justice, equity and good conscience which is the rule applicable to cases of pre-emption, and there is nothing in the Muhammadan law, as far as we are aware, which militates against it. This appeal must fail. We dismiss it with costs.

*Appeal dismissed.*

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*Before Sir Arthur Strachey, Knight Chief Justice and Mr. Justice Knox.*

KAUSALIA AND OTHERS (DEFENDANTS) *v.* GULAB KUAR AND OTHERS (PLAINTIFFS).*

*Land-holder and tenants—Trees—Property in trees growing on tenant's holding—Burden of proof—Civil Procedure Code, section* 561—*Appeal—Objections by respondents—Letters Patent, section* 10.

*Held,* that the property in trees growing on a tenant's holding is, by the general law, vested in the zamindar, and a tenant is not entitled, in the absence of special custom, the burden of proving which is on him, to cut down and sell such trees. *Indad Khan* v. *Bhagirath* (1) *Nafar Chandra Pal Chowdhuri* v. *Ram Lal Pal* (2) and *Ruttonji Edulji Shet* v. *The Collector of Tanna* (3) referred to.

*Held* also, that section 561 of the Code of Civil Procedure is not applicable to appeals under section 10 of the Letters Patent.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Jogindro Nath Chaudhri* and Pandit *Moti Lal*, for the appellants.

Babu *Devendro Nath Ohdedar*, for the respondents.

KNOX, J. (STRACHEY, C. J. concurring).—The respondents to this appeal (plaintiffs in the Court of first instance) came into Court as zamindars or landholders of certain land, situate within which was a grove of trees. Their position as zamindars was expressly admitted by all the defendants who now appear as appellants in the appeal before us. Their claim was for an injunction to restrain the defendants from cutting and selling the trees in this grove and for the recovery of damages or compensation on account of certain trees, which, according to them, some of the

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* Appeal No. 24 of 1898, under section 10 of the Letters Patent.

(1) (1888) I. L. R., 10 All., 159. (2) (1894) I. L. R., 22 Calc., 742.
(3) (1867) 11 Moo. I. A., 295.

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defendants had illegally sold to other of the defendants, and which trees the last named defendants had illegally sold. The plaintiffs in a replication filed by them on the 21st of March 1896, admitted that they were not the owners of these trees, but only of the ground on which the trees stood. The District Judge of Allahabad upon hearing the appeal from the Court of the Munsif, who had dismissed the claim, held that the burden of proving that they had a right to the relief they sought lay upon the plaintiffs. He held it was for them to prove the custom set up by them, *viz.*, that they were empowered to interfere with the defendants and to prevent them from cutting and selling the trees standing in the grove in dispute, and that, as they had failed to prove it, their claim was rightly dismissed, and he accordingly dismissed the appeal before him.

The plaintiffs then came to this Court and impugned the judgment of the District Judge, first, upon the ground that the burden of proof had been wrongly laid upon them; and, secondly, upon the ground that, if it did lie upon them, the entries in the wajib-ul-arz, which they had proved and which were in their favour, sufficed to shift the burden of proof on to the respondents. The appeal was heard by Mr. Justice Burkitt. That learned Judge, following the precedent laid down in *Imdád Khan* v. *Bhagirath* (1) held that the property in trees growing on land in agricultural villages and on occupancy holdings vests in the zamindar subject to any customary right which may be established by tenants to cut down and to remove or take the produce of the trees. The entries in the village record-of-rights, he considered, did not in any way affect the question. He called for a finding upon the issue:—Have the defendants established by evidence any legal binding custom authorizing them to cut down and sell or otherwise dispose of the trees standing in the disputed grove? The finding on this issue was against the respondents, and the appellants' (plaintiffs') claim, so far as regards the injunction asked for by them, was granted.

(1) (1888) I. L. R., 10 All., 159.

The defendants have now come under the Letters Patent, section 10, and ask us to reconsider the question of burden of proof. They made no attempt to deal with the precedents cited in the judgment now appealed from. Their case was that upon the pleadings the issue remitted did not arise. It had been admitted that they were owners, and their contention was that so long as they continued to occupy the grove they had a perfect right to deal with the trees as they chose.

On referring to *Imdad Khan* v. *Bhagirath* (1) we find that in that case, as in the present, the trees were the property of occupancy tenants, and the suit was a suit brought by the zamindar for cancelment of a deed of sale under which the tenants, relying on their right as owners of the trees, had purported to sell them to others. Upon a review of earlier cases decided by this Court the learned Judge who decided that appeal found that the trees upon an occupancy holding, whether planted by the tenant himself or not, belong and attach to such occupancy holding, and like it are not susceptible of transfer by the occupancy holder. It does not appear in the case before us what was the precise nature of the appellants' holding, but unless it were the holding of an exproprietary tenant, it could not be a holding susceptible of transfer. It is nowhere pleaded, and it certainly would have been pleaded had there been any ground for it, that the tenancy was an exproprietary tenancy.

The case of *Nafar Chandra Pal Chowdhuri* v. *Ram Lal Pal* (2) was a similar case. There two Judges of the Calcutta High Court, after considering a number of cases on the point, held that the property in trees on a tenant's holding is by the general law vested in the zamindar. In *Ruttonji Edulji Shet* v. *The Collector of Tanna* (3) the Privy Council decided that the trees are part of the land on which they stand, and the right to cut them down and sell them is incident to the proprietorship of the land. Much was made of the admission by the respondents

(1) (1888) I. L. R., 10 All., 159. (2) (1894) I. L. R., 22 Calc., 742.
(3) (1867) 11 Moo. I. A., 295.

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that they were not the owners of the trees in the grove, but of the ground under the trees and of the claim being based on custom and usage as recorded in the village administration paper. But this admission must be read with paragraph 3 of the plaint. The two read together satisfy us that the admission was intended to be that while the defendants (appellants) were in possession, and the respondents were not owners in the sense of full and unlimited ownership, still they were owners of the ground on which the trees stood, and by virtue of this claimed the right to restrain the appellants from cutting down and selling the trees at the free will and pleasure of the latter.

In this view of the case we think the burden of proof was rightly laid and that the appellants did not prove any custom derogating from the general law.

The respondents have filed a paper which they term objections under section 561 of the Code of Civil Procedure. Section 561 is a section which applies to appeals from original decrees. It is true that section 590 of the Code makes the provisions of this section applicable, so far as may be, to appeals from orders, and section 587 similarly makes them applicable to second appeals, but no statute or rules have been pointed out to us making the terms of this section applicable to Letters Patent appeals. Nor can it be pointed out that the section has ever been made use of in Letters Patent appeals.

We dismiss the appeal with costs to be borne by the appellants and we also disallow the objections with costs. The costs of the appellants, so far as the objections are concerned, will be borne by the respondents.

*Appeal dismissed.*