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Service of Civil Process on Sunday (State ex rel. Staley, et al. v. Hereford, Judge, et al., 45 S.E.2d 738 (W. Va. 1947))

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public cannot acquire a right of way by prescription,[23] and defendants did not acquire a right of way by prescription because they used it in common with the public.[24]

Defendants in the principal case also sought to establish a grant of a right of way across the plaintiff's premises but failed to prove a valid written conveyance of the alleged easement so as to satisfy the Statute of Frauds.[25] The clause "together with the appurtenances and all the estate and rights of the parties of the first part in and to said premises" in the defendants' deed and the deeds of their predecessors in title, was not a grant of the right of way. Except for necessities, "appurtenances" include only such things as are contained within the boundaries of the land demised.[26] Nor can a permanent interest in land, even by way of easement, be created by or under a parol license.[27]

The burden of proving all the facts necessary to constitute adverse possession is upon the one who asserts it,[28] and the defendants failed to do so on either of the grounds claimed.

As to the propriety of the remedy sought by plaintiff, it has been held in *Sadlier v. City of New York*,[29] that in a suit to restrain a continuous trespass, which the facts in the principal case have been held to constitute, the court should grant all the relief that the nature of the action and facts demand.

This decision follows the established pattern of law both in New York and elsewhere in reference to right of ways by prescription or grant.

M. M.

SERVICE OF CIVIL PROCESS ON SUNDAY.—Petitioners, who were personally served with process on Sunday in a civil action, appeared specially to quash the summons and the return of service indorsed upon it, contending the court lacked personal jurisdiction, as the service on Sunday was void. Motion to quash was denied and petitioners seek a writ to prohibit the civil action. A statute provides, with a few enumerated uncommon exceptions into which petitioners do not fall, that service of civil process on Sunday is void. *Held*, writ of prohibition granted. *State ex rel. Staley, et al. v. Hereford, Judge, et al.*, — W. Va. —, 45 S. E. 2d 738 (1947).

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[23] See Note, 28 C. J. S., EASEMENTS § 8 (1941).

[24] JONES, TREATISE ON THE LAW OF EASEMENT § 274 (1st ed. 1898).

[25] N. Y. REAL PROP. LAW § 242.

[26] Van Roo v. Van Roo, 268 App. Div. 170, 49 N. Y. S. 2d 220 (4th Dep't 1944).

[27] Selden v. Delaware & Hudson Canal Co., 29 N. Y. 634 (1864).

[28] Sewall v. FitzGibbon, *supra* note 22.

[29] 104 App. Div. 82, 93 N. Y. Supp. 579 (2d Dep't 1905), *aff'd*, 185 N. Y. 408, 78 N. E. 272 (1906).

By a somewhat similar statute [1] in New York, service on Sunday is also void,[2] except for breach or apprehended breach of peace, for the apprehension of a person charged with crime, or where such service is specially authorized by statute. A judgment based on Sunday service is void,[3] the religious belief of the defendant being immaterial. Sabbath breaking is a misdemeanor.[4] A summons may be served on Sunday if accompanied by an injunction order permitting such service, which is granted in the discretion of a justice of the Supreme Court to prevent irreparable injury.[5]

A summons may be served on a legal holiday,[6] provided it does not fall on a Sunday. Service may be made at any hour;[7] and if an area is on daylight saving time, that time, rather than standard time, controls, to determine on what day service was made.[8]

Maliciously serving a summons on Saturday on a person who observes such day as holy time and does not labor on that day is a misdemeanor,[9] and while the statute does not expressly declare such service void, the courts have construed it as being void; but if it was not served maliciously, the service is valid.[10] Even though a person observes Saturday as holy day, he may not be served on Sunday, unless within one of the statutory exceptions. Except for the statutory prohibitions in regard to Saturday and Sunday service, service may be made on any other day, even though such other day is observed as a holy day.

