by any Statute. The case of *Black* v. *Christchurch Finance Co.*, (1894) A.C., 48, is authority, if authority be needed, for the proposition that the liability of the principal for the acts of his agent is not excluded by the fact that the agent is a contractor, or himself works by sub-agents. The terms of the employment must be the subject of inquiry to the extent of ascertaining that the relation of service or agency exists in fact, but in our judgment the Executive Government cannot be controlled either in its choice of agents or in the form of their appointment or mode of their remuneration. Nor, in our judgment, is it material whether the appointed agent does the work with his own hands, or through the medium of his servant. For these reasons we think that the appeal must be allowed.

Appeal allowed with costs.

Solicitor, for appellant, *Powers*, Commonwealth Crown Solicitor.

Solicitor, for respondent, *Pyman*, Melbourne.

[HIGH COURT OF AUSTRALIA.]

HIS MAJESTY'S ATTORNEY-GENERAL IN AND FOR THE STATE OF NEW SOUTH WALES . . . . . } APPELLANT;

AND

BRIDGET METCALFE, RICHARD THOMAS WATKINS, WILLIAM WATKINS, MATILDA MOLONEY, MICHAEL HOGAN, AND DENIS O'KENNEDY . . } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Will—Construction—Charitable purposes—Indefiniteness.

A devise of real property to "the Reverend D. O'K. . . . Parish Priest," with a direction to sell and expend the moneys derived from the sale thereof "in and towards Church or Convent purposes at C. or for any other purpose or purposes that in his discretion he may think best":

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Held, not to be a good gift for charitable purposes, but void for uncertainty.

Decision of *A. H. Simpson*, C.J. in Equity, (18th April, 1904), affirmed.

APPEAL from the decision of *A. H. Simpson*, C.J. in Equity of the Supreme Court of New South Wales.

The testatrix, Johannah Mary Brown, by her will, dated 29th May, 1903, made the following dispositions :—" I give devise and bequeath to the Reverend Denis O'Kennedy of Cowra in the said State " (New South Wales) " Parish Priest of Cowra aforesaid all my real property " (consisting of various portions described in detail), " and I direct the said Denis O'Kennedy to sell and dispose of the whole of the said land or any portion of the same whenever he thinks proper and convey the same to the purchaser or purchasers thereof and to expend the moneys derived from such sale or sales in and towards Church or Convent purposes at Cowra aforesaid or for any other purpose or purposes that in his discretion he may think best ; I also give and devise to the said Reverend Denis O'Kennedy for his own absolute use and benefit all my personal property of every kind and description together with all the ready money which I may be possessed of at the time of my death in the Bank of New South Wales whether on fixed deposits or running account or elsewhere and I hereby appoint the Reverend Denis O'Kennedy sole executor of this my last will and testament, &c."

The testatrix died on 5th July, 1903. Probate of her will was, on 31st July, granted to the respondent, Denis O'Kennedy, the executor named in the will, who sold the real property for the purpose of expending the proceeds in accordance with the directions contained in the will. Thereupon the respondents, other than Hogan and O'Kennedy, brought a suit in Equity against the Attorney-General, as representing the public, and the other respondents, in which they sought to restrain O'Kennedy from disposing of the purchase-money above mentioned in any way to their prejudice, and claimed that the direction in the will as to the expenditure of the moneys to be derived from the sale of the land referred to in the will was void, and that O'Kennedy, as executor of the will, held the land until sold, and the money arising therefrom after sale, in trust for them and the other next-of-kin of the testatrix.

These questions of law were, by the order of the Court, set down for argument, and on 18th April, 1904, *A. H. Simpson*, C.J. in Equity, after hearing argument, declared that the direction in the will as to the expenditure of moneys to be derived from the sale of the lands was void, and that O'Kennedy, as executor, held the lands and the proceeds of the sale thereof in trust for the next-of-kin. By the decree the question of the costs of all parties was reserved in the event of an appeal.

From this decision the Attorney-General appealed, on the ground that the directions in the will affecting the moneys to be derived from the sale of the lands created a valid charitable trust, and that the moneys in question should be applied and devoted to charitable purposes.

Gordon, K.C., and *Maughan*, for the appellant. The direction creates a valid charitable trust, within the definition and rules stated in *Jarman on Wills*, 5th ed., vol. I., pp. 173, 174. It must be conceded that the direction is void if the effect of the general words is that a discretion is left in the trustee to travel in any direction he pleases outside charitable objects; *Anderson* v. *Anderson*, (1895) 1 Q.B., 749. This is a case for the application of the doctrine *ejusdem generis*. The testatrix has mentioned certain specific charitable objects, and the "other purposes" must be of the same kind. In all the cases in which such directions have been held void, the specific words exhausted the genus of charitable purposes, and, therefore, the "other purposes" necessarily fell outside the genus; *Beale on Legal Interpretation*, p. 32. In the present case the specific words do not exhaust the genus. There is a clear distinction between a gift to charitable and other purposes, and one to certain specified charitable objects and other purposes. In the former there can be no application of the rule of *ejusdem generis*, because the "other purposes" are necessarily non-charitable, whereas in the latter the rule may, in proper cases, be applied, because the "other purposes" include other charitable purposes. Here the words "other purposes" cannot have their full ordinary meaning, because a trust is intended. The executor cannot apply the money to his own benefit; otherwise the subsequent gift of

