control of the situation in which they are placed. Thus in *Kochanski* v. *Kochanska*,[56] Sachs, J., when referring to the circumstances in which the presumption could be rebutted, mentioned "circumstances . . . where there are to be found resistance movements, concentration camps, prisoners of war, camps of displaced persons, and groups of persons who may by divers methods be prevented from leaving the country in which they are".[57] All these instances fall within the interpretation of the rule stated above but none of them outside it. In any case a view which held the mere intention of the parties as a sufficient rebuttal would render the general *lex loci* rule, which has stood for over 200 years, virtually impotent and would, it is submitted, call for an immediate repudiation by the appellate courts.

Finally, it is interesting to note that in *Kochanski* v. *Kochanska*[58] Sachs, J., declared that until the decision in *Taczanowska* v. *Taczanowski*[59] it was generally believed (e.g. by Dicey[60] and Westlake[61]) that where the *lex loci* was inapplicable the law to apply was the *lex domicilii*. Now, however, it would appear from the decision of the Court of Appeal that this is not so and that the law to apply in such case is not the *lex domicilii* but the common law of England i.e. the *lex fori*. Though his Lordship did make an attempt to distinguish the judgments of the Lord Justices of Appeal on this point this not very convincing, and he himself admitted[62] that counsel in the case (for the husband) was bound to argue, and he to make his decision on the basis, that the marriage was valid under the common law regardless of the *lex domicilii* of the parties. It may be observed that Sachs, J. failed to refer to any of the Australian decisions on the matter, apart from *Savenis* v. *Savenis*,[63] although that of Myers, J.,[64] is clearly in support of the view which his Lordship evidently preferred but felt unable to follow because he was bound by the decision of the Court of Appeal.

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CY-PRÈS DOCTRINE

RE ULVERSTON AND DISTRICT NEW HOSPITAL FUND

In the recent decision of the Court of Appeal in *Re Ulverston and District New Hospital Building Trusts*[1] the court examined the fate of moneys collected for a charitable purpose, which cannot be applied to that charitable purpose owing to failure of some necessary condition.

The case arose out of a public appeal made between 1924 and 1942 in the Ulverston district for funds for building, equipping and maintaining a new hospital to serve the district. Contributions were sought in this appeal for the fund which was to be known as the Ulverston and District New Hospital Building Fund, from a variety of donors by a variety of methods. Some money was collected from named or identified donors, the balance from unidentified sources including anonymous contributions and donations, street collections and entertainments of various sorts. However, insufficient money was raised to carry out the purpose for which the fund was collected, and in 1946 the National Health Service Act came into force and so rendered the carrying out of the purpose impossible. The trustees sought directions from the court as to how they should dispose of money still in their hands.

The Court of Appeal (Lord Evershed, M.R., Jenkins and Hodson, L.JJ.) in a reserved judgment held that the fund had been collected for a particular purpose, and not for the general charitable purpose of improving hospital

[56] *Supra.* [57] *Supra* at 623. [58] *Supra.* [59] (1957) 3 W.L.R. 141.
[60] A. V. Dicey: *Conflict of Laws*, (6 ed. 1949), 772.
[61] J. Westlake: *Private International Law*, (7 ed. 1925) 63.
[62] (1957) 3 W.L.R. 619, 621, 622, 625.
[63] (1950) S.A.S.R. 309. [64] *Supra* n. 53.
[1] (1956) 3 W.L.R. 559.

facilities in the area, that no general charitable intention should be imputed to the identified donors. That since the particular charitable purpose for which the money had been collected failed *ab initio*, all the money in the hands of the trustees should be held on resulting trusts for those donors who could be identified. It thus affirmed the decision of Stone, V.-C., sitting in the Chancery Court of the County Palatine of Lancaster (Manchester Division). The leading judgment was delivered by Jenkins, L.J. with whom Hodson, L.J., concurred. Evershed, M.R., delivered only a short judgment in which he discussed a judgment delivered by himself in *In re Hillier's Trusts*.[2]

The Attorney-General based his argument on three main submissions. He first argued that on the facts of the case a general charitable intention should be imputed to all donors. The Court upheld the view of Stone, V.-C., and held that a particular charitable intention, that of benefiting only a particular hospital, was to be imputed. It is submitted that the finding of such intention by way of conclusion directly from the facts will depend on those facts in each case, and comment is made only on the inferences drawn therefrom.

