

1856-012

SOUTHAMPTON COUNTY
CHANCERY PAPERS

NICHOLSON VS. WHITEHEAD'S ADM'R.

5/1856

Nicholson
vs
Whitchard.

Southampton.

1856 May Term

Bishop
Edwards
Redin
Grady
Whitchard
Waller

Nicholson

v. { Stat: Rules

Whitchards own

William St Nicholson

against

John Whitehead admor. with the will annexed of Harriet Whitehead de^o

1853 Aug. 17th Summons issued returnable to September Rules

" Sept. R. Sum^s ret^d Executed. Bill filed & Decree nisi & Deft.

" Oct " Bill taken for confessed.

" " (Last Monday m) Cause set for hearing.

" Nov. 5. Leave for Deft. to file ans: within sixty days.

1856 May 2 Repl. & Decree &c

Volke Books

£ 6. 48.

Shiff ..

50

Saw.

15. 75
£ 22. 73

Nicholson

8 Bill

Whitehead's ~~gutter~~

mm

1853 Sept. Ruled

To the Honorable Richard H. Baker judge
of the Circuit Court of Southampton County.

Humbly Complaining shews unto your Honor
Your Orator William K. Nicholson of the County of
Southampton Virginia that in the year 1852 Harriet
Whitehead of the said County departed this life
after having duly made and published her last will
and testament, whereby she gave to your Orator
One thousand dollars, to be raised out of her estate
for the special purpose of his purchasing and fitting
up a suitable place for a parsonage for the preacher
in charge of the Southampton Circuit, to be appro-
priated to that use as long as the Methodist Episcopal
Church shall remain a regular organized Church.
That the said will was duly admitted to probate in the
Circuit Court of Southampton Virginia on the 5th
day of May 1852. A Copy of which is herewith
filed as an exhibit marked A.

That the Methodist Episcopal Church then,
was a regularly organized Church and still is, and
had in 1842 and now has a Minister in charge of
the Southampton Circuit Virginia.

That the said will was duly made and,
published on the 18th day of June 1842, in accordance
with the then existing law. That nevertheless doubts
are entertained of the legality of that pious pro-
vision of the will aforesaid, and John Whitehead, who
is the Administrator with the will annexed of her
estate refuses to comply with it.

That the said administrator received his letters
of administration in May 1852, that the debts were
trifling and it is believed have all been paid and
there remains applicable thereto to pay the said
sum, abundant assets in his hands.

And your Orator has been instructed by

the official members of the said Methodist Episcopal Church to sue for the same.

In tender consideration whereof he prays that the said John Whitehead may be made defendant hereto and may answer fully (and especially whether he has not assets, applicable thereto, sufficient to pay your orator the said sum, that all necessary accounts may be ordered, that the said administrator may be decreed to pay to your Orator, for the purpose, for which it was given, the aforesaid sum of \$1,000, with interest from the time he ought to have paid it; that such further (and general relief may be given him as Equity (and the nature of the case may require; that subpoena may issue &c. (and he will ever pay &c. &c.

Thoson Jones & Cobb J.L.

Nicholson

vs. } Susner.

Whitbread. atw.

1854 May 3rd

To the Honorable Richard St. Barthe. Judge of the Circuit Court of Southampton County.

That Andrew of John Whitehead, Executor of Hamlet Whitehead and. to a Bill filed in this Court against him by Comd. Nicholson

This defendant saying and moving to himself an answer to some of the said Bill as he is advised, it is material he should answer - says, that it is true Hamlet Whitehead departed this life on the 5th day of April 1852 - having first made ~~the~~ his last will in writing, which was admitted to Record by the Circuit Court of Southampton at the May Term 1852 - a copy of the same is filed by the Plaintiff with his Bill -

That your Respondent - qualified as Executor of Hamlet Whitehead, and has assets sufficient to pay any debts and legacies, required by Law and the will of his Testator

That your Respondent ^{is advised} ~~he~~ should not pay the Legacy, bequeathed to the Plaintiff, because, the objects of the Testator's bounty, are too uncertain and indefinite, to be entitled to claim & receive the legacy of \$1000 - Comd. Nicholson is certain, and the Judge in charge of the Southampton Circuit is uncertain, and if Nicholson should receive the Legacy - there is no person or class of person who could enforce the performance of the trust, and the application of the funds, to the proper purposes indicated by the Testator.

