

TWENTIETH JUDICIAL CIRCUIT
OF VIRGINIA



ER V. SNEAD, JUDGE RETIRED
LETON PENN, JUDGE RETIRED

THOMAS D. HORNE, JUDGE
POST OFFICE BOX 727
LEESBURG, VIRGINIA 22075

WILLIAM SHORE ROBERTSON, JUDGE
POST OFFICE BOX 985
WARRENTON, VIRGINIA 22186

FAUQUIER, LOUDOUN AND
RAPPAHANNOCK COUNTIES

JAMES H. CHAMBLIN, JUDGE
POST OFFICE BOX 123
LEESBURG, VIRGINIA 22075

29 March 1988

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In Re: Waterford Union Cemetery
In Chancery No. 10375

Gentlemen:

This cause is before the Court upon the Bill of Complaint of the Trustees of the Waterford Union Cemetery to remove a cloud on Complainants' title, and for leave to convey to the Virginia Historic Landmarks Board a scenic easement binding the land comprising that cemetery.

The proposed Deed of Easement describes the property as containing 1.06 acres, more or less, as also supplies a Tax Map designation. (I reject a Tax Map designation for the purpose of this case.)

The order of publication contains the same description, naming as defendants any unknown parties in interest and the personal representatives, heirs, devisees, assigns and successors in interest to the estate of Lewis Cole (Coale), deceased. Lewis Cole was the grantee in a deed dated 15 September 1818, in Deed Book 2 Y's, Page 12, and the Court finds from the evidence that there is no recorded conveyance of Lots No. 10 & 11 subsequent thereto.

Each of those lots contained but one-fourth of an acre. While the evidence shows, and the Court so finds, that land at that location has been used as a cemetery since 1829, although the cemetery is fenced, no witness testified that the fence is on the lot-lines. On the contrary, it was the opinion of the witness who had done extensive research of the land records that additional acreage had been acquired.

It also appeared from the evidence that land on the east of the land in question (All or a part of Lot No. 12) had been used for many years as a cemetery for black people. The cemetery held by Complainants was used for the burial of white people. The evidence showed that there had been Trustees for the black cemetery, but they have not been made parties to this suit. (Complainants would prefer to have the Court's decree in this suit apply to both contiguous cemeteries.) There is no evidence as to the state of title of the other cemetery.

Counsel for Complainants conceded that the description of 1.06 acres is in error, and, indeed, a deed of contiguous land in 1835, (Exhibit 8) refers to "the Graveyard lot containing three-fourths of an acre...". There is no evidence as to the size of the black cemetery or whether the reference to the "Graveyard lot" was to both cemeteries.

The Court finds that adverse possession has been proven sufficient to vest in Complainants the land of the Waterford Union Cemetery as contained within the fences. This ruling is dispositive of Counts I and II of the Bill. The Court is agreeable to hearing further evidence ore tenus to delineate the location of the fences so that the decree herein will be definite.

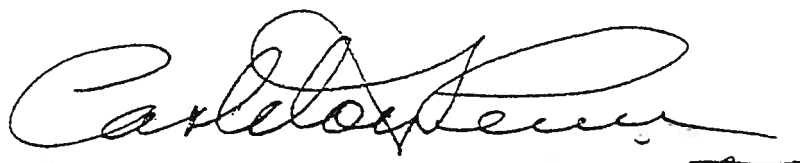
As to Count III of the Bill, Code Section 57-22 provides that cemetery trustees shall hold the land for use as a cemetery, "and no other". Code Section 57-24 states the powers and duties of cemetery trustees.

While it may be argued that Trustees have certain powers incident their ownership of land, it was said in Catlett v. Hawthorne, 157 Va. 372 (1931) at page 378:

"This rule affecting unauthorized acts of trustees is not changed because in certain instances they are given power by statute to act. For example, the power given to them by Section 45 of our Code cannot be extended to include other powers....". (Code Section 57-15 is the successor statute.)

The scenic easement sought to be conveyed may well protect the cemetery in question, but it appears that the present posture of the case prevents the Court from granting that relief.

Very cordially yours,



Carleton Penn, Judge *Designate*