acquire against the plaintiff property in the elephant by his own wrong according to *Blades* v. *Higgs*.

For these reasons the appeal must be dismissed with costs.

NOTES.

[See. *Threlkeld* v. *Smith* (1901) 2 K, B. 531; *Brady* v. *Warren* (1900) 2 Irish. R. 632 Q. B. D: *Elwes* v. *Brigg Gas Co.* (1886) 33 Ch. D. 562.]

[4 Mad. 272.]

APPELLATE CIVIL.

The 15th December, 1880, and 18th October and 1st December, 1881.

PRESENT:

SIR CHARLES A. TURNER, KT., CHIEF JUSTICE, AND MR. JUSTICE KINDERSLEY.

Hanumantamma.....(Plaintiff), Appellant

and

Rami Reddi.....(Second Defendant), Respondent.*

Custom of Illatom.†

The custom of *Illatom* (affiliation of a son-in-law) obtains among the Motati Kapu or Reddi caste in the district of *Bellary* and *Kurnool*.

He who has at the time no son, although he may have more than one daughter, and whether or not he is hopeless of having male issue, may exercise the right of taking an *Illatom* son-in-law.

For the purpose of succession the *Illatom* son-in-law stands in the place of a son and in competition with natural-born sons takes an equal share.

Quaere—(1) Whether a father with a son living is entitled to exercise the right; (2) If the father is dead, whether the power may be exercised by a surviving paternal, **[273]** grandfather; and (3) whether the affiliation is effected by the introduction into the family or requires for its completion marriage with a daughter.

(4) Whether the affiliation is analogous to Hindu adoption, except in so far that the *Illatom* is regarded as member of the family into which he is admitted.

(5) Whether the *Illatom* can demand partition.

THE facts of this case appear in the Judgment of the Court (TURNER, C.J., and KINDERSLEY, J.)

Mr. *Spring Branson* for Appellant.

Ramachandra Rau Sahib and *Narasimyyar* for Respondent.

Judgment:—The appellant is the widow of Mahomed Reddi, the sole surviving son of Linga Reddi, and she brought this suit to recover, as forming part of her husband's estate, certain lands, a house, cattle, and other moveable property. She also claimed mesne profits, and prayed that the deed of gift dated May 14th, 1878, whereby Hanumantamma, the widow of Linga Reddi, had purported to convey certain of the lands sued for to the respondent, Rami Reddi, might be declared inoperative.

* Second Appeal No. 633 of 1879 against the decree of V. Gopala Rau, Subordinate Judge of Bellary reversing the decree of D. Yagappa, District Munsif of Adoni, dated 5th September 1879.

† *Illata* karu, a bride's father having no son and adopting his son-in-law (*Wilson.*)

On behalf of the defendants it was denied that the moveable property in the plaint mentioned had belonged to Mahomed Reddi and in respect of the lands and house, it was pleaded that they belonged to Hanumanta Reddi, the father of Rami Reddi under the following circumstances, namely, that on the death of Tippa Reddi, the then only son of Linga Reddi, Linga Reddi gave Narasamma, one of his four daughters, in marriage to his wife's brother, Hanumanta declaring him his *Illatom* and heir of his house, patta and inam lands; that thereafter Hanumanta lived in the house and managed the property; that Mahomed Reddi was born to Linga Reddi about three months before his death, which occurred about 15 years before suit: that Linga Reddi, before his death, had directed his wife Hanumantamma after his death to get the patta and inam lands in Nagarur entered in her name, and to transfer them to Hanumanta Reddi, and to give to Mahomed Reddi a house and lands which he owned in the district of Kurnool; that Hanumanta Reddi, after Linga Reddi's death, continued to reside in the house in suit and rebuilt it at considerable expense and enjoyed the patta and inam lands up to the time of his death, which occurred a few months before suit, and that after his death, in conformity with her husband's instruction, she had executed the deeds of gift of May 14th, 1878 in favour of the respondent Rami Reddi.