Will -

That the Law passed by the General Assembly, which went into operation on July 1850. prohibits, expressly for the purposes, attempted by his Testator, as he

advised, and if he should pay this legacy, without
the order of this Court, or of some competent Court,
he might be held responsible to those entitled
to the estate of his Testator.

That if the Court should require it, he is prepared to
settle his accounts, with the estate of his Testator
and, he again admits, admits sufficient, of his
Testator, in his his hands to pay the Legacy claimed
by the Plaintiff, who states in his will that, he is
required to bring his suit, by the "official members
of the Methodist Episcopal Church" - These "official
members", are a body of men, unknown to your Hon-
or, and not recognized by the Law of Virginia.
They can neither sue, nor maintain a suit - and
having assumed, your Honorable, may be
much surprised with his costs.

May it please the Court &c.

To
John Whithead

Southampton County to wit.

This day John Whithead
personally appeared before me a Justice of the Peace
for the County aforesaid. That the facts contained
in the foregoing answer are true to the best of his
knowledge & belief; *John E. Gillette J.P.*

Given under my hand this 2nd day of May

1854 -

Nicholson.

N. S.

Whitehead's Adm'n

Note for Decree

To be entered

R. H. Baker

Code 362.

Nov. 20 '54.

Nicholson

v.

Whitehead Adm'r &c

This day, this cause came on to be heard on the Bill, Answer, Replication, and the Exhibit filed, and was argued by Counsel:

On consideration whereof, the Court, being of opinion that the devise, contained in the first clause of the will of Harriet Whitehead dec'd, is valid, and John Whitehead, the Administrator, with the will annexed, of said Harriet, having, in his Answer, admitted that he had, in his hands, assets sufficient to pay and satisfy the same, doth decree that the said John Whitehead, Administrator of Harriet Whitehead dec'd, ~~doth~~ ^{do}

pay to William H. Nicholson, one thousand dollars with interest thereon from the 5th day of May 1853, till paid; and that the said John Whitehead, Administrator, as aforesaid, of the personal estate of the said Harriet Whitehead, out of the assets of his testatrix, in his hands to be administered do pay to the plaintiff his costs by him about his suit, in this behalf expended.

And the Court doth further order that the said William H. Nicholson invest the said sum, remaining after paying the expenses of pursuing this suit, in a mortgage, in the County of Southampton, and report his proceedings to this Court.

But this decree is to be suspended until the said Nicholson shall execute before the clerk of this Court a bond with sufficient security, in the penalty of two thousand dollars, conditioned to carry into effect the decree aforesaid.

Nicholsen

Wm. J. Macer

Whitehead

To be entered

R. H. Baker

May 3. 1856

St. Nicholas

21

Whitehead's will &

This day this cause came on to be again heard on the papers formerly read, and on the report of William H. Nicholson made in pursuance of a decree rendered at November Term 1854, to which report no exceptions have been filed, and the court confirming the same, doth adjudge, order & decree that James H. Seibert execute to Wm. H. Nicholson, John Cobb, Joseph Gillette, Wm. B. Westbrook, James W. Bryant, James S. Gillette, James Hurry, Davis Barrett and Thomas B. Morrell, who are hereby ^{appointed} trustees for that purpose on the application of the proper authorities of the Methodist ^{Episcopal} Church for Southwestern Circuit, a deed with general warranty for a tract of land, purchased of him by Wm. H. Nicholson, lying near the town of Jerusalem & containing ^{and more particularly described by an obligation filed} nearly three acres, which said land was ^{with his report} purchased for the purpose of a parsonage for the Methodist ^{Episcopal} Church on Southwestern Circuit. And the court doth further adjudge, order & decree that Wm. H. Nicholson pay the costs of this decree.

Nicholsen

vs J. C. Dene

Whithead's Ann. 3^e

Southampton Circuit Court, May Term, 1836.
William H. Nicholson

Deft

Against

John McWhithead, adm^r. with the will annexed,
of Thos^r Whithead

Defts

Ch. Chy.

