, 344 Ill. 38, 175 N.E. 784 (1931); *Strayer v. Dickerson*, 205 Ill. 257, 68 N.E. 767 (1903); *Henry v. Henry*, 215 Ill. 205, 74 N.E. 126 (1905); *Lyon v. Balthis*, 24 Ohio App. 57 (1926); *Powell v. Powell*, 27 Ga. 36 (1859); *Else v. Kennedy*, 67 Iowa 376, 25 N.W. 290 (1885); *Union Trust Co. v. Boardman*, 215 App. Div. 73, 213 N.Y.S. 277 (1925); *Smith v. Smith*, 80 Ark. 458, 97 S.W. 439 (1906); *Browne v. Gorman*, (Tex. Civ. App. 1918) 208 S.W. 385; *Shears v. Westover*, 110 Mich. 505, 68 N.W. 266 (1896); *Froman v. Froman*, 13 Ind. 317 (1859). See also *Skelton v. Tyner*, 247 Ala. 511, 25 S. (2d) 160 (1946); *Abbot*, "Mistake of Fact as a Ground for Affirmative Equitable Relief," 23 HARV. L. REV. 608 at 620 (1910). Some decisions have stated that the heir of his own merit has an equity greater than or equal to that of the intended donee in certain cases. *Hout v. Hout*, 20 Ohio St. 119 (1870); *Willey v. Hodge*, 104 Wis. 81, 80 N.W. 75 (1899); *Enos v. Stewart*, 138 Cal. 112, 70 P. 1005 (1902); *Triesback v. Tyler*, 62 Fla. 580, 56 S. 947 (1911).

³² E.g., *Partridge v. Partridge*, 220 Mo. 321, 119 S.W. 415 (1909); *Elliott v. Daves*, 176 Miss. 846, 170 S. 680 (1936); *Uebbing v. Koester*, 14 Ohio C. C. Rep. (N.S.) 553 (1908), *affd.* 81 Ohio St. 564 (1910).

³³ E.g., *Powell v. Morisey*, 98 N.C. 426, 4 S.E. 185 (1887); *Hutsell v. Crewse*, 138 Mo. 1, 39 S.W. 449 (1897).

³⁴ *Mason v. Moulden*, 58 Ind. 1 (1887). See *Lefsey v. Mims*, 193 Ga. 780, 20 S.E. (2d) 32 (1942); *Scott v. Grow*, 301 Mich. 226, 3 N.W. (2d) 254 (1942). Cases on meritorious consideration are collected in 69 A.L.R. 423 at 438 (1930), supplemented in 128 A.L.R. 1299 (1940).

donee and transfers the property to a stranger rather than to the intended donee. A similar situation arises when there are simultaneous gifts to more than one donee, but mistake causes one donee to receive what another should have been given, and vice versa.³⁵ It has been stated previously that the donor or his successors in interest are entitled to restitution from the unintended transferee.³⁶ The question now to be considered is whether the intended donee is entitled to obtain from the transferee the property which the donor intended he should have.

The means by which the transferee obtained the property may be controlling. Where the mistaken transferee is not guilty of tortious conduct, it seems that the intended donee has no rights against the transferee during the donor's lifetime. The reasons for this are similar to those which apply in the absence of a third party. The donor is empowered to act if he wishes to correct the mistake by reacquiring the property from the transferee and then completing the gift to the intended donee. Conversely, if the donor wishes to leave the parties in status quo, thereby affirming the transfer, he is privileged to do so.

When the donor is dead, however, the intended donee on a showing of the mistake is permitted to complete his gift against either an excessively enriched co-donee³⁷ or a stranger who received the property in the same transaction which gave rise to the intended donee's claim.³⁸ The rationale seems to be that since both parties are "volunteers" whose rights arise in the same transaction, their equities would normally be equal, so that as between the two, the donor's true intention should control.³⁹ Several cases have clearly distinguished the transferee who takes an interest in the gift property at the same time the intended donee acquires his rights, from the transferee who subsequently acquires title to the

³⁵ As to the excess property which the co-donee receives, he may be treated as if he were a stranger.

³⁶ See text at note 3 supra. Of course if the transferee conveys to a bona fide purchaser, the donor's right to the specific property is cut off. *German Mutual Ins. Co. v. Grim*, 32 Ind. 249 (1869).

³⁷ *Reinberg v. Heiby*, 404 Ill. 247, 88 N.E. (2d) 848 (1949); *Simms v. Simms*, 139 Misc. 726, 249 N.Y.S. 171 (1931); *Kiser v. Lucas*, 170 Md. 486, 185 A. 441 (1936); *Huss v. Morris*, 63 Pa. 367 (1869); *Spencer v. Spencer*, 115 Miss. 71, 75 S. 770 (1917); *Weir v. Van Tromp*, 16 T.L.R. 531 (1900).

³⁸ *Swinebroad v. Wood*, 123 Ky. 664, 97 S.W. 25 (1906); *Mattingly v. Speak*, 67 Ky. 316 (1867); *Larkins v. Biddle*, 21 Ala. 252 (1852).

³⁹ *Miles v. Miles*, 84 Miss. 624, 37 S. 112 (1904); *Adair v. McDonald*, 42 Ga. 506 (1871).

property.⁴⁰ The subsequent transferee is thought to stand in the place of the donor, and may assert the donor's rights to the same extent that the donor's heirs or legatees are able to do so.⁴¹

When the third party transferee has obtained the property by tortious conduct (e.g., fraud), the *Restatement of Restitution* takes the position that the intended donee has a right against the transferee both during and after the donor's life-time.⁴² No cases, however, have been found to support this view.