[274] The Munsif described *Illatom* as a sort of adoption sometimes practiced in the Reddi caste when a man has an only daughter, and no hope that a son will be born to him, but he does not specify the legal consequences of the connection. It is to be inferred he considers the son-in-law introduced as *Illatom* would take the place of an adopted son, and he states apparently on this assumption that on the birth of a natural son the *Illatom* would take what would be taken by an adopted son under similar circumstances, namely, one-fourth of a son's share. He noticed three decisions, in two of which the custom had not been recognized, and one in which it was held to have been established by sufficient evidence. The witnesses examined on behalf of the respondents asserted that Hanumanta had been taken into the family of Linga Reddi, and that Linga Reddi had then verbally assigned to him all his property but on the birth of a son to him subsequently he had given to his wife the directions alleged respecting the disposal of his property. They further stated that Hanumanta had lived at Nagurur, rebuilt the house and held possession of the patta and inam lands. On the other hand the appellant's witnesses declared Hanumanta had lived with his wife at Auspuri and had only visited Nagarur occasionally; and that the lands in Nagarur had been cultivated by the servants of Linga Reddi's widow under directions and with the assistance of her son Mahomed Reddi when he arrived at an age to render it; and that the house had been rebuilt by Linga Reddi's widow.

Considering it improbable that Linga Reddi having four daughters would have assigned his whole property to the husband of one of them, and that the entry and continuance of the widow's name in the registers increased the improbability of the case of the respondents, the Munsif found that the introduction of Hanumanta into Linga Reddi's family as *Illatom* was not proved, and decreed the claim to the house and lands and to some of the cattle.

The Subordinate Judge in the commencement of his judgment adverts to the hardship that would be occasioned in this case if the ordinary rules of Hindu Law were applied. The plaintiff is the child wife of a husband who died a minor, and if, as she alleges, the whole estate of Linga Reddi vested in him, it will go to her, by birth a stranger, and her aged mother-in-law will be dependent on her for maintenance. The sense which the Subordinate

[275] Judge entertained of the hardship to which the female members of the family of Linga Reddi would be subjected has, perhaps, induced him unconsciously to dispose somewhat summarily of the issues presented to him for decision.

He describes *Illatom* as a long prevailing custom having the force of law. He accepts the evidence of the witnesses of the respondents that Hanumanta was in virtue of that custom introduced into the family, and characterizes the reasons given by the Munsif for refusing credit to it as not tangible, seeing that in a statement presented by Linga Reddi to the Inam Commissioners in 1860 Hanumanta was described as a member of the family; and lastly he accepts, without discussing the evidence adduced in proof or disproof of it, the respondents' allegation that a nuncupative will was made by Linga Reddi. If there has been, as the Subordinate Judge states, a long prevailing custom sanctioning the introduction into a family of a son-in-law as *Illatom*, we apprehend it has not been of such universal or general acceptance, or at least that advantage has not been so generally taken of it that we could act upon it without more proof than exists in the record.

We find no mention of it in any of the text-books. Of reported cases in which allusion has been made to it, only four have been brought to our notice—Shundariyammal *v.* Kamatchiyammal, (M. S. D. 1859, p. 250) Tayumana Reddi *v.* Perumal Reddi; (1. M. H. C. R., 51) Mopur Ademma *v.* Damaravapu Subba Reddi (6 Madras Jurist, 59 1871) and Chella Papi Reddi *v.* Challa Koti Reddi (7 M. H. C. R., 25). In the first and second of these cases it was held that the proof of the custom was insufficient. In the third, to establish the title set up by the defendants, two instances were alleged as having occurred in the family very many years—one of them 100 years before the custom was pleaded. In the fourth the validity of the alleged custom was not in question. In the third case above mentioned there was no allegation that the custom applied only where the head of the family had no sons or an only daughter, and in both the alleged instances it was stated the head of the family had sons, though it was not stated whether or not these sons were in existence when the son-in-law was introduced.

[276] We have looked into the evidence taken in that case to establish the custom.

The witnesses were agreed that *Illatom* meant the introduction of a son-in-law into the family, but they were not agreed as to whether this could only be effected by a writing; and while more than one of the witnesses stated it could take place when there were male descendants in the family, another declared he, as an *Illatom*, had no right in the property of the family into which he had been introduced; and another that, having been introduced into a family as *Illatom*, he had been expelled because there was no writing.

We have adverted to these statements not, of course, that they can be regarded as evidence in this case, but as showing that it would be dangerous to assume, if not the existence of the custom, at least its incidents.