This day this cause came on to be again heard, in the papers formerly read and in the report of William H. Nicholson made in pursuance of a decree rendered at November Term 1834, to which report no exceptions have been filed, and the Court confirming the same, doth (re)judge, order & decree that James B. Sabrell execute to William H. Nicholson, John Cobb Joseph Gillette, W^m B. Westbrook, James D. Bryant, James C. S. Gillette, James Drury, Davis Barnett, and Thomas B. Warren, who are hereby appointed trustees for that purpose in the application of the proper authorities of the Methodist Episcopal Church for Southampton Circuit a deed with general warranty for a tract of land purchased of him by W^m H. Nicholson lying near the Town of Jerusalem & containing nearly three acres (and more particularly described by an obligation filed with his report which said land was purchased for the purpose of a parsonage for the Methodist Episcopal Church in Southampton Circuit. And the Court doth. ad- judge, order and decree that W^m H. Nicholson pay the costs of this decree.

Attest,

Deft.

Henry S. Howard, D.C.

The Commonwealth of Virginia: to the Sheriff of Southampton County, GREETING:

We command you to summon

John Whitehead adnor: with the will
annexed of *Harriet Whitehead* dec^d.

to appear ^{at} ~~before~~ the *clerks office* of our *County* - - Court of Southampton
County at the ~~Court house on the first day of~~ - - term - -

*Rules to be holden for the said Court on the first Monday in September
next to answer a bill in chancery exhibited against him in our said Court
by William B. Nicholson*

And have then there this writ. Witness, Littleton R. Edwards Clerk of our said Court
at the Court house the *17* day of *August*, 1853, in the *78* year of the
Commonwealth.

L.R. Edwards cl^k

Executed on John Whitehead the 25 day Augt
1853 by delivering him a copy of the within
summon.

6 D Jones copy of
S Hello Shff

Richardson

2 { D. A. Chy.

Whitman

1853 September 25th

Booth.

Nicholson
vs { Report
Whitchard

1836 May 2^d

Agreeably to a Decree of The Circuit Court
for The County of Southampton, obtained at The Nov-
Term 1854 in the case of Nicholson Trustee vs Whitehead's
~~Admors~~ and in accordance with the Will and
Testament of Harriet Whitehead dec'd, and further with
the advice of most of The principal ~~Officers~~ of the
Church on the Southampton Circuit; I have purchased
a lot of land with the improvements &c thereon,
of James H Sebrell lying near Jerusalem, and con-
-taining nearly Three acres, for the sum of Six hun-
-dred and fifty dollars: leaving a balance in hand
of Four hundred and eight doll^{rs} & $\frac{27}{100}$ which amt
we think it will require to put the lot in suitable
repairs. There has been no deed Taken, but an obli-
-gation to make such a deed and to such person or
persons as the Court may direct, ^{which is herewith filed} and in anticipation
of of which The Quarterly Conference for the South-
-ampton ^{Circuit} recommence to the Court, the appointment
of the following persons as a board of Trustees to wit
Messrs Nicholson, Joseph Gillitt, James D Bryant,
John Cobb, James A Gillitt, Messrs Westbrook, James
Drewry, Davis Barrett & Thomas M Worrell

April 30th - 1856

Respectfully Submitted

Messrs H. Nicholson

Nicholson

v. { Exh^b. with bill

Whitheads Ex

I, Harriet Whitehead of the County of Southampton, State of Virginia, being in perfect senses and memory, do hereby make my last will and testament in manner and form following, viz:

1st. I give to William St. Nicholson of the aforesaid County the sum of one thousand dollars to be raised out of my estate for the special purpose of his purchasing and fitting up a suitable place for a Parsonage or place of residence for the Preacher in charge of the Southampton Circuit, which property is forever to be appropriated to that use and purpose as long as the Methodist Episcopal Church shall remain a regular organized church.

2nd. I give to my Brothers Joseph B. and John Whitehead the remaining part of my estate to be equally divided between them.

It is my request if William St. Whitehead should live to the age of Twenty one years my brother John should pay over to him the sum of Two hundred Dollars out of his part of my estate.

