As regards *lineal primogeniture* see the remarks of Mayne, p. Secs. 499-502 and the criticism thereof in Ghose's *Impartible Property* at 180 to 186.

II. IMPARTIBLE ESTATE HOW FAR JOINT PROPERTY.—

See (1892) 16 Mad. 11 at 16; affirmed (1896) 19 Mad. 451 at 457, with reference to succession; (1909) 32 Mad. 429 pp. 434 to 438. with reference to alienation and (1912) 23 M. L. J. 79 with reference to maintenance. In (1912) 23 M. L. J. 79 it was held that the right to maintenance, like that of survivorship, was not extinguished on account of the estate being impartible.

[4 Mad. 268.]

APPELLATE CIVIL.

The 31st March, 1880

PRESENT:

MR. JUSTICE KERNAN AND MR. JUSTICE MUTTUSAMI AYYAR.

Makath Unni Moyi.....(Defendant). Appellant

versus

Malabar Kandapuni Nair.....(Plaintiff) Respondent.*

Animal feræ naturæ, capture of, in pit—Right of owner of land.

A wild elephant having fallen into a pit made by K. N. in his own land was secured, removed, and tamed by U. M. without the leave of K. N.

Held that K. N. was the captor and that U. M. acquired no property in the elephant.

THE facts of this case are set forth in the Judgment.

Mr. *Wedderburn* (Mr. *Ross Johnson* with him) for the Appellant.

Mr. *Wedderburn*.—It must be taken as a fact that the pit into which the elephant fell was dug by the plaintiff in 1869 upon his own land. and that the defendant secured the elephant in the pit, took it out, tied it up, and tamed it. The Lower Court has not decided whether this pit was or was not dug out subsequently in 1876 by the defendant. But apart from that fact it is submitted that the elephant is the property of the defendant. By falling into the pit the elephant afforded the plaintiff an opportunity of capturing it or reducing it into possession; had it been left alone it must, almost necessarily, being a ten years' old tusker, have escaped, as these pits are merely roughly dug holes of no great depth out of **[269]** which any elephant of ordinary sagacity would find its way, either by itself or with the assistance of its fellows in a short time.

The defendant was in law and in fact the captor. In the Institutes of *Justinian* (Inst, L. II, 1, 12, 13 (Krueger, Ed. 1872), it is laid down as follows:—

"Feræ igitur bestiæ et volucres et pisces, id est omnia animalia, quæ in terra mari cælo nascuntur, simulatque ab aliquo capta fuerint, iure gentium statim illius esse incipiunt: quod enim ante nullius est, id naturali ratione occupanti conceditur nec interest, feras bestias et volucres utrum in suo fundo quisque capiat, an in alieno: plane qui in alienum fundum ingreditur venandi aut oucupandi gratia, potest a domino, si is providerit, prohiberine ingrediatur,

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Second Appeal 378 of 1879 against the decree of H. Wigram, Acting District Judge of South Malabar, dated 17th March 1879, confirming the decree of T. Kunji Raman Nair, District Munsif of Calicut, dated 27th September 1878.

quidquid autem eorum ceperis, eo usque tuum esse intellegitur, donec tua custodia coercetur : cum vero evaserit custodiam tuam et in naturalem libertatem se receprit, tuum esse desinit et rursus occupantis fit. naturalem autem libertatem recipere intellegitur, cum vel oculos tuos effugerit vel ita sit in conspecut tuo, at difficilis sit eius persecutio. Illud quæsitum est, an, si fera bestia ita vulnerata sit, ut cap, possit, statim tua esse intellegatur. Quibusdam placuit statim tuam esse et eo usque tuam videri, donec eam persequaris, quod si desieris persequi, desinere tuam esse et rursus fieri occupantis. Alli non aliter putaverunt tuam esse, quam si ceperis sed posteriorem sententiam nos confirmamus, quia multa accidere solent, ut eam non capias."

This elephant in the pit is very similar to the case of the wounded animal just mentioned, and the better opinion is, it is said, that as between the person who inflicted the wound and the person who actually caught the animal, the property is in the latter.

This rule of law certainly obtains in India. Government have never claimed any right to the ivory of elephants killed before, or, by license, after The Elephant Act (Madras Act I of 1873) was enacted.

The owners of forest in Malabar, the Cochin and Travancore Rajas levy a royalty only on the tusks, and no one ever heard of a landowner claiming the *exuviæ* of tigers and bison in Malabar or elsewhere in Southern India, and yet the skins of the former are brought in every month to the kacheris by shikaris for the purpose of obtaining the Government reward and often sold by public auction at considerable profit.