Secondly, the Attorney-General argued that even if the fund were raised for a particular purpose, primarily it involved the more general charitable purpose of benefiting the district by the provision of such a hospital. Jenkins, L.J., here relied on the test laid down in *In re Wilson*[3] by Parker, J., and held that this submission failed. As an application of settled law no objection is made to this part of the decision.

The third submission of the Attorney-General was based on the inclusion in the fund of sums received from anonymous sources. The argument was developed in three stages. He argued, first, that the donors who gave anonymously must be taken to have given "out-and-out", and to have had no intention that the money should under any circumstances be returned to them. He then argued that in view of this the anonymous donors must be taken to have had a general charitable intention. He urged, finally, that a general charitable intention should therefore also be imputed to the identified donors in view of their knowledge that the funds raised by their donations would be mixed with the funds raised from unidentified sources. Jenkins, L.J. rejected this argument both on principle and authority, and three aspects of this holding may be examined here. (1) Whether there exists in law a distinction to be drawn between the case of failure of the charitable purpose *ab initio* and failure after the funds have been applied to the purpose, so that a surplus remains, and more importantly, if such a distinction exists, what is its effect? (2) What is the distinction which is to be drawn between a gift made "out-and-out" and a gift made with a general charitable intent, and how is the former to be applied in case of failure of the purpose for which collected? (3) What intention is to be presumed in the case of identifiable donors where the donations are made by them in the knowledge that they will be mixed with sums raised from anonymous sources?

I. *Failure Ab Initio and After Fund Applied.*

Jenkins, L.J. drew the following distinction between the case of total failure *ab initio* and the case of disposal of a surplus:

> With regard to this case *(In re Welsh Hospital (Netley) Fund)*[4] I would observe that it concerned the disposal of a surplus after the immediate purposes for which the fund had been raised had been fully fulfilled, and not a case of total failure *ab initio* like the case with which we now have to deal. The intention of a subscriber might well be that his contribution should be returned in the event of total failure *ab initio* of the purpose for which he made it, but that in the event of a surplus being left over after that purpose had been duly fulfilled, any share in

[2] (1954) 1 W.L.R. 700. [3] (1913) 1 Ch. 314. [4] (1921) 1 Ch. 655.

> such surplus which might be regarded as representing his subscription or some part thereof should be permanently devoted to charity. In forming his intention as to the fact of his contribution in the latter event (if indeed, he formed one at all) he might well be influenced by the fact that the inclusion of contributions from anonymous sources, and the indiscriminate spending of a mixture of anonymous contributions and contributions from varied subscribers, would make it impossible to ascertain whether the whole or any, and if so, what part of any particular contribution had been spent. In the case of total failure *ab initio* different considerations apply, for the whole of the fund is *ex hypothesi* intact and there has been no effective application of it for the purpose for which it was raised.[5]

It is respectfully submitted that this reasoning does not go beyond a guess at the intention of the donors, and an assertion that different considerations apply in the two situations. But the only such consideration specified is that where none of the fund has been spent there is no problem of deciding which particular contribution has been spent. Where contributions are anonymous, however, it is difficult to see what bearing this consideration could have. Denning, L.J. in *In re Hillier's Trusts* had strongly disapproved of any distinction being drawn. "Next suppose that the specific charity fails before the money is spent at all . . . What is to happen to the money which has been collected in church, on flag days, and so forth. The answer is, I think, the same as in the case of a surplus . . . "[7] His Lordship went on to state that exactly the same considerations apply in the case of named donors who make no specific provision for the return or otherwise of their money in the event of its non-application to the charity. The distinction had not been drawn in the earlier cases, although in *In re British School of Egyptian Archaeology*[8] its existence was suggested by counsel and foreshadowed by Harman, J. but not elaborated.

