1919.

Present: Schneider A.J.

AHAMATH *v.* APPUHAMY.

417 and 418—P. C. Kurunegala, 5,150

Game Protection Ordinance, 1909, s. 12 (5) — Definition of 'elk" and "game."

Killing an elk which is tame is not an offence punishable under section 12 (5) of the Game Protection Ordinance, 1909.

"Elk" does not come within the definition of "game."

The word "game" must be taken to mean the animals given in the definition which are *res nullius*, that is, which have not become the property of some person by domestication.

THE facts appear from the judgment.

G. Koch, for first accused, appellant.

Arulanandan, for third accused, appellant.

Hayley, for complainant, respondent.

June 20, 1919. SCHNEIDER A.J.—

In this case three men were charged with having killed an elk by striking it with a club, and of having committed an offence punishable under section 12 (5) of the Game Protection Ordinance, 1909. They were also charged with mischief. They were convicted of the charges under both counts, and sentenced to three months' rigorous imprisonment on each count, the sentences to run concurrently. The evidence proves that the first accused, who is an Arachchi, struck the animal with a fence stick three or four times and killed it. Subsequently, he and the second and third accused were found near the animal, the feet of which were tied, evidently in preparation for its removal from where it was lying. When seen on the spot all the three accused ran away. The learned

Police Magistrate has accepted the evidence for the prosecution, and disbelieved the evidence called for the defence. I see no reason for interfering with his findings on the facts, but it seems to me that the conviction under the Game Protection Ordinance cannot stand. The evidence in the case proves that the animal which was killed was a tame one belonging to Colonel T. Y. Wright, and had escaped from its enclosure and made its way into the village, where it had been killed. One of the witnesses says the animal was quite tame. The Game Protection Ordinance defines game as meaning and including a number of animals the names of which are given in the definition, such as sambur, spotted deer, &c. The word "elk" does not appear in that definition. I have no knowledge whether elk will come under any one of the kinds of deer the names of which are given in the definition. Therefore, one reason against the conviction under the Game Protection Ordinance would be that elk does not come within the definition of game. There is a further objection equally fatal against the conviction under that Ordinance In my opinion the word "game" must be taken to mean the animals given in the definition which are *res nullius*. that is, which have not become the property of some person by domestication. It seems to me that, unless this limitation is placed upon the definition, that a license to kill or capture game would mean to kill or capture game, which is subject of private property, so that a tame peafowl or deer may be killed under such a licence. I would therefore, set aside the conviction of all the accused under the Game Ordinance and acquit them of that charge. In regard to the conviction of the accused for mischief, there is no evidence that the second and third accused had any part in the killing of the animal. The only evidence against them is that they were seen near the spot where the animal had been killed. The first accused is a Gan-Arachchi, and it is quite possible the second and third accused had been brought there by him after he had killed the animal to help him to remove the carcase. I think, therefore, that there is no evidence to warrant a conviction of the second and third accused. The third accused has appealed, but the second has not. I would, therefore, in the exercise of my powers of revision, set aside the conviction of the second accused and acquit him. The third accused is entitled to an acquittal. I, therefore, acquit him. In regard to the first accused, it appears to me that the conviction is well founded on the evidence. He must have been aware that the animal was a tame one, and that the killing of it would cause wrongful loss or damage to some person. If he did not consider it a tame animal, he must have regarded it as a wild one. I see no reason, therefore, to interfere either with the conviction of the first accused or with his sentence. I would dismiss the appeal in regard to the conviction and sentence for mischief.

Varied.