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THE LEGAL EFFECT OF SUNDAY.

(Continued from March No., ante, p. 145.)

APART from the somewhat special instances, heretofore enumerated, there is a wide field of inquiry of a more general application, which may be considered under

I. THE EFFECT OF SUNDAY UPON LEGAL PROCEEDINGS.

II. UPON CONTRACTS.

I. *Legal Proceedings*.—No maxim of the common law is more familiar, nor any more generally misinterpreted, than *dies dominicus non est juridicus*. In the earliest period of the Christian era, no distinction was observed between Sunday and other days in judicial proceedings. The whole year was one continual term. This, however, was remedied by the several canons previously quoted, which, being subsequently adopted by both Saxon and Norman races, became part of the common law of England, and so formed the origin of the maxim. Nowhere is this more clearly stated than in Spelman's Original of the Terms. "To beat down the Roman superstition touching observation of days, against which St. Augustine and others wrote vehemently, the Christians at first used all days alike for hearing of causes, not sparing (as it seemeth) the Sunday itself. * * But for the reformation of the abuse among Christians in perverting the Lord's day to the hearing of clamorous litigants, it was ordained in the year 517, that *Nullus Episcopus vel infra positus Die Dominicus causas judicare præsumat*. For it appeareth that bishops and clergymen did hear and determine causes lest Christians should go to law under Heathens and Infidels:" Spelman's Original of the Terms 76.

So, in one of the earliest known repositories of legal learning, it is said, "It is an abuse that pleas hold upon Sundays, or other days forbidden, or before sun-rising, or in the night-time in dishonest places."¹ So Coke says, "*Dies non juridici sunt dies Dominici*—the Lord's days throughout the whole year:" 2 Inst. 264; Finch's Law 7.

The subject was elaborately discussed in the leading case of *Swann v. Broome*, 3 Burr. 1595,² wherein, after referring to some of the preceding canons and authorities, it was decided that upon Sunday no judgment could be entered, and the law has been held the same way on both sides of the Atlantic.

So, an award made and published upon Sunday (*Story v. Elliott*, 8 Cowen 27);³ a notice or demand (*Sterne's Appeal*, 64 Penn. St. 447; *Rheem v. Bank*, 76 Id. 132; *Brackett v. Edgerton*, 14 Minn. 174; *Delameter v. Miller*, 1 Cowen 75; *Chesapeake Co. v. Bradley*, 4 Cranch C. C. 193);⁴ a return of process (*Peek v. Cavell*, 16 Mich. 9; *Gould v. Spencer*, 5 Paige 541; *Arctic Ins. Co. v. Hicks*, 7 Abb. Prac. R. 204)⁵ or levy of execution (*Bland v. Whitfield*, 1 Jones, Law (N. C.) 122; *Pelice v. Hill*, 9 Porter (Ala.) 151) upon that day is a nullity; and a rule expiring on Sunday will expire on Monday: *Cork v. Bumm*, 6 Johns. 326; *Re Goswiler*, 3 Penna. St. 200; *Baxley v. Bennett*, 33 Georgia 146. *Aliter* of a special statutory lien: *Alderman v. Phelps*, 15 Mass.

¹ Mirror of Justice, c. 5, § 1, art. iii. See a learned note upon this book in 2 Reeves's History of the English Law 232 (Finlason's ed.), and Coke's preface to 9 Rep.

² For the arguments of counsel see 1 Wm. Black. 496, 526; *Arthur v. Mosly*, 2 Bibb 589; *Coleman v. Henderson*, Littell Sel. Cas. 171; *Hotaling v. Osborn*, 15 Johns. 119; *Chapman v. State*, 5 Black. 111; *Baxter v. People*, 3 Gilman 333; *Davis v. Fish*, 1 Green (Iowa) 406.

³ *Aliter* if commenced and continuously proceeded with on the preceding day, and the deliberations of the arbitrators extended beyond midnight of Saturday: *Sergeant v. Butts*, 21 Vt. 99, and in *Isaacs v. Beth Homedash Society*, 1 Hill 469, where all the parties were of the Jewish religion, an award commenced and concluded on Sunday, but dated and delivered on Monday, was sustained.

⁴ In England and Vermont, however, a notice received on Sunday and afterwards retained, is deemed equivalent to notice on Monday: *Rawlings v. Overseers*, 2 C. B. 72; *Crozier v. Shantz*, 43 Vt. 478; and in *Kiger v. Coats*, 18 Ind. 153, service of notice of a previous award, was held valid as being a mere ministerial act; *infra*.

⁵ In *Wright v. Jeffrey*, 5 Cowen 15, this defect in a *capias* was held to be waived by the entry of special bail, and in *Boyd v. Vanderkemp*, 1 Barb. Ch. 273, it was intimated that a similar return could be amended.