Lastly, I hereby constitute and ordain this to be my last will and testament and do hereby inoke and annul all other wills heretofore made by me. In testimony whereof I have hereunto set my hand and Seal this the first day of June 1842.

Signed and Seal in presence of Harriet Whitehead (Seal)
W^m. J. Sebell
Jos. S. Diles
Marion Powell

A Circuit Court held for the County of Southampton, the 5th day of May 1852.
This last will and testament of Harriet Whitehead d^{ce} was this day proved by the oath of W^m. J. Sebell one of the subscribing witnesses thereto, and it appearing to the Court that Jos. S. Diles & Marion Powell the other witnesses thereto are not residents of this State, and their attendance cannot be procured to testify concerning the said will, the said W^m. J. Sebell deposed that the said Jos. S. Diles subscribed his name thereto at the request and in the

presence of the said Harriet Whitehead, at the time that he
the said W^m J. Sabrell signed his name to the same,
and John (Barkham being) sworn deposed that he is well
acquainted with the handwriting of the said Joseph F.
Liles, and verily believes that this name signed to
the said will as a witness is in the proper handwriting
of the said Joseph F. Liles, and thereupon the said will
is ordered ~~to~~ be recorded, and on the motion of John
Whitehead who made oath (and together with Cath-
bert D. Barkham and James R. Jaynes (his securities
who justified on oath as to their sufficiency))
entered into (and acknowledged) a bond in the penalty
of eight thousand Dollars, conditioned as the Law
directs. Certificate is granted him for obtaining
letters of administration on the said Harriet Whitehead's
estate with her will aforesaid annexed in due
form.

Teste.

L. R. Edwards, C. C.

A Copy

Teste.

Henry S. Howard, D. C.

Nicholson
vs
Whitehead
obligation of James
H. Schell.

Know all men by these presents that I have
this day received of William H. Nicholson
the sum of six hundred and fifty dollars
for the purchase of a lot of land situated
near the town of Jerusalem containing nearly
three acres bounded on the west by the road
leading from Jerusalem to Petersburg, on the
north by the plantation lately belonging to the
estate of ^{and a small piece of land which was purchased by me} ~~St. M. Seabell dec'd.~~ on the east by the
land belonging to the late Fielding J. Mathews
and on the south by Harrison P. Pope's lot,
it being the lot on which I have lately
resided; which said lot has been purchased
of me by the said William H. Nicholson
for the purpose of a parsonage for the
Methodist Church on the Southampton
Circuit, in obedience to a decree of the
Circuit Court ^{of Southampton} rendered at November Term
1854 in a chancery suit therein depending
between the said William H. Nicholson and
John Whitehead admr. with the will annexed
of Harriet Whitehead dec'd. And I hereby
bind myself to execute a deed with general
warranty for the said lot of land whenever
the said William H. Nicholson may require
one, to the said William H. Nicholson, or to
such person or persons as the Circuit Court
of Southampton may direct. Given under
my hand and seal this the 9th day of
April 1855.

Teste
Wm. W. Cobb
Horn Seabell

Jas. H. Seabell (Seal)

Notes on

Chambers & Mapuchungo

R. H. Whitford Sept. 1880.

Nicholson against Whitehead. Eas.

This suit is instituted to recover a legacy, under the will of Samuel Whitehead, bequeathed in the following words.
" I give to William H. Nicholson, of the aforesaid County, the
" sum of one thousand dollars, to be raised out of my estate
" for the special purpose of his purchasing and fitting up
" a suitable place for a parsonage or place of residence
" for the pastor in charge of the Southampton Circuit,
" which property is forever to be appropriated to that use
" and purpose, as long as the Methodist Episcopal Church
" shall remain a regular organized church."

