

Property Act. In this view the plaintiffs are entitled to a decree for sale of a 2 anna 8 pie share in Nakahi Nagahi and the decree of the court below must be varied as regards the share in that village comprised in the mortgage.

We accordingly vary the decree of the court below so far that we make a decree for sale of 2 anna 8 pie share of the village Nakahi Nagahi, instead of 10½ pie as decreed by the court below. The appellants will get their costs of this appeal and also in the court below from Ram Kumar Naik, defendant. Musammatt Jairaj Kunwari will get her costs of this appeal from the plaintiffs appellants. We extend the time for payment of the mortgage money for a period of six months from this date. In other respects we affirm the decree of the court below. The objections preferred by Ram Kumar Naik necessarily fail and are dismissed with costs.

Decree varied.

APPELLATE CRIMINAL.

Before Mr. Justice Karamat Husain.

EMPEROR v. BRADSHAW. *

*Criminal Procedure Code, sections 462 (3), 537—European British subject—
Jury—Jury not chosen by lot—Illegality.*

Held that the provisions of section 460 (3) of the Code of Criminal Procedure are imperative, and if there is no choosing of the jury by lot, as provided for by the section, the result is that the whole trial is vitiated—*Brojendra Lal v. King-Emperor* (1) referred to.

IN this case one T. Bradshaw was committed to the Court of the Sessions Judge of Lucknow on charges under sections 474 and 417 of the Indian Penal Code. The date fixed for the trial was the 7th October, 1910. For that date ten European jurors were summoned to attend the Judge's Court at 10 o'clock, but up to 10-35 a.m., only three out of those summoned had appeared, and these were all empanelled without being chosen by lot. The accused was convicted, and appealed to the High Court, urging that the jury which tried him had not been constituted in the manner provided for by the Code of Criminal Procedure.

Mr. C. Dillon (with him Mr. R. F. Bahadurji), for the accused.

* Criminal Appeal No. 825 of 1910 from an order of H. Warburton, Sessions Judge of Lucknow, dated the 10th of October, 1910.

(1) (1901) 7 C. W. N., 188.

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EMPEROR
v.
BRADSHAW.

The Government Advocate (Mr. A. E. Ryves) for the Crown.

KARAMAT HUSAIN, J.—In this case one Bradshaw, a European British subject, was committed to the Court of Sessions of Lucknow, for trial, for offences under sections 474 and 417, Indian Penal Code. He was convicted on both counts and sentenced to an aggregate term of one year's rigorous imprisonment. He appeals to this Court and one of the points taken is that there was no selection of jurors by lot as required by section 276 of the Code of Criminal Procedure, and that, therefore, the proceedings resulting in his conviction are illegal.

He, as it appears from the record of the case, claimed to be tried as an European British subject and with a jury composed of Europeans or Americans (section 450). The last date fixed for the trial by the Court of Session was 7th of October, 1910, and the record of the case shows that for that date 10 European jurors were summoned to attend, and the remarks of the learned Sessions Judge, in his order, dated the 7th of October, 1910, are to the same effect. He, towards the end of that order, says:—"I further note that, including the two above gentlemen, only three European jurors have up to this moment (10.35 a.m.) appeared, out of 10 summoned to be present at 10 a.m."

According to Notification No. ¹⁶⁹³ VI-546-A-10 in trials by Jury before the Courts of Sessions in the North-Western Provinces and Oudh, the jury shall consist of five persons.

Section 462, clause (3) of the Code of Criminal Procedure, provides that from the whole number of persons returned, the jurors who are to constitute the jury shall be chosen by lot in manner prescribed in section 276, until a jury containing the proper number of Europeans or Americans or a number approaching thereto as nearly as practicable has been obtained.

Section 276 of the Code of Criminal Procedure provides that the jurors shall be chosen by lot from the persons summoned to act as such, in such manner as the High Court may, from time to time, direct.

Rule 102 of the rules and orders for Criminal Courts subordinate to the Court of Judicial Commissioner of Oudh,

gives the manner in which the jurors are to be chosen by lot. As the number of European jurors who appeared on the 7th of October, 1910, was only three, and as all of them were empanelled, it is evident that the imperative procedure prescribed for choosing jurors was not followed. Jurors are the judges of facts, and in the absence of a properly constituted jury, the violation of the imperative procedure prescribed by the Code of Criminal Procedure is of such a serious nature as cannot be cured by the provisions of section 537 of that Code. See *Brojendra Lal Sircar v. King-Emperor* (1).

For the above reasons I allow the appeal, set aside the sentence and conviction, and direct that the appellant be retried by a properly constituted jury. As the appellant is in the Naini Jail, I, on the application of his learned counsel, allow him to be admitted to bail to the satisfaction of the District Magistrate of Allahabad.*

Appeal allowed.

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.
 GHULAM HAZRAT AND ANOTHER (PLAINTIFFS) v. GOBARDHAN
 DAS AND OTHERS (DEFENDANTS).*

Act No. IV of 1882 (Transfer of Property Act), section 82—Mortgage—Contribution—Principle upon which contribution is to be assessed.

Where of two properties belonging to the same owner one is mortgaged to secure one debt and then both are mortgaged to secure another debt, for the purpose of apportioning the liability of the respective properties in regard to the subsequent mortgage, the value of the two properties must be taken into account, and credit given for the amount due upon the earlier mortgage out of the value of the property comprised in the subsequent mortgage. Where the amount due upon the earlier mortgage exceeds the value of the property comprised in that mortgage the necessary result is that the whole of the amount of the second mortgage is recoverable from the other property comprised in the later mortgage.

THE facts of this case are fully stated in the judgement of the Court.

Babu *Jogindro Nath Chaudhri* (with him *Mr. Nihal Chand*), for the appellant.

* See also *Emperor v. George Booth* (I. L. R., 26 All., 211).

*First Appeal No. 308 of 1909 from a decree of Girraj Kishore Datt, Subordinate Judge of Bareilly, dated the 26th of May, 1909.

(1) (1901) 7 C. W. N., 138.

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 EMPEROR
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