

the knowledge of the applicant. The objection in such cases is, that the applicant comes too late; not, as here, that he comes too soon; and the cases cited at the bar as to applications after sentence are therefore inapplicable." That is the rule that applies to taking objection to jurisdiction by way of prohibition. Applications to this Court for special leave to appeal are not granted as of course. We think that the analogy of the rule just stated may very well be applied when special leave is asked for the purpose of raising an objection which would not have been allowed to be taken by way of prohibition, especially when the value of the property involved is so small. For these reasons we think the application should be refused.

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Leave refused.

Solicitor, for appellant, *F. Morley Alcock.*

Solicitor, for respondent, *J. M. Speed.*

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[HIGH COURT OF AUSTRALIA.]

GOODE APPELLANT;
PLAINTIFF,
AND
BECHTEL RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF
WESTERN AUSTRALIA.

Arbitration—Jurisdiction of arbitrator—Setting aside award—Grounds for setting aside.

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As a general rule an arbitrator is a judge of law as well as of fact, and his decision cannot be objected to on the ground that he misconceived the law, or possibly that the law was unjust.

Judgment of the Full Court of Western Australia (6 W.A. L.R., 86) reversed, and the award of the arbitrator restored.

Griffith C.J.
Barton and
O'Connor JJ.

H. C. OF A. APPEAL from a judgment of the Supreme Court of Western
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On 20th November, 1903, an agreement of reference was entered into between the appellant and the respondent which, after reciting that the parties had been carrying on in partnership together the business of saddlers and tanners at Perth and Kalgoorlie under the style of R. Bechtel and Co., that an agreement had been made for the dissolution of the partnership, and that divers questions, disputes, and differences had arisen and were still subsisting between the parties in connection with the partnership, provided, *inter alia*, that all disputes, questions, and matters in difference between the said parties in anywise relating to or concerning the said partnership or the affairs or accounts thereof, or which might arise out of or in connection with the same, should be referred to the arbitration and determination of one W. E. Moxon.

On 6th January the arbitrator gave his award the material part of which was as follows:—

“3. That as regards the alleged and unexplained deficiency of £2,974 13s. 4d. shown in the balance-sheet of the said partnership affairs prepared by Messrs. Smith and Goyder, and produced to me on the said reference, the deficiency alleged shall be taken to be the sum of £2,974 13s. 4d. and no more, and that there shall be allowed by way of deduction from such sum the following items viz. :—

Loss on Tannery	...	...	£1,338	18	5
D. and P. Discounts	...	...	14	3	8
Advertising Charges	...	...	143	8	8
Making a total of	...	...	£1,496	10	9
Leaving a balance deficiency of			£1,478	2	7

Of which last-mentioned sum the said Robert Bechtel shall forthwith pay to the said Frederic Daniel Goode one half, namely the sum of £739 1s. 3d.”

On application made on 13th April, 1904, to the Supreme Court of Western Australia the award was ordered to be set aside with costs on the ground that it appeared on its face that the arbitrator had acted on a mistaken idea of the law as to the responsibility of partners *inter se* for losses sustained by the partnership.

Robinson (with him *Russell*), for the appellant. The award cannot be set aside unless it is bad on the face of it: *Redman on Arbitration*, 3rd ed., p. 261; *Hodgkinson v. Fernie* (1); *Archer v. Owen* (2); *Lancaster v. Hemington* (3). Here the respondent was the active partner, the appellant being merely a sleeping partner.

The Court has set aside an award on the ground of mistake on the part of the arbitrator: *Ames v. Millward* (4); but that was on the ground of inconsistency. [He also referred to *Fuller v. Fenwick* (5); *Adams v. Great North of Scotland Railway Co.* (6); *Re London Dock Co. and Trustees of Shadwell* (7)].

The *Arbitration Act* of Western Australia under which this reference was made (59 Vict. No. 13) enables the parties to state their case.

[GRIFFITH C.J.—The proper course, where one party fears a wrong decision, is to apply to revoke the reference to arbitration.]

Pilkington, for the respondent. A mistake of law appears on the face of the award, and therefore the award may be challenged. *Hodgkinson v. Fernie* (1) is not to the contrary.

[GRIFFITH C.J.—Can you give a concrete instance of a mistake of law appearing on the face of the award?]

In all cases where certain facts are admitted and the law is wrongly applied, the mistake arises on the face of the award. *Kent County Council v. Elstob* (8); *Gaby v. Wilts and Berks Canal Co.* (9); *Fuller v. Fenwick* (10).

[GRIFFITH C.J.—In *Gaby's Case* the defendants pleaded a Statute by which certain actions were required to be brought within six months. The award found that the acts sued for were prohibited by the Statute, and that the defendants were consequently not within the protection of the limitation. The Court thought that the protection extended to acts done under the circumstances found by the arbitrator. In all the cases cited the award showed on its face that the arbitrator did not really intend

(1) 3 C.B. N.S., 189.

(2) 9 Dowl., P.C., 341.

(3) 4 A. and E., 345.

(4) 8 Taunt., 637.

(5) 3 C.B., 705.

(6) (1891), A.C., 31.

(7) 32 L.J., Q.B., 30.

(8) 3 East, 18.

(9) 3 M. and S., 580.

