M.R.O. 14—5,450—22-10-25.

MADRAS RECORD OFFICE.

Government of Madras.

Revenue **DEPARTMENT.**

G.O. No. 1123 Press Mis.

Dated 11-5- 1866.

Not to be folded or roughly handled

No. 203. Read the following Proceedings of the Court of Wards, dated 28th April 1866, No. 3,000 :—

Read the following letter from the Collector of Tinnevelly, to the Secretary to the Court of Wards, dated Trichendoor, 18th April 1866, No. 152.

I have the honor to submit, for the information of the Court of Wards, an authenticated copy (to be returned) of the Judgment of the High Court, in the appeal case connected with the succession to the Oorkad Estate, adverted to in my letter to the Court of Wards, dated 2nd March 1866, No. 83, and received from the successful claimant, the plaintiff, and to request the sanction of the Court of Wards and of Government to make over the estate on the terms of that Decree.

ENCLOSURE No. 1.—Decree.

ENCLOSURE No. 2.

JUDGMENT.

In the High Court of Judicature at Madras.

Monday the twelth day of February, one thousand eight hundred and sixty-six.

Present.

The Honorable Sir C. H. SCOTLAND, Knight, Chief Judge,

and

The Honorable Mr. Justice HOLLOWAY.

Regular Appeal No. 70 *of* 1864.

Sivanananja Perumal Sethurayar..... Appellant, (Plaintiff.)

Muttu Ramalinga Sethurayar, and five others..... Respondents, (Defendants.)

Regular Appeal No. 80 *of* 1864.

Athilakshmi Ammal..... Appellant, (sixth Defendant,)

and

Sivanananja Perumal Sethurayar..... Respondent, (Plaintiff.)

Regular Appeals against the Decree of the Civil Court of Tinnevelly, in Original Suit No. 15 of 1863.

These Regular Appeals coming on for final hearing, the Court delivered the following

JUDGMENT.

This is a suit brought to recover the Zemindary of Urkadu, and to make void an alienation of a portion of the partible family property, made by the plaintiff's father (the Zemindar last in possession) to his daughter, the sixth defendant, upon her marriage by way of dowry, the same having been made without the consent of the plaintiff and others. The plaintiff also seeks a division of all the partible real and personal estate left by his father, the late Zemindar, and the delivery over of his one-fifth share therein. The grounds of the plaintiff's claim, as alleged in the plaint are: That his father married three wives, by the first of whom he had no male issue; that the plaintiff is his first-born son by the second wife, and sole heir to the Zemindary in preference to the first defendant, the eldest son of the third wife, the fourth defendant.

In the written statement put in by the fourth defendant as mother and guardian, she asserts that her marriage took place before the marriage of the plaintiff's mother, and that being the senior wife, her eldest son, the first defendant, is the sole heir entitled to succeed, according to the long-established usage regulating the succession to Zemindaries in that part of the country. She further states that there was no delay on her part in regard to the division of the estates

which were divisible, and that the only delay was on the part of the plaintiff and his brother, the fifth defendant.

The sixth defendant, in her written statement, relies upon the validity of her right to the property given to her as dowry, under an instrument executed on the 13th September 1860. She alleges enjoyment of it ever since, and that it was a less amount of dowry than her position and the late Zemindar's fortune entitled her to, and that the assent of the plaintiff to the gift was not necessary.

The Civil Court finds that the marriage of the fourth defendant to the late Zemindar was celebrated before his marriage to the plaintiff's mother, and being of opinion that in point of law the right of succession passed to the eldest son of the second wife, in preference to the first born of all the sons by the third wife, has decreed against the plaintiff's claim as heir to the Zemindary. But as to the other property in suit, the Court has decreed to the plaintiff his one-fifth share upon a division, holding the alienation by gift to the sixth defendant to be invalid as against the plaintiff.