[270] The law which obtains in England is laid down in the case of *Blades* v. *Higgs* (11 H. L. 621). It differs from the Civil Law as shown by Lord *Chelmsford* (S. C. P. 637).

" By the Civil Law, the person who took or reduced into possession any animal *feræ*, *naturæ*, although he might be a trespasser in so doing, acquired the property in it. This appears clearly from the passage in the Institutes cited in the argument. If the same rule prevails in our law, then the rabbits in question were not the property of Lord Exeter, but of the poacher who took and killed them upon His Lordship's land.

"This doctrine, however, as to the right of property in wild animals captured seems never to have prevailed in our law to its full extent. With respect only to live animals in a wild and unreclaimed state there seems to be no difference between the Roman and the Common law."

There is no reason for adopting the English law in this country. The departure in the English law on this point from the Civil Law is probably due to the great importance attached to the rights of forestry by the early English kings. The life of a deer was as valuable as that of a man.

It would appear from the passage in the Institutes just quoted that the fact that the captor was a trespasser makes no difference. The passage is so interpreted by Lord *Chelmsford*.

The plaintiff may have his action of trespass, but the defendant is, according to the rule of equity and good conscience, entitled to the beast. He has expended trouble and money upon it, and his servants must have incurred considerable danger in taming it.

Ramachandrayyar for the Respondent.

The **Judgment** of the Court (KERNAN and MUTTUSAMI AYYAR, JJ.) was delivered by

Kernan, J.—In this case plaintiff (respondent) sued for the recovery of an elephant valued at Rs. 800. It was alleged that the wild elephant fell into a pit prepared by plaintiff's men as a trap in the Peruli forest, which belongs to him, and that, without his knowledge and consent, defendant (appellant) took it out of the pit and converted it to his own use. Defendant contended that the pit was dug by his men in the Mundur forest **[271]** of which he is the owner, and that the property in the elephant was in him. Both the Lower Courts found that the pit in which the animal was captured was in plaintiff's forest and decreed the claim. Upon an issue being sent for trial, the Lower Appellate Court found that it was plaintiff's men who originally prepared the pit; that a wild elephant was captured in it in 1869; and that, though there was some evidence to the effect that defendant repaired it lately, the weight of testimony was in plaintiff's favour. It is argued in appeal that the property in the elephant is in the person who captured it, though the capture may be made on another's land, and that this case is governed by the rule of the Civil Law explained by *Justinian* in his Institutes, B. II, Tit. I, 12, and not by the principle of Blades *v.* Higgs reported in XI, House of Lords Cases, 621. In the passing cited from *Justiniar's* Institutes, it is stated that wild beasts become, by the law of nations, the property of the captor; that natural reason gives to the first occupant that which had no previous owner; and that it is immaterial whether a man takes wild beasts upon his own ground or on that of another, though the owner may prohibit a stranger from entering upon his property for the sake of hunting. In *Blades* v. *Higgs* the rabbits claimed by the plaintiff had been started, chased, and killed on the land of the Marquis of Exeter by persons unknown to him, and who, on killing the rabbits, at once put them into bags, carried them away, and sold them to the plaintiff. Mr. Justice WILLES, who tried this case, said, in his charge to the jury, that property in the land did not give a man property in animals of a wild nature upon it after they had become old enough to escape from it. The House of Lords held that this was a misdirection, and observed that the owner of land has the exclusive right to take and kill all such animals—*ferœ naturæ*—as may, from time to time, be found upon his land; that, as soon as this right is exercised. the animal caught or killed becomes the absolute property of the owner of the soil; and that a trespasser, by unlawfully killing it on the land of another, converts it into a subject of property for the owner of the land and *not* for himself.

Thus this case is a clear authority for the proposition that, according to the English law, the Civil Law is applicable only to those cases in which no one has property in the soil where the **[272]** capture takes place, or in which the capture is not in itself a wrongful act.

The appeal before us cannot be supported either under the Civil or the English law. The Courts below have found as a fact that the pit into which the elephant fell was a trap prepared under plaintiff's orders, and in which a wild elephant was captured in 1869. Such being the case, directly the animal fell into the pit it must be considered as caught in plaintiff's trap and brought into his power, and as potentially in his possession. Plaintiff was, therefore, the captor of this wild elephant. It appears further that, after such capture, the defendant unlawfully took it out of the pit in plaintiff's land, and converted it to his own use; and, as he was a trespasser, it is clear that he cannot

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.*)