This will was dated and executed on 1st day of June 1842.
Testatrix died in 1852, and the will was admitted to
record on 5th May 1852 -

The bequest, is a charity for the use of the Methodist
church, or of the Southampton Circuit - and the first
question is, whether this gift can be enforced in a Court
of Equity in Virginia -

The Courts in England, under the Statute of 43 Elizabeth
support legacies to charities, that are uncertain and indis-
crete, which would, without that Statute, be void,
Smitham Part 1. Sec. 16 -

If this Statute was ever in force in Virginia it
was repealed in 1792 - and whether, the power of

Courts of Equity, to decree charities, was derived from that statute, or was inherent in the Court, it is immaterial to inquire - The Courts of ^{Appeals} Virginia, has had this question before it on several occasions, and has expressly decided that charitable bequests, where no legal interest is given, and where the beneficiaries are too vague - can not be established by Courts of Equity, either under their general powers, or by the statute of Elizabeth - called Stat. of uses - 4 Alleg. Exc^r vs. Atto: Genl. 3 Leigh 450 -

Under case above referred, the object of the Testamentary bequest, was as well, if not better defined, than in Whitbread. Mill - The bequest of Richmond, could be ascertained with as much certainty - as "The Preacher in charge of the South-western Circuit": "forever" - The preacher, in charge of a circuit, not incorporated - of a church not incorporated, and if this bequest is established, the Court must constitute, the preacher a corporation, sole, doing what the Legislature has refused to do -

The question was again before the Court of Appeals in the case of Jenny vs. Latham - 4 Leigh p. 327 - and a similar decision given - also in the case of Leannon Mill 10th Leigh p. 147 -

So of a bequest to the "Baptist Association, that for ordinary needs at Philadelphia, to be a perpetual fund to not being a corporate body. 4th Wheaton 1-455 - 3 Pinn 481 -

A case almost identical, came before the Court of Errors in New York. That was a devise to The Trustees of Brookhaven, a corporate body, capable of taking and holding land

in Trust to pay the rents and profits, to the regular minister, in charge for the time being, of a Baptist Church, which was not, a corporate body. This bequest arose was held void - 2 Gaines, cases in Error - Jackson vs. Hammond, page 337 -

In the case under consideration, Nicholson, is in Law capable of taking & hold property, just as the Trustees of Brookhaven, and the beneficiaries were not sufficiently definite & certain. It is not the capacity of the Trustee, to hold but, the ability of the beneficiaries, to take, which decides all cases of charitable bequests.

It is submitted that there is no power, in a Court of Equity to enforce this charitable gift, under Mill Whitbread. Mill - and the question arises, whether under the Statute of 1842 - and the Statute of 1850, this bequest can be maintained.

11 - The Law and public policy alike forbid, the incorporation of religious societies - and repeated efforts, have been made, without success, to allow churches to be incorporated to hold specific & limited amounts of property and for specific objects, but all that has ever been obtained was the act of 1842 - & that was limited by the act of 1850 - The Courts ~~the Courts~~ had decided, they had no right to decree charities - and with that fact, before the mind of the Legislature, they passed a Law, which continued no power on Courts, on this subject, and

which only authorize, the devise or conveyance of a "Lot or part of a Lot, Tract or parcel of Land" so named - not enclosing in Town lots acres and in the country thirty acres and to be held for no other use than as a place of public worship, religious or other institution ~~and~~ burial ground and residence of their minister" - The courts were authorized to appoint trustees -

Thus the Law was until July 1850 - (long after which time the Legislature acted) when the Legislature, thinking they had gone too far - restricted the misdeeds comprised by the act of 1842 - in a most important particular - being the only one from which much evil was likely to spring -

By the 8th Section Ch: 77 Code - It is, declared, that "Every conveyance - devise or dedication" ~~of Land~~ - "shall be valid, made since 1777 - and every conveyance shall be valid which hereafter shall be made, of Land - for the use of any religious congregation as a place for &c -

If the Legislature had intended, to make devises, valid under the act of 1850 - they would have said so - but they strike out the word, devise, as in 1842 - and restrict, the mode of ~~conveying~~ vesting Land in a religious congregation to conveyances -

The act of 1850 does not, nor did the act of 1842 - authorize the devising or conveying of any thing - (not money, stocks, bonds) except Land, and that in limited quantity and for a specified purpose - according to the literal (and we think) proper construction of each of

These acts, the devise - in one and the conveyance in the other, could be, of Land only - Charitable bequests, should be continued favorable only in cases of freedom.