It is submitted that the position of Denning, L.J. in *In re Hillier's Trusts*,[9] is to be preferred, and that the distinction between the failure of the fund *ab initio* and failure after application to the particular purpose is significant only insofar as the fund is made up of gifts made by identifiable donors, and where the intention of the donor is an expressed intention. Where there is no expressed intention the distinction leads to guessing, like that of Jenkins, L.J., at the intention of the donors. In the case of an anonymous donor, as Denning, L.J. said in *Hillier's Case* — "the law gives them credit for the best of intentions, and presumes that he would have wished it so."[10] But his Lordship still seems to regard this as a deduction from what he, the judge, thinks is the testator's intention. The view here taken is that where, by anonymity or otherwise, an expression of intention is absent, the court should, as a matter of law, treat the money as conclusively applied to charity. On this view no distinction will be made between the case where the money has been in part applied and the case where no application has been made.

It may be that in no case where money has been applied to a charity has there afterwards been any consequential operation by way of resulting trust, on which point Jenkins, L.J. quotes Sargant, L.J. in *In re Monk*.[11] This, however, does not support the conclusion that a difference exists between the two cases. It is possible that such an instance as Sargant, L.J. has been unable to find[12] could arise, but its absence to date does not establish the difference.

II. *"Out-and-Out Gifts" and General Charitable Intention.*

The second question which arises for discussion is interlocked with the

[5] (1956) 3 W.L.R. 559, 568. [6] (1954) 1 W.L.R. 700.
[7] *Id.* at 715. [8] (1954) 1 W.L.R. 546, 553. [9] (1954) 1 W.L.R. 700.
[10] (1954) 1 W.L.R. 700, 715. [11] (1927) 2 Ch. 197, 211. [12] *Ibid.*

above. It is suggested by Jenkins, L.J. that where a gift is made "out-and-out", there should not necessarily be a general charitable intention presumed in all cases, that such funds may be given for a particular charitable purpose only, and that on failure of this *ab initio* the money would be properly *bona vacantia*. His Lordship, while accepting the proposition that anonymous donors give "out-and-out", found "serious difficulty in the inference that, because the anonymous donors have given "out-and-out" therefore a general charitable intention must be imputed to them, however exclusive and specific the avowed purpose of the fund may be."[13]

His Lordship's implication is that the donor might have wished the money in the event of non-application upon failure *ab initio* to become *bona vacantia*. This is directly contrary to the view expressed in the *Welsh Hospital Case* by Lawrence, J., a view strongly affirmed by Denning, L.J. in *Hillier's Case*,[14] that "the law in all cases should make a presumption in favour of charity. It should impose on the trustees the same trust for all the money they receive, namely, to apply the money for the named purpose: see the *Netley Hospital Case*." A view based on this reasoning would be that wherever a gift of money is made by an anonymous donor to a fund collected for a particular charity, in such circumstances that he cannot recover the money (an "out-and-out" gift), then from this quality in the gift there should in all cases be implied that the gift is made with a general charitable intent. This is not to identify the quality of "out-and-outness" with a general charitable intent, as has been done in a number of cases, and as Professor L. A. Sheridan in a Case Note in the *Canadian Bar Review*[15] appears to do, but rather to say that the intent to be presumed in the case of such a gift is necessarily a general one, and that the funds can be applied cy-près in a proper case.

One purpose of this Note is to suggest that in cases where there is no expression of the intention of the donor, there should be imputed a general charitable intention, whereupon the gifts will be applied cy-près in the event of failure. This imputation should be a matter of the policy of the law in all appropriate cases, and not a matter of purported inference as to the actual state of the donor's mind. Under both the preceding heads such purported inferences are obviously drawn from facts inadequate to support them; and this can only lead to arbitrary and even contradictory results.[16] It is admitted that cases may conceivably arise where the facts themselves are such as to negative the imputation above contended for; such a case was foreshadowed in the judgment of Evershed, M.R. in *Hillier's Case*.[17]

III. *Mixed Funds (Identified and Anonymous Sources).*

Evershed, M.R. said in *Hillier's Case*:[18]

> . . . it is a relevant and admissible fact in determining his true intention that when he contributed to the fund, he must be taken to have known that his contributions would be mingled with thousands of others,[19] sub-