225;¹ and with the exception of the days of grace allowed in negotiable instruments, the same doctrine applies in ordinary business transactions: *Hammond v. Amer. Mut. Ins. Co.*, 10 Gray 306; *Avery v. Stewart*, 2 Conn. 69; *Bazley v. Bennett*, 33 Ga. 146; *Kuntz v. Temple*, 48 Missouri 711.² So service of civil process upon which a rule may be granted is illegal: *Selectmen v. Turnpike Co.*, 2 Vt. 531; *Rob v. Moffat*, 2 Johns. 257; *Van Vechten v. Paddock*, 12 Id. 78; *Field v. Park*, 20 Id. 140; *Vanderpool v. Wright*, 1 Cowen 200; *Moore v. Hagen*, 2 Duvall 437; *Smith v. Noe*, 35 Ind. 117; *Taylor v. Phillips*, 3 East 155; *Roberts v. Monkhouse*, 8 Id. 547; *Doe v. Roe*, 8 Dow. & Ry. 342; and a notice required to be published every day for a week, need not be published on Sunday: *Re Excelsior Fire Ins. Co.*, 16 Abb. Prac. R. 8. Nor, in general, can an official, charged with civil duties, exercise his office upon that day; *Frost v. Hull*, 4 N. H. 153; *Shaw v. Dodge*, 5 Id. 462.

The foundation of the maxim, however, rests solely upon motives of public policy, it being considered a breach of that policy to allow a violation of a period of time peculiarly appropriate for Divine worship, when another day will as well promote the ends of justice: see *Allen v. Brookbank*, 1 Salk. 625; s. c. *nom. Alanson v. Brookbank*, 5 Modern 449; Carthew 504; *Bloom v. Richards*, 2 Chic St. 388. But when, in the absence of express prohibitory legislation, it is sought, as many cases do, to construe this common-law rule as a total restriction of power to transact any judicial business, however urgent the cause, the maxim is carried beyond both its reasonable and legal limits.

This is clearly recognised in a portion of Spelman's treatise, which seems to have been generally overlooked in the legal literature upon this subject: "Some law business may be done on days exempted, and sometimes on Sunday itself, notwithstanding anything before mentioned. * * * The Synod of Medard admitteth

¹ In some states intervening Sundays are totally excluded in legal computation: *Snell v. Scott*, 2 Mich. N. P. 108; *Read's Case*, 22 Grattan 924; *Thayer v. Felt*, 4 Pick. 354; *aliter* in others: *Re Goswiler*, *supra*; *Patchin v. Bonsack*, 52 Mo. 431; *McIntosh v. Great Western Railroad*, 1 Hare 329. See note to *Anonymus*, 2 Hill 376; *Rex v. Elkins*, 4 Burr. 21, 30; as "special pleaders are supposed to be less observant of the Sabbath than the rest of mankind," 3 Chitty's Gen. Prac. 105 n.

² By a species of judicial legislation, this distinction was disregarded in *Seibert v. Stiles*, 39 Wisc. 534.

matters *de pace et concordia* to be despatched both on holy-days and on Sunday itself; the laws of Henry I., matters of concord and doing fealty to the Lord; the decree of Gregory IX., cases of necessity and piety. * * * Out of these and such other authorities of the laws ecclesiastical and civil the canonists have collected these cases wherein judges may proceed legally upon the days prohibited, or do the things herein following:

“For matters of peace and concord by reason whereof our judges take the acknowledgment of fines, statutes, recognisances, &c., upon any day, even the Sabbath day, though it were better then forborne, if necessity require it not.

“For suppressing of traitors, thieves and notorious offenders, which may otherwise trouble the peace of the Commonwealth, and endanger the kingdom.

“For manumission of bondmen; a work of piety.

“For saving that which otherwise would perish; a work of necessity.

“For doing that which time overslept cannot be done; as for making appeals within the time limited, &c.

“For taking the benefit of a witness that otherwise would be lost, as by death or departure.

“For making the son *sui juris*, as if amongst us the lord should discharge his ward of wardship. * * * By a constitution of Trajan, military business may be done *in diebus feriis*, and at all times. Upon these reasons the Admiral Court is always open; for that strangers and merchants and seafaring men must take the opportunity of tides and of winds and other necessities, and cannot without ruin or great prejudice attend the solemnity of courts and dilatory proceedings. The Marshal’s Court also for military matters falleth within the privilege granted by Trajan; yet hath it observed as near as conveniently it may, the canons of the church, as forbearing to assign in battle *Quadragesima* and *temporibus prohibitis*, and so lately in the case between the Lord Raye and Mr. Ramsey. So, likewise, the Chancery being a Court of Piety, is said to be always open; but I take this to be understood as it is *officina brevium* and *Consistorium aequi et boni*; not where it is *Prætorium juris communis*, and proceedeth in course of the common law:” Spelman’s Original of the Terms 93–95.

So in Comyn’s Digest, tit. *Tempus (Dies non Juridicus)*, it is said, “The Chancery is always open, and the Court of Exchequer

may sit upon Sunday or out of term." So, in an old case, CROKE, J., said, "An original writ or patent bearing *teste* upon the Sunday is good enough, for the chancellor may seal writs or patents upon any day:" *Waite v. Hundred*, Cro. Jac. 496. So, too, "matters of necessity may be done on Sunday:" *Pit v. Welby*, 2 Bulst. 72.