If the court should decide, however - that this gift is to be regarded, as real estate, because that money is directed to be laid out in the purchase of real estate. Then it is, contended that under the act of 1850 - no devise of Land, to the use of a religious congregation, is valid, but conveyances only, are of legal effect for the purpose of conveying title, for such purpose -

A devise, is not a conveyance - each word has a separate, distinct, definite and technical meaning - and it can not be supposed the Law makers, intended to use them as synonymous terms -

It is argued by the Plaintiff, that the act of 1850 gave validity, to devises made - that is a title and executed, prior to that act. So far as to pass property to persons, and for purposes, prohibited by it, if allowed by existing Law. That is, that by the Law, of 1842 Whitehead was at liberty to make, such a gift as her will contains, and as it was a devise in 1842 - although she did not die, until 1852. yet, the property passed under that will precisely as if she had died prior to 1850 -

This view can not be correct. Ch: 122. Sec. 11 - Code of Va. declares, a will shall be construed with reference to the real and personal estate, comprised in it, to speak and take

effect, as if it had been executed, immediately before the death of the Testator. - Bequests, and conveyances, however made, mean, such as were complete, such as vesting property, and only require the appointment of trustees, or other action of the Court, to carry out, the provisions of the instrument. Thus if, Whitehead, had died, prior to 1850 - and the Court had not appointed trustees on the trustee, Nicholson, has declined to carry out, the bequest of his Testator - the Law, would recognize ~~that~~ bequest as valid; but surely, the Legislature did not mean, to give effect, to an illegal gift in will, merely because the will, happens to be dated, before such bequest, was declared to be illegal - no right had vested - or can vest, under a will, until the death of the Testator - His death, alone gives life to his will - The date may be looked to, for many purposes - but not for the purpose of conferring rights and vesting property, which by the Law as it exist at the Testator's death, could not be conferred, and vested, ~~as an exception to the rule~~ as an exception to the rule -

The mode of making, is one of the instances, saved by the Statute of 1850 - which requires, a different mode of witnessing a will, to that which prevailed, prior to that act -

It is then a will must be made in the lifetime of the Testator, but it may be made at any time before his death - and can only be said to be made, in

legal acceptance, when he dies, for then only is it complete -

It is then submitted, that this charitable gift, bequest - or devise, can not be enforced, ~~by~~, by a Court of Equity, under its general powers, nor by force of the Statute of 1850 -

Other points are alluded to in the arguments, which it seemed unnecessary to refer to.

Respectfully Submitted
Chambers & Mapleburg.
Per W. Whitehead

Nicholson

as

~~Whitman~~
opinion of
Mason & Heath

Mr Jones.

Will please send
these papers To Lucie Ballin
as soon as possible

JR Chambers

Richmond, July 18th 1853.

my dear Walter.

I enclose you our opinion on Miss H. Whitehead's Will. I have no doubt of the validity of her bequest to Mr. Nicholson - for the charitable purposes of erecting a parsonage.

The general subject is one of great interest, and I think it more than probable, that the Court of Appeals, will, if ever a case shall be presented, follow the example of the Supreme Court of the United States. But in this case, the Statute covers the case. We have no incorporated Churches in Virginia - so that the Act of assembly, must be construed to apply to Trusts, for unincorporated Churches. My partner Mr. Beatts, drew up the opinion - and on a full examination of the subject, he has no doubt, nor have I of the validity of the bequest.

The fee for the opinion is twenty dollars, which you can collect, and remit us.

We will always be happy to attend to any business of your clients, or to give you any aid in our power, in your cases,

Y^r friend.

Wm. Beatts Esq.

J. G. Mason.

opinion of
mason and Idarh.

The will of Harriet Whitehead has been submitted to us, and our opinion is asked upon the question, whether the bequest contained in the first clause of her will is valid under the law of Virginia, and whether it is such as may be enforced in a Court of Equity.

The clause is as follows.

"I give to William H. Nicholson, of the aforesaid County, the sum of one thousand dollars to be raised out of my estate for the special purpose of his purchasing and fitting up a suitable place for a Parsonage or place of residence for the preacher in charge of the Southampton Circuit, which property is forever to be appropriated to that use & purpose, as long as the Methodist Episcopal Church shall remain a regular organized Church."