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personalty for the executor's own benefit would be meaningless. This distinguishes it from *In re Harbison*, (1902) 1 Ir. Rep., 103. As some meaning other than the ordinary one is to be given to these words, the Court should gather the intention of the testatrix from the rest of the will. The general tenor shows that the intention was that this fund should be applied to charitable purposes only, and that the discretion of the trustee is limited to such purposes. The gift is to the executor as Parish Priest, and the only objects specified are religious, and, therefore, charitable; *In re White*, (1893) 2 Ch., 41. The indefiniteness will not make the gift bad; the discretion may be absolute within a limited area. The words in *Pocock* v. *Attorney-General*, 3 Ch. D., 342, "to be distributed by my executors at their discretion," were quite as indefinite, yet the gift was held valid. In *Ellis* v. *Selby*, 7 Sim., 352, the words were "charitable or other purposes," which allowed the fund to be applied to non-charitable purposes at the discretion of the trustees. In *Kendall* v. *Granger*, 5 Beav., 300, the words "encouraging undertakings of general utility" included non-charitable purposes. In *MacDuff* v. *MacDuff, In re MacDuff*, (1896) 2 Ch., 451, the general words included "philanthropic purposes," which, the Court held, were not necessarily charitable. In *Dolan* v. *Macdermot*, L.R., 5 Eq., 60; 3 Ch., 676, the words, "such charities and other public purposes as lawfully might be in the parish of T." were held to create a good charitable gift. This being a case where charities will be benefited, the Court should put a more liberal construction upon the terms of the will, in the direction of carrying out the intention of the testatrix, than if it were a case of a bequest to individuals.

This was a proper question for the Attorney-General to bring before the Court, and the Judge below practically suggested an appeal. The Attorney-General merely intervenes in the interest of public charities; and should, even if unsuccessful, have his costs out of the estate. It is a matter for the discretion of the Court whether he should get his costs; *Attorney-General* v. *Corporation of London*, 12 Beav., 171.

Lingen and *Mann*, for the respondents other than Denis O'Kennedy. The words of the will must be read in their ordinary

sense. If there is no clearly expressed direction, the Court cannot look at the general tenor to see what the testatrix is "driving at"; *Hunter* v. *Attorney-General*, (1899) A.C., 309. If the words used include non-charitable purposes in their natural meaning, a general flavour of charitable intention will not avail to restrict the meaning to charitable purposes. The use of such descriptive words as "Parish Priest" is not sufficient to enable the Court to assume that the intention was charitable; *Jarman on Wills*, 5th ed., pp. 170, 171; *Donnellan* v. *O'Neill*, 5 Ir. Rep. (Eq.), 523, cited in *Theobald on Wills*, 5th ed., pp. 333, 351. "Convent purposes" are not necessarily charitable, because in some convents the objects are altruistic, in others not. The words used in this will give the trustee an absolutely free hand. Therefore, in accordance with the rule of construction stated by Lord *Cairns*, L.C., in *Dolan* v. *Macdermot*, L.R., 3 Ch., 676, at p. 678, that must be adopted as the intention of the testatrix. The gift is therefore void, because the "other purposes" include purposes not charitable. [He cited also *Wilkinson* v. *Lindgren*, L.R., 5 Ch., 570; *Jarman on Wills*, 5th ed., p. 174.]

This is not a case for departing from the general rule that the Attorney-General does not get his costs. In *A.-G.* v. *Corporation of London*, 12 Beav., 171, the Attorney-General had succeeded. *Mayor of Glo'ster* v. *Wood*, 3 Hare, 149, cited in *Daniell's Ch. Prac.*, 5th ed., p. 1,337, laid down the rule that when the Attorney-General fails he does not get his costs. In that case he appeared as defendant unsuccessfully. (See also *Morgan and Wurtzburg on Costs*, pp. 337, 338).

[Griffith, C.J.—As a general rule, where a person makes a claim against an estate and fails, he ought not to get his costs out of the estate.]

The only exception is in the case of administration suits, where the executor could not pay out funds without the decision of the Court. In such cases the plaintiff enables the Court to administer. In the case of the Attorney-General the only exceptions are where he appears for a charity as plaintiff, and succeeds, or for a defendant charity, and fails. The respondents should be awarded costs out of the estate generally, because the difficulty was caused by the testatrix; *In re MacDuff*; *MacDuff* v. *MacDuff* (*supra*).

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Sheppard, for the respondent O'Kennedy. The costs should come out of the fund in dispute, not out of the estate generally; *Patching* v. *Barnett*, 51 L.J. (Ch.), 74, followed in *In re Middleton*, 19 Ch. D., 552.

Lingen, in reply. On a question of construction costs should come out of the estate.