IV. *The Problem of Multiple Claimants*

When a mistake results in the gift property being in the hands of the wrong person, it is sometimes possible that two claims can be made upon him, one by the donor or his successors, and the other by the intended donee. From the discussion above it can be seen that if the donor is living and the mistake is not caused by wrongdoing on the part of the transferee, then the donor clearly has an exclusive claim to the property. When the donor is dead, however, both the donor's estate and the intended donee may have claims to the property which is in the hands of an innocent transferee. Another dual claim situation arises if the *Restatement* position regarding tort on the part of the transferee is accepted. In this case the property in the hands of the transferee may be subject to the claim of the donor or his estate, and to the claim of the intended donee, both during or after the donor's life.

This possibility of dual claims poses the problem of which claim has priority in each situation. This priority problem can arise in two contexts, first, where all contestants are before the court in a single action; and second, where one claimant acting alone obtains the property and subsequently is forced to litigate his right to the property against the other claimant.

When all the parties are before the court and the mistaken transferee is not guilty of tortious conduct, the contest for the gift property arises between the intended donee and the donor's successors. The proper resolution of the conflicting claims should be by analogy to the two-party situation where the intended donee

⁴⁰ *Reinberg v. Heiby*, 404 Ill. 247, 88 N.E. (2d) 461 (1949); *Miles v. Miles*, 84 Miss. 624, 37 S. 112 (1904); *Adair v. McDonald*, 42 Ga. 506 (1871). But see *Gibson v. Johnson*, 148 Ark. 569, 230 S.W. 578 (1921).

⁴¹ See notes 30 and 31 *supra*.

⁴² *RESTITUTION RESTATEMENT* §133 (1), comment *c*, illus. 7, 8, 9 (1937). But see special note to §133 in A.L.L., PROPOSED FINAL DRAFT, *RESTITUTION RESTATEMENT* 267 (1936), and dictum contra to §133 in *Peters v. Priest*, 134 Ark. 161, 203 S.W. 1042 (1918).

is claiming against the donor's estate. If the jurisdiction is one which would permit the donor's estate successfully to resist the intended donee's claim when the estate continues to possess the gift property, then it would be proper to allow the donor's estate (or successors in interest) to prevail when three parties are involved.⁴³ If the jurisdiction is one which allows perfection of the gift against the donor's estate, then the intended donee should have the superior claim against the third-party transferee.⁴⁴ In other words, it seems equitable to weigh the relative rights of the claimants against the third-party transferee by reference to the claimants' rights *inter se*.

If the transferee obtained the property through tortious conduct, this again provides two potential claimants, the intended donee and the donor or his estate. Here again by analogy to the two-party situation of donor and donee it would seem that when all parties are before the court, the living donor's claim should be superior, since the intended donee can not compel the donor to complete a gift which is imperfect due to mistake. This view is reinforced by the *Restatement* position that if the donor reacquires the property from the tortious transferee, the intended donee's right to restitution is terminated.⁴⁵

The most interesting question arises not when all parties are before the court but when the intended donee alone acts first and obtains the property. As indicated above, generally he can do this after the donor's lifetime, or if the mistaken transferee was tortious, during as well as after the donor's lifetime. In such a case may the donor or the donor's estate re-acquire the property from the donee who has obtained fulfillment of his gift? The donor's estate, although capable in some jurisdictions of resisting a claim by the intended donee, realistically may represent "volunteers" to which equity should hesitate to lend its aid. In addition, the donor's intention has been fulfilled by the intended donee's suit. It does not seem reasonable to allow the donor's estate to point to the mistake, now corrected, as a ground upon which it should have a right to the property.

As to the living donor, there are plausible reasons why he also should not be permitted to re-acquire the gift property. The donee can point to final intent plus transfer by the donor at one time.

⁴³ See note 31 supra.

⁴⁴ See note 30 supra.

⁴⁵ RESTITUTION RESTATEMENT §133 (2) (1937).

The donor has done everything that was necessary to divest himself of the gift property in favor of the intended donee. To be sure, there was a mistake as to the identity of the donee, but that has since been corrected, and the donee now holds the property as was originally intended. What the donor is not bound to make he is not bound to perfect, and therefore in this situation perfection by the donor is no longer required. In the absence of mistake the donor could not revoke the gift because he changed his mind on the matter; thus he should not be able to take advantage of the fortuitous existence of a mistake, now eliminated, to do what was not possible in the absence of mistake.

But the difficulty with this line of argument is that the ultimate rights of the claimants will be determined by a race to judgment upon the discovery of the mistake, for it is clear that if the donor acts first and obtains the property from the transferee, the intended donee cannot compel the donor to complete his gift. The race to judgment result seems singularly inappropriate in the setting of gift transaction, and should be avoided. When a living donor is involved, the question ultimately is whether to prefer an avaricious donee or the donor who has changed his mind; when the donor's estate is the claimant, the question is usually one of avaricious donee versus the avaricious heir. The best solution would seem to be to allow the intended donee no greater rights by reason of his initial acquisition of the gift property from the transferee. In accordance with the better view, the intended donee should have a better right to the property than the donor's estate, whether the property is in the hands of the estate or a mistaken transferee. When the living donor is the other claimant, however, he should have the superior right in all cases. Despite the fact that the policy of finality in gifts is somewhat undermined, the donor, as the source of the property, should have the right to control its ultimate disposition.

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