Where a summons was served on Monday, but by mistake the affidavit of service of the summons was dated Sunday, the court denied a motion to permit the affidavit to be amended, because the court said it never acquired jurisdiction to permit the amendment when the affidavit on its face showed service on Sunday.[11] Since jurisdiction was acquired when service was made, rather than when the affidavit of service was filed, it seems on principle the court should have permitted the amendment.

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[1] N. Y. PENAL LAW § 2148.

[2] Scott Shoe Machinery Co. v. Dancel, 63 App. Div. 172, 71 N. Y. Supp. 263 (1st Dep't 1901); Di Perna v. Black, 187 Misc. 437, 62 N. Y. S. 2d 69 (Sup. Ct. 1946).

[3] Allen v. Godfrey, 44 N. Y. 433 (1871).

[4] N. Y. PENAL LAW § 2142.

[5] N. Y. JUDICIARY LAW § 5.

[6] Flynn v. Union Surety & Guaranty Co., 170 N. Y. 145, 63 N. E. 61 (1902) (service on Labor Day valid).

[7] Babb v. Black, 223 App. Div. 780 (mem. dec. 2d Dep't 1928) (service made at 11:56 p.m. Saturday valid).

[8] Briegel v. Day, 202 App. Div. 484, 195 N. Y. Supp. 295 (1st Dep't 1922) (service made 12:15 a.m. daylight saving time Sunday invalid), *aff'd*, 236 N. Y. 646, 142 N. E. 318 (1923).

[9] N. Y. PENAL LAW § 2150.

[10] *Cf.* Martin v. Goldstein, 20 App. Div. 203, 46 N. Y. Supp. 961 (4th Dep't 1897).

[11] Taft v. Delsener, 175 Misc. 894, 25 N. Y. S. 2d 582 (Mun. Ct. 1941).

At common law, some authorities hold that service of process on Sunday is valid,[12] saying it is merely a ministerial act; although the day itself is non-judicial so that no valid judicial act, such as entering a judgment, can be performed. However, most states have enacted statutes in regard to Sunday service, as in the principal case.

C. I. O.

SPECIFIC PERFORMANCE—CONTRACT FOR SALE OF REAL PROPERTY—HARDSHIP AS A DEFENSE—ZONING REGULATIONS.—Action by vendor to compel specific performance of a contract for the sale of real property. At the time the contract was made, both parties knew of the vendee's intention to erect a storage plant on the premises, which use of such property was not prohibited by any zoning ordinance then in existence. Thereafter, but prior to the date set for the closing, the area was rezoned, so that the lot could be used only for residences, thus frustrating the purpose for which the vendee desired to use the lot. *Held,* specific performance, being a discretionary remedy, will not be decreed where it will produce hardship through a change of circumstances not contemplated by the parties. *Clay v. Landreth,* 187 Va. 169, 45 S. E. 2d 875 (1948).

The court, while admitting the existence in Virginia, of the doctrine of equitable conversion, namely, that equity ". . . looks upon things agreed to be done as actually performed,"[1] and that generally where there is a valid contract for the sale of real estate, equity will treat the buyer as the owner of the property and the vendor as the owner of the purchase price, denied that its application was a matter of right. The doctrine is a mere fiction invented by courts of equity to be applied only when necessity and justice require its exercise. Where a change in circumstances, not contemplated by either party, has rendered the contract harsh and oppressive, it will not be enforced.[2] Equity will regard that which is agreed to be done as actually performed, only ". . . where nothing has intervened which ought to prevent a performance."[3] Whether or not specific performance will be decreed, lies within the sound discretion of the court. Here in the light of the complete defeat of the purpose of the contract, it was deemed inequitable to require the vendee to specifically perform.

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12 50 AM. JUR., Sundays and Holidays § 81 (1944); 60 C. J. 1138 (1932).

1 Dunsmore v. Lyle, 87 Va. 391, 392, 12 S. E. 610, 611 (1891).

2 Tazewell Coal & Iron Co. v. Gillespie, 113 Va. 134, 75 S. E. 757 (1912).

3 Craig v. Leslie, 3 Wheat. 563, 4 L. ed. 460 (1818).