Gordon, K.C., in reply, referred to *Morgan and Wurtzburg on Costs*, p. 165; *Dolan* v. *Macdermot* (*supra*); *Prendergast* v. *Prendergast*, 3 H.L.C., 195; *Maxwell* v. *Maxwell*, L.R., 4 H.L., 506.

GRIFFITH, C.J. The question that arises in this case is entirely one of construction of a will made by a widow. The material words are as follows: [His Honor then read the material portion of the will as reported above, and proceeded.]

It was conceded that, the gift of the land, with directions to sell and dispose of the same, and to expend the moneys derived from the sale upon certain specific objects, being followed by a gift of all the personal property to the same person for his own use and benefit, there was sufficient to show that with respect to the land a trust was created to carry out the objects specified. The question arises upon the words "to expend the moneys derived from such sale or sales in and towards Church or convent purposes at Cowra aforesaid, or for any other purpose or purposes that in his discretion he may think best"; whether those words create a good and valid gift for charitable purposes. The plaintiffs represent the next-of-kin, who claim that, the real property being given upon limitations and for objects uncertain, there is an intestacy as to that property, and that the executor therefore holds it in trust to be distributed amongst them and the other next-of-kin. The Attorney-General has intervened, and claims that there has been a good charitable devise of the real property under the will. It is not disputed that if property is given upon trust to be expended on charitable or other purposes, and it is left wholly to the discretion of the trustee to decide what those other purposes shall be, the gift fails. The question, therefore, is whether these words "other

purposes" in the will are to be read literally, or are to be qualified by the interpolation of some such word as "like" or "religious," so as to restrict them to purposes of a character similar to those actually specified, as if the words had been "for other like purposes," or "for other religious purposes." At one time, no doubt, the rule of *ejusdem generis* was somewhat liberally applied, so as to construe general words as being cut down by the use of antecedent specific words. But in the more modern cases, such as *Anderson* v. *Anderson*, (1895) 1 Q.B., 749, and others of the same class, there has been a contrary tendency, and in general the rule has been adopted of giving the words their natural construction. Looking at these words simply as they stand, we ask ourselves: What conclusion would an ordinary person come to as to the intention of the testatrix, upon reading the words "to expend the moneys . . . in and towards Church or convent purposes at Cowra . . . or for any other purpose or purposes that in his discretion he may think best?" Surely the natural idea suggested by those words is that the testatrix had absolute confidence in the Reverend Father O'Kennedy, and wished to entrust him with the disposition of this fund, to apply it in whatever way might seem to him proper. In *In re MacDuff*; *MacDuff* v. *MacDuff*, (1896) 2 Ch., 451, *Lindley*, L.J., said (p. 467): "Now, turning to this particular case, can we fairly get out of these words any direction that this £10,000 is to be applied, and applied only, to such purposes as the law can say are charitable? My answer is 'No, the words are too general, and too indefinite.'" Nor can we see in this will any implied direction that the fund in question is to be applied to charitable purposes only. It cannot, therefore, be held that there is a good gift of the real property for charitable purposes. The purposes are not sufficiently indicated, the words used being too general and indefinite, and the gift therefore fails. I should not have said so much but for respect for the learned counsel who argued the matter, and for the public who appeared by the Attorney-General. Otherwise we should have been quite content to rely upon the judgment of the learned Judge in the Court below, and the reasons given by him, in which we entirely concur, except, perhaps, as to his suggestion "that different minds might come to a different conclusion in this

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matter." In that we do not quite agree with him. We think that there is only one possible construction to be put upon the words of the will.

As to the costs, this being the only point at issue in the suit, the question arises whether the costs of the unsuccessful parties should come out of the fund. No doubt there is a general rule that, if an appellant is unsuccessful, *primâ facie* he must pay his own costs, and there is also the rule that, generally speaking, an unsuccessful defendant does not get his costs. But to this rule there are exceptions; for instance, in a case where the costs are incurred in a proceeding which is proper and incidental to the administration of the estate. The question, therefore, is, Was this proceeding proper and incidental to the administration? Now, it is clear that the learned Judge below suggested an appeal. Moreover, this may be fairly said that, as by the failure of this gift the next-of-kin have become entitled to property which would not otherwise have come to them, and was not intended by the testatrix to come to them, it is to them somewhat in the nature of a windfall. To order that these costs should come out of the estate would, in effect, having regard to the terms of the will, be to order them to be paid by the executor out of his own pocket, which would be manifestly unfair. We think, on the whole, that the costs of the appellant and of the respondent executor should come out of the proceeds of the land. These matters were expressly left open by the learned Judge below. In other respects the decision will be affirmed.

Judgment varied by directing that the costs of the Attorney-General here and below and the respondent O'Kennedy's costs of the appeal be paid out of the proceeds of the land.

Judgment, so varied, affirmed.

Solicitor, for the appellant, *The Crown Solicitor of New South Wales.*

Solicitor, for the respondents other than Denis O'Kennedy, *D. T. Gilcreest*, by *Russell & Russell.*

Solicitor, for the respondent Denis O'Kennedy, *Curtiss & Barry.*