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since the partition actually occupied, by the partners for the time being, they are, by the terms of the section, to be deemed owners of the land. This cannot be maintained. The case does not come within the letter of this section, as a taxing provision requires.

None of the appellants was a "person making the" conveyance or transfer of the land. George Mant was that person.

Both contentions failing, the question must be answered in the the negative, and the case remitted with that opinion.

Question answered in the negative.

Solicitors, for the appellants, *Flower & Hart.*

Solicitors, for the respondent, *Chambers, McNab & McNab.*

R. G.

HIGH COURT OF AUSTRALIA.]

PRITCHARD . . . . . APPELLANT;
COMPLAINANT,

AND

JEVA SINGH . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1915.

MELBOURNE, *Sept* 9.

Griffith C.J., Gavan Duffy and Rich JJ.

Practice—High Court—Special leave to appeal—Question of procedure—Court of Petty Sessions—Jurisdiction—Service of summons—Order to review—Justices Act 1890 (*Vict.*) (*No.* 1105), *secs.* 23 (3), 89 (4), 141.

On a complaint before a Court of Petty Sessions of Victoria to recover a sum of £9 an affidavit, in the usual form, of service of the summons was filed. At the hearing objection was taken on behalf of the defendant that the service was bad, and an application for an adjournment was made. The justices

nevertheless proceeded to hear the complaint, and made an order for the amount claimed. On an order to review the Supreme Court set aside the order of the justices, holding that the service was bad and therefore that the justices had no jurisdiction, and also that an order to review under sec. 141 of the *Justices Act* 1890 (Vict.) was the proper remedy.

Held, that, whether the proper remedy was an order to review or an application to the justices for a rehearing of the complaint under sec. 89 (4), the case was not one for granting special leave to appeal.

Special leave to appeal from the Supreme Court of Victoria (*Madden* C.J.): *Pritchard* v. *Jeva Singh*, (1915) V.L.R., 510; 37 A.L.T., 50, refused.

APPLICATION for special leave to appeal.

Arthur Horton Pritchard proceeded by complaint upon summons in the Court of Petty Sessions at Melbourne to recover from Jeva Singh the sum of £9 for work and labour done. An affidavit of service of the summons upon the defendant was filed. Upon the hearing of the complaint the solicitor for the defendant objected that the service of the summons was bad, and asked for an adjournment. The justices, however, proceeded to hear the evidence and made an order in favour of the complainant for the amount claimed. An order *nisi* was obtained by the defendant to review this decision on the grounds (1) that the order was made as upon appearance for the defendant and there was no appearance for him other than an appearance by his solicitor to state that there had been no service of the summons, and (2) that in fact there had been no service of the summons on the defendant and, therefore, the justices had no jurisdiction to make the order.

On the return of the order *nisi*, *Madden* C.J. held that there had been no service of the summons, that, therefore, the justices had no jurisdiction, and that the proper remedy was by order to review; and he set aside the order of the justices: *Pritchard* v. *Jeva Singh* (1).

The complainant now applied for special leave to appeal to the High Court from that decision.

Robertson, for the appellant. Under sec. 23 (3) of the *Justices Act* 1890 the affidavit of service was *primâ facie* evidence of the service, and, that affidavit having been filed, the justices had

(1) (1915) V.L.R., 510; 37 A.L.T., 50.

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jurisdiction to proceed and determine the complaint. If the service was in fact bad, the remedy was under sec. 89 (4): the defendant should have applied for a rehearing by the justices. The remedy by order to review under sec. 141 was not open, for there was no error or mistake on the part of the justices, nor was there a want of jurisdiction, nor did it appear that the order ought not in law to have been made. The procedure by order to review is in substitution for that by prohibition, and irregularity of service does not oust the jurisdiction of the Court, and is not a ground for prohibition: *Backhouse* v. *Moderana* (1).

[GRIFFITH C.J. I take it that the justices ought not to have proceeded. The fact that the remedy given was by order to review, and not by an order of the justices for a rehearing, may be an irregularity, but this Court does not sit to set right irregularities of that sort, which are irregularities as to matters of procedure only.

GAVAN DUFFY J. Assuming that the justices might properly do what they did and that *Madden* C.J. was wrong in doing what he did, why should special leave to appeal be granted ?]

Whether the justices were not bound to proceed is an important question of law.

Owen Dixon, for the respondent, was not heard.

PER CURIAM. Special leave to appeal will be refused.

Special leave to appeal refused.

Solicitor, for the appellant, *Joseph Barnett.*

Solicitor, for the respondent, *L. S. Lazarus* for *P. T. Park*, Mildura.

B. L.

(1) 1 C.L.R., 675