If, indeed, the letter of the maxim were to govern its observance, the argument that would impose a total restriction upon all such legal proceedings at common law would equally apply to the declared saints' days and other holy festivals. For, as remarked in a recent case, "The Day of the Purification, the Feast of the Ascension, the Feast of St. John, All Saints' and All Souls' Days, were as much unjudicial days as Sunday, yet the most devoted admirer of the common law would not hesitate to say that the proceedings of a court of justice on either of those days would be valid:" *Langabier v. Railroad*, 64 Ill. 243; see *Baddely v. Adams*, 5 Term 170; *Osborne v. Taylor*, 1 Chit. 400; *Mesure v. Britter*, 2 H. Black. 616; *Harrison v. Smith*, 9 B. & C. 243. And it is familiar that when occasion requires, the Houses of Parliament may, and formerly did, sit upon Sunday: *Swann v. Broome*, 1 W. Black. 498; *Broom's Leg. Max.* 21; *Wood. Lect.* 39.

Hence in direct recognition of this doctrine it has always been held that a verdict may be rendered and received on Sunday: *Hoghtaling v. Osborn*, 15 Johns. 119; *Butler v. Kelsey*, Id. 177; *Huidekoper v. Cotton*, 3 Watts 56; *Cory v. Sulcox*, 5 Ind. 371; *Rosser v. McColly*, 9 Id. 587; *Joy v. State*, 14 Id. 139; *Baxter v. People*, 3 Gil. 385; *Webber v. Merrill*, 34 N. H. 202; *True v. Plumley*, 36 Me. 468;¹ and so of an award where the deliberations of the arbitrators have continuously extended through the preceding night: *Sergeant v. Butts*, 21 Vt. 99, *supra*.

So, "ministerial acts may be lawfully executed on the Sunday, for otherwise, peradventure, they can never be executed:" *Mackally's Case*, 9 Rep. 66; *Pearce v. Atwood*, 13 Mass. 324. And,

¹ In *Heller v. English*, 4 Strob. 486, 500; *Van Riper v. Van Riper*, 1 South. 156, and *State v. Ricketts*, 74 N. C. 187, such a course was considered as an act of charity to the jury. See *State v. Green*, 37 Mo. 466, as to the Missouri statute. So, it has been held, in criminal cases, the court may upon that day adjudicate the fact that the jury cannot agree: *People v. Lightner*, 49 Cal. 226; *State v. McGimsey*, 80 N. C. 377. The early cases of *Davis v. Fish*, 1 Greene (Iowa) 406, and *Shaw v. McCombs*, 2 Bay (S. C.) 232, are no longer authorities upon the point stated in the text.

therefore, an information may be exhibited: *Bedoe v. Alpe*, W. Jones 156; or an arrest made, both at common law (*Mackally's Case, supra*),¹ and since the Statute of Charles: *Rawlin v. Ellis*, 16 Mees. & Wels. 172.² So, too, a recognisance taken upon that day is valid: *Johnston v. People*, 31 Ill. 471; *Salter v. Smith*, 55 Ga. 245; *Baddely v. Adams*, 5 Term Rep. 179; and in a somewhat recent case TINDAL, C. J., said: "Many things at common law were feasible, and were held valid if done on Sunday; an entry for condition broken, or to preserve an estate, was equally valid whether made on Sunday or any other day; so a demand of possession to support an ejectment might well be made upon that day:" *Rawlins v. The Overseers*, 2 C. B. 79.³

This doctrine is well illustrated by a recent case in Illinois, where an application to a master in chancery, for an injunction was made on Sunday, upon a bill averring that the defendant, an insolvent corporation, had, immediately after midnight of the preceding Saturday, taken violent possession of a certain street for the avowed purpose of laying a track thereon before Monday morning, whereby irreparable damage would result to the complainant's property. The injunction was accordingly allowed, issued and served on that day, and the exercise of this power affirmed upon appeal. "The defendants insist," said the court, "that no valid writ could issue on Sunday. They insist that the order of the master in chancery being made on Sunday, was void, for the reason that it was a judicial act, and Sunday is not a judicial day. As a general proposition it may be conceded that Sunday is not a day in law for proceedings. * * * The case before us is not one of life or death, but it involves irreparable injury to property. An imperious necessity demanded the prompt interposition of chancery. On that principle the act is fully justified. This is the dictate of common justice and common sense:" *Langabier v. The Fairbury, &c., Railroad Co.*, 13 Amer. Law Reg. (N. S.) 751; 64 Ill. 243.

The principle of this decision has since been incorporated into the statute law of that state: Rev. Stat. Illinois (1875) p. 581, pl.

¹ "There is no prohibition at common law of the service of process in criminal cases on the Lord's day, except in so far as the service might be unnecessary on that day:" *Keith v. Tuttle*, 28 Me. 334.

² By Statute of 11 & 12 Vict. c. 42, § 4, a justice of the peace is empowered to issue on Sunday a search-warrant or warrant to apprehend persons indicted.

³ In *Walgrove v. Taylor*, 1 Ld. Raym. 705, service of a declaration was held good.