The Plaintiff and the sixth defendant have appealed against this decree. The plaintiff's grounds of objection, relied upon at the hearing, are substantially that the evidence wholly failed to support the special custom put forward by the fourth defendant, and that by the general Hindu law the right of primogeniture is not governed, in the case of sons by several wives, by priority of marriage amongst the wives; but if priority of marriage does govern, then that the evidence proved that his mother's marriage took plates (? place) before the marriage of the fourth defendant. The sixth defendant's grounds of objection are, that the alienation being a gift to her upon marriage for maintenance was valid and binding, but that at all events her father might alienate to the extent of his own share in the property, without the consent of his son.

Both appeals have been heard together and, as in the lower Court, we have, with the consent of the parties, taken all the evidence in Suit No. 3 of 1861 as admissible evidence for our consideration. To dispose of the plaintiff's appeal first. There is no doubt that the plaintiff is the first-born son of the late Zemindar, and there is no dispute as to the relationship in which the parties stand to each other and to the Zemindar except in regard to the priority in point of time of the marriage of the plaintiff's mother, and that issue it will only be necessary to allude to after we have expressed the decision at which we have arrived upon the two main questions in the case.

First then, has it been shown that by established custom, where there are several wives and the first wife has no male issue, the right of succession passes to the eldest sons of the other wives according to the priority of their mother's marriages, and not to the first born of all the sons? It is not pretended that such a cstom has at any time received judicial sanction, and what the law requires before an alleged custom can receive the recognition of the Court and so acquire legal force is, satisfactory proof of usage so long and invariably acted upon in practice as to shew that it has, by common consent, been submitted to as the established governing rule of the particular family, class or district or country; and the course of practice, upon which the custom rests, must not be left in doubt, but be proved with certainty. Applying that rule of law here, we are of opinion that the evidence wholly fails to support the custom set up. The loose statements made by the witnesses on both sides, of what they had generally heard and understood to be the custom, are of no avail; and beyond these statements the only evidence in the suit is that given by the late Zemindar himself and one or two witnesses for the defendant, as to two instances of succession to the Zemindary, when there were sons by several wives, according to priority of marriage. This, at best, would have been slight evidence; but the circumstances here throw such discredit on the late Zemindar's testimony, as to make the evidence wholly unreliable. It appears that in 1849 the Zemindar, in an Arzi to the Collector, and in the Mahazarnama which he with other Zemindars then gave, stated that the right of succession, on failure of male issue by the first wife, passed to the first born of the sons by all other wives. Again in 1853, after the birth of the first defendant the Zemindar, in his communications with the Collector (marked E and F), treats the plaintiff as his heir, and calls him his "Puttathu Kumaran." Further, we find that, when he was in 1861, charged with being concerned in substituting amongst the records of the Collector's office a spurious Arzi, stating that the son of the wife first married had the right to succeed, he not only denied the charge, but repeated his first statement as to the rule of succession. Soon after this, the Plaintiff and his father, the Zemindar, became at enmity with each other, and the suit was brought by the present first and fourth defendants against the plaintiff and the Zemindar (collusively, there can be little doubt, as between the then plaintiffs and the Zemindar), in which the statements now relied upon were made by the Zemindar as a witness for the plaintiffs. It is impossible, under the circumstances, to place any reliance upon these statements, or the other evidence offered to support them. Then, with reference to the opinion of nineteen Zemindars of the District, upon which the lower Court altogether rests its decision in favor of the custom: they are not the statements of witnesses, but opinions obtained for the information of the Board of Revenue upon the occasion of a dispute about the succession to another Zemindary, the precise particulars of which we know nothing of in this case. They cannot, therefore, properly be regarded as any evidence in this case; but, even if evidence, they are merely individual opinions expressed in general terms, in which the Zemindars vary from each other, and from the opinion expressed at the same time by the plaintiff's father, and no effect can be given them in support of the alleged special custom.