The intention of the Testatrix is plain and manifest. She bequeathes to Wm H Nicholson one thousand dollars, giving him no benevolent intent therein, but upon the special trust and confidence, that he will apply the money to the purchase of ~~the~~ a parsonage for the Methodist Preacher in charge of the Southampton Circuit. Wm H Nicholson is clearly constituted a Trustee for that purpose. Is the trust sufficiently definite to be enforced in equity? It is clear that no individual person is the intended recipient of the Testatrix's bounty; but in the present condition of things, the object of her bounty is capable of easy ascertainment, and the doctrine laid down by Jameson in his Treatise on Wills p 370, that "it is not

" specified to the validity of a gift, either of real or personal estate, that the person who is the intended object of the testator's bounty should be actually pointed out in the face of the will, it is enough that the testator has provided the means of ascertaining it, according to the maxim, id certum est quod certum reddi potest, nor is it material, that the description makes the object of gift to depend upon circumstances or acts of persons, which are future or contingent" would seem to apply. Yet here the object of the testator's bounty is the creation or appointment of an association or organization, unincorporated, of which the rules & regulations, as well as its members are wholly indefinite and uncertain. Even at this day there is much litigation, growing out of the actual division of the Church, depending upon the question, what is the Methodist Episcopal Church. So that it would seem, that, according to the ordinary rules governing this subject, the bequest under consideration would be void for uncertainty.

The Court of Chancery of England however have supported certain bequests & devises, otherwise to their objection, because they were for charitable purposes. And the question does not yet appear to be fully settled, whether they exercised such jurisdiction by virtue of their inherent powers as Courts of equity, or by authority of the Statute of 43 Elizabeth, known as the Statute of charitable uses.

In Virginia it has been decided, that such powers were exercised solely by authority of the Statute of Elizabeth,

and that Statute having been repealed with the other British Statutes by the Virginia Legislature, that there exists no such jurisdiction in the Courts of Chancery here, to uphold, as a charity, a devise or bequest void at Common Law as a bequest for uncertainty.

See Jones vs Hart Exors 1 Hen & Munf 481. Gallego vs Atty General 3 Leigh 450, Jamney, Exors vs Latane et al 4 Leigh 327, Attorney General vs Sawson et al 10 Leigh 147. Allen Charles et al vs Hummick et al 5 Call 311.

These decisions of the Court of Appeals all follow the decision of the Supreme Court of the United States in the Trustees of the Philadelphia Baptist Association vs Smith, Exors of Whetson. In that case, not only were the objects of the testator's bounty uncertain, but the devise, being an unincorporated association, was incapable of taking. But the Court there decided, the general question, that the Courts of Equity did not possess & exercise the jurisdiction over charitable uses, at Common Law, before the Statute of 43 Elizabeth. That doctrine was however overruled by the same Court, in the case of Bidal et al vs Girard's Exors 2 Howard R 127. in the year 1844. Judge Story, delivering the opinion of the Court, held, that before the Statute of 43 Elizabeth the Court of Chancery in England exercised jurisdiction over charitable uses, and said, "Whatever doubts, therefore, might properly be entertained upon the subject, when the case of the Trustees of the Philad Baptist Assn vs Hart's Exors & Whetson was before this Court (in 1818) these doubts are entirely removed by the late and more satisfactory course of information, which we have obtained."

What effect that decision of the Supreme Court, and the better courses of information, referred to by Judge Story, might have on the decisions of the Court of Appeals of Virginia; it is unnecessary to enquire, as in regard to the particular species of charity in the case under consideration, there are statutory provisions which under such enquiries unnecessary.

We are of opinion that at common law in Virginia as settled by the decision of the Court of Appeals cited above, unless that Court should follow (or we think it probable they might) the example of the Supreme Court and reverse them, the bequest to Wm H. Nicholson would be held void, both for uncertainty in regard to the beneficiaries, and as contrary to the policy of the State in regard to the religious corporations; the effect of the bequest, if sustained being to constitute the Circuit Preacher a species of Corporation sole.