In Challa Papi Reddi *v.* Challa Kcta Reddi, (7 M.H.C.R., 25) it was held that a son-in-law, who had acquired property by the customary rule of *Illatom*, takes the property to which he succeeds as a self-acquisition, and not as ancestral, as it would be taken by an adopted son. If this be so, it could not be inferred from any similarity in his position to that of an adopted son that he would take the same share as an adopted son in competition with a natural b orn son. But, assuming that the custom were proved to obtain in the district, and that in virtue of that custom Hanumanta was introduced into the family by

Lings Reddi, and was consequently entitled to a share in Linga Reddi's estate; and assuming also it was proved that Linga Reddi made the disposition of his property alleged inasmuch as Linga Reddi could not by will defeat the interest to which his natural son was lawfully entitled, it would have to be determined whether the devise to Hanumanta exceeded the power of disposition which under the circumstances Linga Reddi enjoyed; and in determining this question it would be necessary to consider not only the nature of the property of which Linga Reddi if he made the will assumed to dispose, and what share, if any, would devolve on Hanumanta if he was introduced into the family by Illatom-but also the further question whether Hanumanta was induced to and did under, take [277] the management of the property on any contract that he should be remunerated by participation in the estate; and, if so, to what extent it was agreed he should participate in it. For authority that such a contract may be made by a member of the Reddi caste, and that effect would be given to it, there is the ruling of this Court in Challa Papi Reddi *v.* Challa Koti Reddi. (7 M. H. C. R., 25).

Before we could affirm the decision of the Lower Appellate Court it will be apparent from the preceding remarks that several issues must be tried which have not been considered by the Lower Appellate Court, and we are not satisfied that issues which that Court tried were properly investigated.

The circumstance to which the Subordinate Judge adverts, the enumeration of Hanumanta as a member of the family in the report made by Linga Reddi to the Inam Commissioners, is certainly entitled to consideration, but at that time Linga Reddi had no living son, and he may not have been unwilling to benefit his son-in-law, but it is hardly less important to ascertain what was the subsequent conduct of the parties whether Hanumanta before and after the death of Linga Reddi was associated in the management of the family estate and resided in the family house.

The evidence of the witnesses who depose that on the introduction into the family of Hanumanta, Linga Reddi assigned to him all his estate, though he was at the time himself in the enjoyment of such vigour that a son was subsequently born to him and had three unmarried daughters, for whom it was natural he should make provision, appears, it cannot be denied, opposed to probability, and the Court would have to consider whether if it were not accepted it should be altogether rejected or accepted as evidence of the existence of a contract for the remuneration of Hanumanta if he undertook the management of the estate.

Again, it cannot be denied that the conduct of the widow of Linda Reddi in causing her own name to be entered in the registers as owner, and refraining from making any assignment of the property until 1878, after the death of Hanumanta and after the death of her son, creates doubts as to the making of the nuncupative will which may or may not be removed by the widow's explanation that she apprehended Hanumanta would [278] fail to protect or maintain her. These circumstances are not conclusive, but they merited consideration which the Subordinate Judge refused to them. To enable us to arrive at a satisfactory decision we shall remit for trial the following issues:—

(1) Does the custom of *Ilatom* obtain among members of the Reddi caste, and especially in the district in which the parties reside?

(2) If it exists, under what circumstances is the head of a family entitled to resort to it?

(3) If a son-in-law is introduced into a family as *Illatom*, does he thereby acquire a right to receive a share in the ancestral and self-acquired property of his father-in-law ; and if he is so entitled, what share ?

(4) Is he entitled to a share on succession in competition with a natural born son, and if he is so entitled what share ?

(5) Was Hanumanta introduced into the family of Linga Reddi as *Illatom* ?

(6) Was there at the time of his introduction, if he was so introduced, any agreement that on his taking part in the management of the estate he should receive a share ?

(7) If there was such a contract, did Hanumanta undertake and continue in the management of the property ?

(8) Did Linga Reddi make the nuncupative will alleged ? If he did so make it, was the property devised to Hanumanta in excess of the share (if any) to which he would have been entitled in virtue of his introduction into the family as *Illatom* : or was it in excess of the share to which he would have been entitled in virtue of the contract (if any) made at the time of his introduction into the family ?