We are thus brought to consider the second question, whether by Hindu Law, independently of particular custom, the plaintiff is rightful heir to the Zemindary, and in determining it, we are relieved from considering any qualification that the law may attach to the difference of caste amongst the wives, as in this case there is no difference of caste. Heirship by right of primogeniture rests upon an exceptional rule of the general law of inheritance, applicable to Zemindaries and other estates, which are considered in the nature of principalities, and impartible. As respects all other property, except under certain strictly limited grants from the Government, and in the case of some offices, the law at the present day does not recognise a right by succession in one of several sons, or one of the other male members of an undivided family to the exclusion of the others, beyond the preferential claim of the eldest to manage the property. Now, no work of authority or decision, directly relating to the descent of property which, at the present day, is governed by the rule of primogeniture, was cited at the bar, nor have we found any bearing materially upon the present question. We must, therefore, decide it upon principle and by analogy to the existing general law of inheritance, and upon what we find laid down in early times, when primogeniture by the general law conferred some special proprietary rights and privileges which no longer exist.

Upon general principle, where the wives are, as in the case, of the same caste and rank, there is no sound ground of distinction on which the birth-right of the first born of all the sons can be denied. Whether the plaintiff's mother was second or third wife of the late Zemindar, she was equally with the fourth defendant his lawful wife, and by the birth of the plaintiff, his father first acquired all the benefits, temporal and spiritual, which are ascribed to the birth of a son and the performance by him of the appointed exequial rights (Manu IX., 106, 107; Col. Dig. V. I, 10). Then, applying the general law of succession which governs partible property, it favors strongly the plaintiff's right. All legitimate sons of the same rank are upon an equality, though the offspring of several wives, and though the number of sons by each differs. The sons severally take *per capita*, and their rights in the distribution of property are affected in any way by the order of their mothers' marriages (1, Strange's Hindoo Law, 205); seniority too by birth, independently of the order of marriages, gives the preferable claim to the management of the joint property. In the case of a plurality of wives of unobjectionable caste, priority of marriage seems to be regarded by the law only for the purpose of regulating the order of precedence amongst the wives themselves, and the right of each to succeed as heir to the husband in default of sons.

But the plaintiff's right derives still further support from the texts of Manu, to which we were referred in the course of the argument. Although the passages relate directly to rights and privileges of the first born upon partition, which are no longer admitted, still they are not the less of force here and in other cases to which at the present day the rule of primogeniture

applies; so far as they show to which of the sons of several wives rights of primogeniture passed. In Manu Cap. IX., after treating of the then privileged position of the first-born son and his rights upon partition, it is observed in Section 122, with reference to the birth of a son by a first married wife after the birth of a son by a subsequently married wife of a lower class, "It may be a doubt in that case how the division shall be made." But in the next Section, it is declared that the son of the first married wife is entitled to the preference, and after him "those who were born first, but are inferior on account of their mothers who were married last." Then in Section 125, it is laid down that "As between sons born of wives equal in their class, and "without any other distinction, there can be no seniority in right of the mother, but the seni-"ority ordained by law is according to the birth." The effect of these Sections, we think clearly is, (at least as between the sons of wives of equal caste other than the wife first married,) that the first born of all the sons possessed the right of primogeniture, and this view is in accordance with the other texts, and the commentary in 2 Col. Dig. Book 5, Cap. I, to which reference was also made in the argument. Upon the whole it appears to us that, as regards the rights of sons by different wives to inherit, whether in co-parcenery or as sole heir, (except perhaps the son of the first wife,) the priority in point of time of their mother's marriages has never been regarded when the wives were equal in caste and rank, and that the rule of primogeniture was, and is the same in the case of sons by several wives of equal caste and rank, as in the case of sons by one wife. For these reasons, we are of opinion that, by the general law of inheritance, the plaintiff is heir to the Zemindary by right of primogeniture.

It has been unnecessary to decide whether a distinction exists in favor of the younger son of a first wife, as the former Pandits of this Court appear to have thought; and we desire to be understood as not expressing any opinion upon the point one way or the other. Our decision also leaves untouched the question, how far a difference of caste between the wives and the husband would affect the right of the first-born son; but we may refer to some observations upon this subject to be found in the Judgment of the Chief Justice in the recent case of Pandiaya Televar, *v. s.* Puli Telavar, (1, Madras High Court Report, 483).