But in view of the State of the Law, so settled, the Act of Assembly of 3rd February 1842 was passed, legalizing conveyances and devises of limited quantities of land for the benefit of religious congregations, for churches, burial grounds, and parsonages, which has been constitutionally enacted in the Code of 1850 (see Code ch 77 p. 8. 9. 10. 11. 12. 13. pp 382. 383.)

The 8th section of ch 77 Code, ^{enacts that conveyances} of land for a place of residence of a minister of a religious congregation shall be valid.

5
In the case under consideration, there is a bequest to a particular individual, capable of taking, in trust to do certain acts. Upon what ground can the executor refuse to pay the legacy? To whom else can he pay it? The Testatrix clearly did not intend, that the residuary legatee should have it, and it is equally clear that she is not intestate to the amount of the legacy.

Whether the ~~the~~ trust be or be not capable of execution under the laws of Virginia, is a question in which the executor, as executor, has no sort of interest. If the trust be void and incapable of execution, it belongs to those entitled in that event to the fund, to claim the amount from the Trustee. See *Jaglar v Sailor's Snug Harbour 3 R. 115.* But is the trust not valid, and such as the Court of Equity will readily enforce?

Is not the Trustee required to do, precisely what the Statute cited says, shall be valid, when done, viz to obtain a conveyance of landed property as a residence for a Minister of a religious congregation? There does not seem to be any sound for doubt upon this point.

The bequest, ^{then} is to a certain, definite person, capable of taking, and for a valid, legal purpose. We regard this view of the claim under consideration, as conclusively establishing its validity.

But in another view applying the well known doctrine of Equity, which declares that money devised to be invested in land shall be considered as land, and the case is brought within the literal terms of the statute, being a conveyance or appropriation of so much land for the purpose specified.

See Story's Equity. Sections 790-2-2, & 1211-12.

1 Foxbanger Eq. B. 1. ch 1 p. 8. note 4.

Upon these views and authorities, we are of opinion, that the bequest to Wm H. Nicholson in the will of Sarah Whitehead, is valid & legal, that the executors are bound, if the assets are sufficient, to pay the amount of the legacy to Nicholson, and that they may be compelled to do so by a suit in equity.

Mason & Heath.

Richmond July 18th 1853.

Nicholson

~ } Bond

Whitchcads army

Know all men by These Presents that we William A Nicholson James D Bryant
& William W Cobb. are held and firmly bound unto the Com=
monwealth of Virginia in the just and full Sum two thousand dollars. to the payment whereof
well and truly to be made we bind ourselves our heirs executors and administrators jointly and
severally firmly by these Presents. Sealed with our Seals and dated this 28 day of
November 1854.

The Condition of the above obligation is such that whereas at a Circuit
Court held for the County of Southampton on the 7th day of November 1854 in a suit in Chancery
therein depending between William A Nicholson Plaintiff and John Whitehead adm^r. with the
will annexed of Harriet Whitehead dec^d Defendant. the Court being of opinion that the devise
contained in the first clause of the Will of Harriet Whitehead dec^d is valid. and John
Whitehead the administrator with the will annexed of said Harriet Whitehead having in his
answer admitted that he had in his hands assets sufficient to pay and satisfy the same. did
decree that the said John Whitehead administrator of Harriet Whitehead dec^d pay to William
A Nicholson one thousand dollars with interest thereon from the 5th day of May 1853 till
paid, and that the said John Whitehead administrator as aforesaid of the personal estate
of the said Harriet Whitehead out of the assets of his testatrix in his hands to be administered
pay to the plaintiff his costs by him about his suit in that behalf expended. And the Court
further ordered that the said William A Nicholson invest the said Sum remaining after
paying the expenses of this suit, in a parsonage in the County of Southampton and report his
proceedings to the said Court. NOW if the said William A Nicholson shall carry into
effect the decree aforesaid then the above obligation to be void or else to remain in full
force and virtue.

Wm. A. Nicholson (Seal)
James D. Bryant (Seal)
Wm. W. Cobb (Seal)

In the Clerk's Office of the Circuit Court of Southampton County November 28 1854
This bond was executed and acknowledged before me in my Office on the day aforesaid
L. R. Edwards Clk