The Lower Appellate Court will admit such further evidence as the parties may tender on the issues hitherto untried, and such further evidence as in its judgment it may be fitting to admit on the issues which have been previously tried, and will submit its findings with any evidence so admitted to this Court within three months from the date of this order, and on the return of the findings ten days will be allowed the parties wherein to file objections.

Upon receiving the findings of the Subordinate Judge, the Court delivered the following

Judgment :—The Subordinate Judge has tried the issues remitted to him by our order of December 15th, 1880.

[279] On the first issue he finds that the custom of *Illatom* obtains among the caste of which the parties are members in the districts in which they reside and in which the properties are situated.

On the second issue he finds that resort may be had to the custom when assistance is required in the cultivation of the family estate and specially by a man who has no son.

On the third issue that the son-in-law introduced as *Illatom* takes the inheritance as a son, though the evidence is insufficient to show he can demand a share from his father-in-law.

On the fourth issue that the *Illatom* in competition with a natural born son takes the same share as would under similar circumstances be taken by an adopted son. The Subordinate Judge admits that the testimony of the witnesses is unanimous that the *Illatom* takes an equal share with a natural born son, but he refuses to accept this conclusion, as it would ascribe to an affiliated son-in-law larger rights than to an adopted son.

On the fifth issue he finds that Hanumanta was introduced into the family of Linga Reddi as *Illatom*.

On the sixth that no such agreement as is suggested by the issue was necessary, as Linga Reddi, on admitting Hanumanta as *Illatom*, expressly declared he constituted him his heir.

On the seventh that Hanumanta undertook and continued in the management of the estate ; and on the eighth, that Linga Reddi made the nuncupative

will attributed to him, and that the property, which by his direction was to be delivered to Hanumanta, was not in excess of the share to which Hanumanta would have been entitled.

The Subordinate Judge impliedly admits that the property may exceed in value the share which would be taken by a person introduced into the family as *Illatom* on the assumption that his finding on the fourth issue is correct, and that the share of such a person would be no greater than would be taken by an adopted son; he, nevertheless, considers that, in view of the nuncupative will of Linga Reddi, and of the death of Linga Reddi during his minority and the existence of a son of Hanumanta, the deed executed by Hanumantamma to give effect to her husband's will should be sustained.

The respondent, Rami Reddi, takes exception to the finding on the fourth issue; the appellant, to the findings on this and on the other issues.

[280] The evidence now on the record justifies the conclusion at which the Courts below have arrived as to the existence of the custom.

Four witnesses, residents of the Adoni Taluk; eight witnesses, residents of the Allur Taluk; and one witness, resident of the Gooty Taluk, in the district of Bellary; and two witnesses, residents of the Pattekonda Taluk, in the district of Kurnool; and all of them, members of the Motati Kapu caste, to which the parties belong, have deposed to the existence of the custom in the caste.

It was suggested in *Challapapi Reddi* v. *Challakoti Reddi* (7 M. H. C. R., 25) that the custom may have had its origin in the now obsolete rule of the appointed daughter. Motati Kapu is a caste of Sudras, and it may be doubted whether the rule referred to was accepted by them. However these may be, it does not appear that the custom we are considering is now resorted to for any spiritual purpose. Of the witnesses who were examined on this point, two stated that *Illatom* sons-in-law are taken to assist in the cultivation of the estate; the third, that they are taken "for rendering services;" and another witness spoke of an *Illatom* son-in-law as "the son-in-law kept for the family." It would seem that, at the present day, temporal motives, the securing assistance in the management of the family property, and the provision of a protector in the event of the removal of the head of the house by death, induce the resort to the custom, and the circumstance that the son-in-law so introduced takes the place of the son on the devolution of the estate may be explained by the suggestion that the inheritance is a consideration for services rendered and to be rendered. Thirteen instances are mentioned by the witnesses, of which twelve were within their own knowledge. Four of the witnesses claimed to be *Illatom* sons-in-law and to have inherited property in that character. Four of the witnesses had admitted the claims of *Illatom* sons-in-law to property in derogation of their own intersets.

It will be convenient to refer in detail to some of the instances given.

In Pucchakayalamada Vasanta, one of four undivided brothers, had had born to him two or three sons who had died; he took into his house as *Illatom* his elder sister's son, Gujjalaya, who was **[281]** after some years married to his only daughter. The four brothers died; three of them left sons, and one of these sons, Chinna Reddi, was examined as a witness and deposed to the circumstances we have mentioned and stated that after the death of his father and uncles a partition took place and the share of Vasanta was given to Gujjalaya.