[13] (1956) 3 W.L.R. 559, 566.
[14] (1954) 1 W.L.R. 700, 716.
[15] L. A. Sheridan (1956) 34 *Can. Bar Rev.* 431.
[16] (1954) 1 W.L.R. 700. In *Re Hillier's Trusts* the facts were briefly that an appeal was launched for the improvement of hospital services in an area, and in particular the building of a particular hospital. Donations were sought later by contributions accompanied by certain documents naming the subscribers and by anonymous donations at public functions. Owing to the passing of the National Health Service Act, 1946 it became impossible to apply the funds so raised, and directors were sought as to the disposal of the funds held. It was held by the Court of Appeals that in general no donors should receive a return of their donations and that the money should be applied cy-près, unless in certain particular cases among those who subscribed by name, it was found that no general charitable intent existed, and an inquiry was directed accordingly.
[17] (1954) 1 W.L.R. at 714.
[18] *Id.* at 712.
[19] *Id.* at 713 (i.e. "other donors").

stantial numbers of whom were contributing in circumstances which negatived any right of exception on their part to any return of their money in any circumstances.

His Lordship then put the matter on a slightly different basis when he said:[20] "Where there are many sources of contribution to a charitable fund, then all contributions should, in the absence of special circumstances, be taken to contribute on terms common to all; and the only such terms possible in the present case deny any right to the return of their money to all contributors."

In the first passage quoted, his Lordship imputes a special knowledge to the donor, and draws an inference from this, and in the second passage an inference is drawn without the intervention of any imputation of knowledge, but by way of application of a general rule. Jenkins, L.J. in the principal case explained these *dicta* by saying that no general rule was intended, though he recognised that the inclusion in the fund of sums raised from anonymous sources was a factor to be taken into account in determining the intention of the donor. It is submitted that Evershed, M.R., on the contrary, was in *Hillier's Case* attempting to lay down a general rule notwithstanding his qualifying remarks in the *Ulverston Case*,[21] and (with respect) that such a general rule seems not substantiated at law, nor supported by modern accounting and administrative methods. It also seems to disregard the tight control which would necessarily be held over such a fund. Even Jenkins, L.J.'s modified and tentative view[22] that the intention of the donor would in fact be swayed by the thought of a mingling of the moneys received, seems questionable, since the trustees would be bound to keep strict accounts. Here again the present writer believes that the search for the donor's actual intention can end often only in dubious guesswork. In fact, it is unlikely that most donors would have been swayed either way by these considerations. It may be added that Evershed, M.R.'s position seems first to impute certain knowledge to the donor, and then draw inferences of fact as to the donor's intention from this imputed knowledge as if it were actually present. And his Lordship in the *Ulverston Case* may to a degree have recanted his view above in *Hillier's Case*.[23]

The present view, then, is that the inclusion of anonymous donations should make no difference to any general presumptions of intention made in respect of named donors, since it will always be possible to make a rateable adjustment at any stage.

It is submitted, in conclusion, that the law should treat charities more favourably and should be less ready to find only a particular charitable intention; that such a merely limited intention should only be found where it is expressly stated by the donor, and that in other cases an imputation of general charitable intent should be imputed to the donors, so that there will be an application cy-près on failure of the gift.

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THE RECOGNITION OF FOREIGN DECREES OF DIVORCE IN AUSTRALIA

FENTON V. *FENTON*

Are the members of the Full Court of Victoria who recently decided the case of *Fenton* v. *Fenton*[1] to be relegated to the company of "timorous souls"[2]

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[20] (1954) 1 W.L.R. at 712. His Lordship said that unless an express intention was to be found in the terms of the gift then the evidence of the fact that "he must be taken to have known that his contributions would be mingled with thousands of others" would be relevant and admissible in "determining his true intention." (1954) 1 W.L.R. at 712.

[21] (1956) 3 W.L.R. 559. [22] *Id.* at 566. [23] *Id.* at 574.

[1] (1957) V.L.R. 11.

[2] *Per* Denning, L.J., in *Candler* v. *Crane, Christmas & Co.* (1951) 2 K.B. 164 at 178.