

1866.

April 19.

*Suit No. 523 of 1865.*EDALJI SHA'PURJI *et al.* v. TULSIDA'S SUNDARDA'S.

*Award—Application to set aside—Extension of Time to make—The word “shall”—Construction—Act VIII. of 1859, Secs. 320, 324, 333, and 377.*

In an application to set aside an order, made by a Judge in chambers, extending the time (of ten days) for making an application, under Sec. 324 of Act VIII. of 1859, to set aside an award, on the ground of misconduct of one of the arbitrators and of the umpire :—

*Held*, the words of the section being in their ordinary import obligatory, and there being nothing in the other parts of the Code to show that such construction was at variance with the intention of the Legislature; and a similar provision having been held by the courts in England to be imperative; that the application to set aside the award must be made within the ten days, provided the Court be then sitting; and if not, on the first day of its sitting after that time; and that there is no power to enlarge the time to make such application.

BY an order of reference, dated the 2nd of September 1865, this suit was referred to arbitration. The award was made on the 19th, and filed on the 23rd of January 1866.

On the 2nd of February, the defendant applied to Sir Joseph Arnould, in chambers, for an order extending the time for making an application to set aside the award, under Sec. 324 of Act VIII. of 1859. No application was then made to set the award aside. Sir Joseph Arnould made an order that the defendant should have five days' further time, for the purpose of making an application under Sec. 324; and made an indorsement on the order, stating that he felt considerable difficulty in the matter, and doubted whether he had any power under the Code to make such an order.

The plaintiffs now applied to set aside the order of the 2nd of February 1866.

*McCulloch*, for the plaintiff:—There are two questions to be decided: 1st, whether the learned Judge had power to make the order; and, 2nd, whether, supposing him to have a discretionary power to make it, there were sufficient grounds stated to make the exercise of that discretion proper.

[ARNOULD, J. :—I made the order chiefly on the ground that

the time allowed for making the application in chambers was very short. However, I think it clearly lies on the defendant to show that the order can be sustained.]

*Pigot*, for the defendant :—The words of the latter part of Sec. 324 are directory, not mandatory. No affirmative words in a statute are mandatory; it requires the addition of negative words to make them so: *Rea v. The Justices of Leicester (a)*. [COUCH, C.J.:—That case is a familiar one; but there are later cases on the subject. I think you will find that *Rea v. The Justices of Leicester* has been treated as decided on peculiar grounds.] No doubt the Court would be anxious, in that case, to decide as it did, from the very great inconvenience that would arise from holding the opposite; but in the present case it could easily be shown, that a very great grievance will be the result, if the Court has not the power to extend the time. The circumstances under which we were obliged to come in, and apply for further time, amounted to a fatality. We made the motion before the time had expired. [COUCH, C.J.:—You must show that a general inconvenience will be the result. The particular hardship of the present case cannot be considered.] It is contended that the same construction must be put upon the affirmative words in Sec. 324, as was put upon similar words in *Rea v. The Justices of Leicester*. [COUCH, C. J.:—Do you contend that in no case can the word “shall” be considered imperative?] No; there may be cases where, from previous words in the same section, it may appear that it was the intention of the Legislature to make the word “shall” imperative. [COUCH, C. J.:—There are many sections in the Code in which I think the word “shall” must be read as imperative. His Lordship referred to Secs. 6, 7, and 336.] In Sec. 336 there are negative words added.

*Cur. adv. vult.*

COUCH, C. J. :—In this case an application was made to the court to set aside an order made by Sir Joseph Arnould, extending the time for applying to set aside an award made

1866.

EDALJI  
SHA'PURJI,

v.

TULSIDA'S  
SUNDARDA'S.

1866.  
 EDALJI  
 SHA'PURJI  
 v.  
 TULSIDA'S  
 SUNDARDA'S.

in the suit. The award was filed in court on the 23rd of January last; and on the 2nd of February, the defendant applied to Sir Joseph Arnould, in chambers, to extend the time for making an application to the court to set it aside; the ground of the intended application to set it aside being stated, in the affidavit made in support of the application to extend the time, to be the misconduct of one of the arbitrators and of the umpire.

The learned Judge made an order, accompanying it with the following note:—"I have considerable doubt as to my power to make this order: the terms of Sec. 324 appearing to leave no discretion as to enlarging the time; but I make it at the request of the parties, and on their intimation that they are willing to take the risk of having it set aside by a full Court."

The decision of the Court depends upon the construction which is to be put upon Sec. 324 of Act VIII. of 1859. Sec. 320 having provided that when an award in a suit shall be made, it shall be submitted to the Court, together with all the proceedings, depositions, and exhibits in the suit; Sec. 324 enacts:—"That no award shall be liable to be set aside, except on the ground of corruption or misconduct of the arbitrators or umpire. Any application to set aside an award shall be made within ten days after the same has been submitted to the Court."

In support of the application to set aside the order, it was contended that these words were directory only, and not imperative; and the case of *The King v. The Justices of Leicester* was cited, in which Lord Tenterden, in giving judgment, said:—"It has been asked what language will make a statute imperative, if the 54 Geo. 3, c. 84, be not so. Negative words would have given it that effect, but those used are in the affirmative only." But we think that Lord Tenterden did not intend to lay down, as a rule, that negative words were necessary, and that in no case would affirmative words be sufficient.