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to decide as he did in form, so that there was an inconsistency apparent on the face of the award.]

Where the arbitrator says the loss is unexplained and the respondent must bear it, he is wrong upon the face of the award. Partners are only liable for loss arising from personal negligence. *Beven on Negligence*, pp. 1455 and 1456; *Thomas v. Atherton* (1).

The arbitrator has found what is inconsistent with personal negligence—he has found the loss is “unexplained.”

[GRIFFITH C.J.—Suppose the loss was unexplained, on whom was the onus of proof before the arbitrator? If on the respondent, the arbitrator thought he had failed to establish it. *Prima facie*, I should read the award as meaning that the loss was to be borne by the partners equally.

O’CONNOR J.—What is meant by “unexplained?” Does it not mean unexplained in the balance-sheet; there it is put under profit and loss?]

The term “unexplained loss” must mean appearing on the balance-sheet, and not accounted for.

GRIFFITH C.J. This is an appeal from the Supreme Court of Western Australia setting aside an award made by an arbitrator upon a submission to him of all matters in dispute between two persons who had previously carried on business in partnership in Perth and Kalgoorlie. By the reference all disputes, questions, and matters in difference between the partners in anywise relating to or concerning the partnership were referred to the arbitration of Mr. Moxon, who made an award by which he directed various things to be done by the parties. Amongst other things the award contains this paragraph:—“Paragraph 3. That as regards the alleged and unexplained deficiency of £2,974 13s. 4d. shown in the balance-sheet of the said partnership affairs prepared by Messrs. Smith and Goyder, and produced to me on the said reference, the deficiency alleged shall be taken to be the sum of £2,974 13s. 4d. and no more, and that there shall be allowed by way of deduction from such sum the following items: Loss on tannery, £1338 18s. 5d; D. & P. Discounts, £14 3s. 8d.; advertising charges, £143 8s. 8d; making a total allowance of £1,496 10s. 9d., and leaving

a balance deficiency of £1,478 2s. 7d., of which such last-mentioned sum the said Robert Bechtel shall forthwith pay to the said Frederic Daniel Goode one half namely, the sum of £739 1s. 3d.” An application was made to the Supreme Court to set aside the award on the ground that the award, in paragraph 3, was bad in law on the face of it. I confess to having felt some difficulty in apprehending what the alleged mistake in law is. Reading that paragraph by itself, the first impression it would convey to my mind would be this:—On taking the accounts of the affairs of the partnership there was a deficiency in the assets as against the liabilities of £2,974 13s. 4d., the cause of which was said to be unexplained; but on inquiry I find that £1,496 10s. 9d. of this has been accounted for. Then an award follows that the parties should bear the remainder of the deficiency in equal proportions. To that there is on the face of it no objection. It is apparently a most reasonable order to make. But we are told that it is a mistake, and that the real meaning of it is that the respondent shall bear the whole of that loss. We are also told that the respondent was the active partner in the partnership, the appellant being merely a sleeping partner. These facts appear to have been treated by the Supreme Court as before them, and as it is on those facts only that the respondent makes out any sort of a case here, we will deal with them on the assumption that they are true. The error of law, suggested to be apparent on the face of the award, is that, when there is a partnership loss, it must be borne equally, and that no partner can be made responsible for the whole of any particular loss unless it is through his default that it was occasioned. Grant that that is so. The next step which is necessary before you can find any mistake in law is, that it must appear that the arbitrator has required the respondent to bear the whole of this loss without its being proved that he was responsible for it. It was the arbitrator’s province to ascertain whose fault it was. The fact that he describes it as an unexplained deficiency does not indicate that he failed to apply his mind to the question who should be held responsible for it; but supposing that it does, and that on the evidence before him it did not appear who was responsible, he may have come to this conclusion:—“Here is a deficiency. Neither partner offers any

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explanation, and, in the absence of any explanation, I think it is a reasonable thing for me to make the partners bear the loss equally, or, as is suggested, that the active partner should bear it all." I fail to see anything contrary to law in that. The most that can be said or suggested is that the arbitrator, in dealing with the matter, applied an erroneous rule as to the onus of proof. The law is clearly settled, as stated by *Williams J.* in *Hodgkinson v. Fernie* (1), that when a cause or matters in difference are referred to an arbitrator, whether a lawyer or a layman, he is constituted the sole and final judge of all questions both of law or of fact. During the argument we asked for illustrations, concrete instances, of cases of what was called an error of law apparent on the face of an award; but the instances referred to by Mr. Pilkington were cases in which it was clear that the arbitrator had not really himself decided the question which was referred to him, but had answered the question by reference to what he supposed to be a rule of law, but was not a rule of law. There may be other instances, but each case must depend upon the nature of the submission, and the form of the award. We have only to deal with the award before us, and, as I have said, the most that can be urged against it is that the arbitrator took an erroneous view of the onus of proof. Whether he did or did not is merely conjecture. It does not appear on the face of the award. The award on the face of it is good, and ought to stand, and the appeal should be allowed.

*Appeal allowed with costs, including costs
 of proceedings in the Supreme Court.*

Solicitors for appellant, *Haynes, Robinson & Cox.*

Solicitors for respondent, *Stone & Burt.*

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(1) 3 C.B., N.S., 189, at p. 202.