Our decision being in favor of the plaintiff's right by birth upon the general law, it is not necessary to decide the singular question raised, whether the late Zemindar's marriage with the plaintiff's mother was celebrated before or after his marriage with the fourth defendant, it being the case of both parties that the marriages took place at different times of the same day. But we think it proper to observe that the Court at present sees no sufficient grounds for saying that the right conclusion has not been arrived at by the Lower Court.

The remaining question is that raised in the appeal of the sixth defendant, namely, her right to all or a portion of the land in her possession under the deed of gift (marked VI.) from her father, the late Zemindar. For the proper determination of this question it became necessary to send two issues to the lower Court; first, whether the property transferred to the sixth defendant by the said deed was part of the Zemindary; secondly, whether such was executed at the time of the sixth defendant's marriage, and if not, when. On the first issue the Civil Court finds that five kottas, five mercals, and one measure were, and nine kottas, seventeen mercals, and 4½ measures were not part of the Zemindary. On the second issue the finding is, that the deed was not executed at the time of the sixth defendant's marriage, which took place on the 3rd May 1855, five years before the date of the deed.

No exception has been taken to the correctness of these findings on the evidence, nor has it been contended that the appellant can upon them be held to possess a valid right, under the deed, to more than the quantity of land which is found not to be part of the Zemindary. But the appellant represents that she is prepared with witnesses to show that the deed was executed in pursuance of an oral agreement to transfer all the lands as a dowry, entered into by the late Zemindar at the date of her marriage, and the Court is asked, by another issue, to afford her an opportunity for the examination of those witnesses. We think that such a proceeding would result only in a number of persons being obtained to give false and utterly worthless evidence, and ought not

to be allowed. The plaintiff therefore is, in our judgment, entitled to recover the portion of the Zemindary found to be in the appellant's (6th defendant's) possession, but the appellant has a valid title to the portion of partible land transferred by the deed marked VI., the only objection suggested on behalf of the respondent as to its being more than would have been the proper share of the appellant's father on a division not having been persisted in.

The decree of the Court will be (reversing so much of the lower Court's decree as relates to the Zemindary property) that the plaintiff is entitled to possession of the Zemindary, including the portion found to be in the sixth defendants' possession, and the property appurtenant thereto; and (modifying the rest of the lower Court's decree) that the plaintiff is entitled to one-fifth share upon division of the partible family property, except the nine kottas, seventeen mercals, and 4½ measures of land, to which the sixth defendant is entitled under the deed marked VI., and also to recover from the sixth defendant the mesne profits of the five kottas, five mercals, and six measures of the Zemindary land awarded to him by this decree, which accrued since the death of the late Zemindar.

The costs of the appellants in the appeal by the plaintiff, must be borne by the fourth respondent, and in the appeal by the sixth defendant: each party will bear his and her own costs.

(A true Copy.)

———, *Registrar,*
Appellate Side.

(True Copy.)

(Signed) J. W. WILKINS,
Deputy Registrar,
Appellate Side.

The Collector had better instruct the decree holder to apply to the Civil Court for execution of the decree in the usual course; and when the Court's precept reaches him, he will act on it according to law.

No. 204. ORDER THEREON, 11th May 1866, No. 1,123.

Land Revenue. Ordered to be recorded.

(True Extract.)

(Signed) J. GROSE,
Under Secretary to Government.

To the Board of Revenue.

Exd. S. T. Augustin.

No. 4

1866. Department.

Prof Gen Esq

No. 1260

PROCEEDINGS OF THE BOARD OF REVENUE,

Dated 28th April 1866.

Read Letter from Collr of Tinnevelly

No. 3,000.

Directing Collector of Tinnevelly to instruct holder of Decree of High Court in appeal case connected with succession to Oorkad estate to apply to Civil Court for its execution.

14 Encl Copy Petition &c

B 2203-204.

B.P. 1123

N Recr Mad

WDM

Mr Bragg

C 2 Mar 1866