There are various decisions of the courts in England in

which affirmative words in a statute have been held to be imperative and obligatory. In *The Queen v. The Tithe Commissioners* (a), Mr. Justice Coleridge, in delivering the judgment of the Court, says :—“ It has been so often decided, as to have become an axiom, that in public statutes words only directory, permissive, or enabling, may have a compulsory force, where the thing to be done is for the public benefit, or in advancement of public justice.” In *Chapman v. Milvain* (b), Baron Parke, in the judgment of the Court, says :—“ The words ‘shall and lawfully may’ are, in their ordinary import, obligatory, and ought, as was said in that case (*Steward v. Greaves*) (c), before referred to by the learned Judge, according to the established rules, to have that construction ; unless it would lead to some absurd or inconvenient consequence, or be at variance with the intent of the legislature to be collected from other parts of the Act.”

1866.  
EDALJI  
SHA'PURJI  
v.  
TULSIDA'S  
SUNDARDA'S.

In *Morgan v. Parry* (d), indeed, the 13th section of the 6 & 7 Vict., c. 18, which required the list of voters made out by the overseers of a parish or township to be signed by them, was held to be directory only ; the Court saying they could not suppose the Legislature intended that a formal omission of a signature should have the effect of disfranchising a whole parish or township : a decision which is not at variance with the other cases, and only illustrates the grounds for making an exception to the rule. The case of *Henderson v. The Royal British Bank* (e), where it was held that the 16th section of the 7 & 8 Vict., c. 113, which prescribed the form of a memorial to be filed at the Stamp Office, was directory only, is of the same character : whilst the cases of *Bowman v. Blyth* (f) and *Frend v. Dennett* (g) may be referred to as instances of statutes being held to be imperative.

The words of Sec. 324 : “ Any application to set aside an award shall be made within ten days after the same has been submitted to the Court,” are, in their ordinary import, obli-

- (a) 14 Q. B. 459. (b) 5 Exch. 61. (c) 10 M. & W. 711.  
(d) 17 C. B. 334. (e) 7 E. & B. 356 ; 26 Law J., Q. B. 112.  
(f) 7 E. & B. 26 ; 27 Law J., M. C. 2.1.  
(g) 4 C. B., N. S. 576 ; 27 Law J. C., P314.

1866.

EDALJI  
SHA'PURJI  
v.  
TULSIDA'S  
SUNDARDA'S.

gatory; and there is nothing in the other parts of the Code of Procedure which shows that this construction would be at variance with the intention of the Legislature. In many of its provisions the word "shall" is obviously intended to be obligatory. In Sec. 333, which provides that appeals shall be presented within a specified period, it is added: "unless the appellant shall show sufficient cause, to the satisfaction of the appellate court, for not having presented it within such limited period;" and Sec. 377 enacts that "an application for review of judgment shall be made within ninety days from the date of the decree, unless the party preferring the same shall be able to show just and reasonable cause, to the satisfaction of the Court, for not having preferred such application within the limited period."

It is true that ten days are not a short period, and that the corruption of the arbitrators or umpire may not be discovered within that time; but then the Legislature may have considered a speedy and final termination of the dispute, of sufficient importance to outweigh this consideration; and that, where the parties have selected their own tribunal, it is proper that a certain period of time shall be given, after which the award shall be final and conclusive, and the discovery of corruption shall not be available. Misconduct in the proceedings would be known, and ought to be immediately complained of. Ten days might be a sufficient time to allow for that purpose; and, unless the Court is prepared without any reason, to allow an extension in that case, it would have to hold that, in the case of misconduct, the Legislature intended the word "shall" to be imperative, but in the case of corruption, directory only.

The courts, both of law and equity, in England, have held a similar provision in the 9 & 10 Wm. 3, c. 15, to be imperative. By that it was enacted, that the submission to an award might be made a rule of court, and disobedience to it, punished as a contempt of court; but that any award procured by corruption or undue means should be set aside by any court, of law or equity, "so as complaint be made to the court, where the rule is made for submission, before

the last day of the next term after the award is made and published to the parties." And these decisions are not founded upon the peculiar words of that statute, as was argued before us ; but upon a ground equally applicable to the law under our consideration : *Freamer v. Pinniger* (h), *Auriol v. Smith* (i), *Nichols v. Roe* (j).

1866.  
EDALJI  
SHA'PURJI  
v.  
TULSIDA'S  
SUNDARDA'S.

Upon principle, then, as well as upon the words of the Code, we are of opinion that the application must be made within the ten days, provided the court be then sitting ; and if not, on the first day of its sitting after that time ; and that there is no power to enlarge the time.

In the case to which we were referred, in which this court, some time since, made an order enlarging the time, no objection was taken to the order ; and the opposite party showed cause against the rule for setting aside the award. There the ground upon which the enlargement of time was applied for was, that the applicant had changed his attorney.

In the present case, the applicant, in his affidavit, upon which the order of Sir Joseph Arnould, made on the 2nd of February, was obtained, says he had found it advisable to change his attorney ; and his present solicitor was only authorised to act for him on the 30th of January, and had not had time to prepare for making the application to set aside the award ; but no reason is stated for the change of attorney, which may, consistently with the affidavit, have been made solely with the view of obtaining further time. Supposing that we had the power, in setting aside this order, to grant to the party the indulgence of being now allowed to move to set aside the award, as if he had made his application within the ten days, we are of opinion that no sufficient ground exists for it ; and that, having elected to take the order, notwithstanding the doubt expressed by the learned Judge, he must be subject to the ordinary consequence of its being set aside.

The order of the 2nd of February, is, therefore, set aside ; and the defendant ordered to pay the costs of this application.

*Order set aside.*

(h) Cowper 23.

(i) 1 Turner & Russell 121.

(j) 3 Mylne & K. 431.