Venkanna of Masanapalli deposed that his father Madi Reddi, having at the time two daughters and no son, introduced into his family as *Illatom* the witness Virupanna; that subsequently he and another son were born to Madi

Reddi ; that his brother died, and that he had divided his father's house and land with Virupanna in equal shares, his father having declared Virupanna as *Illatom* entitled to share equally with him. Virupanna confirmed this evidence.

Another Virupanna of Kamarabedu deposed that his father took one Sanna Ayanna the husband of his daughter Hanumakka, as *Illatom*, and afterwards had two sons, the witness and another ; that after his father's death and the death of Sanna Ayanna he and his brother had given a one-third share to the surviving son of Sanna Ayanna, because their father had said Sanna Ayanna had been taken as *Illatom* and was entitled to a share.

Venkata Reddi of Atikulagundu proved that his father, Ayappa Reddi took into his house, as *Illtaom*, Timma Reddi to help in the cultivation, and after some years married him to his eldest daughter ; that in the interval two sons and three other daughters were born to Ayappa, and that, on partition after Ayappa's death, Tima Reddi obtained an equal share in Ayappa's property with the witness and the other son of Ayappa.

The same witness also deposed that his uncle had taken, as *Illatom*, Venkata Reddi, the elder brother of Timma Reddi, although he had at the time a son living.

Siva Reddi of Nagarur proved that he was into the house of Siddi Ramanna as Illatom, that Siddi Ramanna had three daughters but no male issue ; that, two years after he had been taken into the house and one month after the death of Siddi Ramanna, he married the second daughter ; that the widow of Siddi Ramanna is dead ; that the patta which stood in her name has been transferred to his name and he has possession of the whole of his father-in-law's property, tha the had eldest daughter **[282]** married a man of some wealth in the village, and has made no claim on her father's property ; that the youngest daughter is living in his house under his protection ; and that his father has property which he considers would devolve solely on his son, the witness' brother.

Gungamma of Kummarabedi deposed that her husband had died leaving her a widow with two daughters ; that one of her daughters married and her father-in-law appointed her son-in-law *Illatom ;* and that all her husband's property will pass to her son-in-law.

Sanjivappa of Nemikonta deposed that his relation Aiyappu Reddi of Basapuram took Narisi Reddi, who was the son of Aiyappu Reddi's sister into his house as *illatom*, and afterwards married him to the younger of two daughters ; that Aiyappu had an after-born son who died in infancy ; and that Narisi has inherited the whole of the property of his father-in-law.

Venkata Reddi of Nagaru Dona proved that in his village Bimappa, who had five daughters made Kumarappa, the husband of the eldest of his five daughters, *Illatom* ; and Rama Reddi, that he had married the only surviving daughter of Bandi Reddi of Munasapalli who had no sons, and had been taken as *Illatom* by Bandi Reddi ; and that in that character he was in possession of Bandi Reddi's lands and claimed title to them, though he admitted the patta stood in the name of his mother-in-law.

If the evidence given by the witnesses who were called to prove instances of the custom was untrue, it in almost every case admitted of easy contradiction, for the witnesses did not confine themselves to a simple assertion of the fact that the power of affiliating a son-in-law has been exercised, but went on to assert a devolution or distribution of immoveable property as a consequence of the fact. It not only stands unrebutted by conflicting testimony, but no

witness has been called on the part of the appellant to deny the existence of the custom.

Under the circumstances we feel bound to uphold the finding of the Subordinate Judge that the custom alleged subsists among the Motati Kapu caste in the districts of Kurnool and Bellary. For the purposes of this suit it is unnecessary that we should determine whether the power may be exercised by a father who has a son living at the time. Although we have referred to the [283] evidence of one witness who alleged an instance of a affiliation by his uncle in the presence of a living son, two other witnesses deposed that it could be exercised only by a father who had no male issue, and, one witness, by a father who had daughters only.

Nor need we determine whether, if the father be dead, the right may be exercised by a surviving paternal grandfather, though the witness Gungamma alleged an instance where this had occurred.

Nor is it necessary for us to ascertain whether the affiliation is effected by the introduction into the family or requires for its completion marriage with a daughter. Although these questions are suggested by the evidence on the record, they are immaterial to the circumstances of the case before us, and we desire te be understood as expressing no opinion upon them.

The evidence warrants the conclusion, which is sufficient for our present purpose, that the power may be exercised by a man who has at the time no son, although he may have more than one daughter, and whether or not he is hopeless of having male issue. We are unable to accept the finding of the Subordinate Judge that, in competition with an after-born son, the *Illatom* son-in-law takes the same share as, under similiar circumstances, would be taken by an adopted son. Although one witness stated that, as *Illatom* son-in-law, he considered himself to have no claim on the property of his natural father, it would be unsafe to accept the opinion of the single witness as establishing an incident of the custom or to draw from it the inference that the affiliation is in any other respect analogous to Hindu adoption save in the circumstance that the *Illatom* is regarded as a member of the family into which he is admitted. In two of the instances alleged by the witnesses, the *Illatom* son-in-law was a sister's son, a relationship which has been held to entail incompetency for adoption. The unanimous testimony of the witnesses supported by the conduct of four of them compels us to the conclusion that the *Illatom* son-in-law for purposes of succession stands in the place of a son, and, in competition with natural born sons takes an equal share. The evidence is silent on the question whether in the lifetime of his father-in-law he enjoys the power of a son to demand partition ; but that question is immaterial to the case before us.

[284] The evidence of seven witnesses for the respondent, of whom three were village Karnams, and another, a son-in-law of Linga Reddi, justified the Subordinate Judge in finding that Hanumanta was taken as *Illatom* by Linga Reddi. The testimony of these witnesses is corroborated by that of the widow of Linga Reddi who was examined as a witness for the appellant, and is confirmed by the statement submitted by Linga Reddi to the Inam Deputy Commissioner in 1860 wherein Hanumanta is mentioned as a member of the family.

The issue respecting the existence of an agreement between Linga Reddi and Hanumanta that the latter should receive a share as a compensation for his services was remitted for trial in case the respondent failed to prove the existence of the custom, and, as a consequence, the title of Hanumanta to a share.

In view of the findings we have accepted on the other issues, its determination becomes unnecessary.

The Subordinate Judge has after more complete investigation reaffirmed his finding that the nuncupative will ascribed to Linga Reddi is proved; and inasmuch as there is evidence to support the finding, we ought not in second appeal to disturb it.

The deed executed by Linga Reddi's widow gives effect to the disposition of the estate which, it is found, Linga Reddi directed.

The property which has been conveyed to Hanumanta is not in value in excess of the share which would have fallen to him on a partition of the whole estate. If the appellant, as the representative of Mahomed Reddi, is entitled to question the disposition of his property made by Linga Reddi's widow under his directions, she could on the facts found get the disposition set aside only on the terms that the whole estate left by Linga Reddi should be divided. That claim is not now made.

Accepting the finding of the Subordinate Judge on the issues which govern the decision with the exception of his finding on the fourth issue, we must affirm his decree, dismissing the claim in respect of the house and lands. The respondent has objected to the order in the decree of the Subordinate Judge respecting costs. It certainly appears to be at variance with the direction in the judgment. We understand the Subordinate Judge to have directed that the appellant and the respondent should pay and receive respectively proportionate costs in the Court of First **[285]** Instance and in the Lower Appellate Court. That direction appears equitable, and we shall give effect to it by directing that the order as to costs be amended. We direct the appellant to pay the respondent's costs in this Court.

NOTE.—Reported by order of the Chief Justice.

NOTES.

[I. ILLATOM AFFILIATION.

This does not sever the heritable rights in the natural family either of the adopted or of the other members of such family :—(1883) 6 Mad. 267 ; (1889) 12 Mad. 442.

An *Illatom* son takes an equal share in competition with natural born sons or dattaka sons :—(1885) 9 Mad. 114.

The *adopter* acquires no right of inheritance :—(1885) 9 Mad. 114 ; (1889) 12 Mad. 442.

Whether there is a right of partition, is dependent upon custom :—(1897) 21 Mad. 226.

As to survivorship, *see* (1893) 17 Mad. 48=3 M. L. J. 239.

II. CUSTOM—

The evidence establishing custom may be gone into on second appeal :—(1905) 29 Mad. 24.]