1866. January 22. R. C. No. 28 of 1865.

against two persons, and those two together had not only not satisfied the demand or entered into an agreement, but the 1st defendant contended that the whole proceeding against him was a gross fraud.

We are of opinion, that it was not only within the power, but would have been a wise exercise of the discretion of the Court to have refused to allow the withdrawal of the suit, in which it was alleged that its proceedings had been grossly and fraudulently abused, and, as a consequence of our opinion on this subject, we need scarcely add that we think that the Court had the power to award costs. It had also the power to permit the withdrawal of the suit upon the terms of plaintiffs paying the 1st defendant's estate.

APPELLATE JURISDICTION (*a*)

Special Appeal No. 35 *of* 1865.

P. VENKATESAIYA.....*Appellant.*

M. VENKATA CHÁRLU and others.....*Respondents.*

The weight of authority is against the validity of the adoption of one upon whom the Upanayana has been already performed. In strictness there is no authority upon the other side.

1866. January 22. S. A. No. 35 of 1865.

THIS was a special appeal from the decision of E. Story, the Civil Judge of Nellore, in Regular Appeal No. 64 of 1864, confirming the decree of the Court of the District Munsif of Gudur in Original Suit No. 34 of 1864.

Tirumalachary, for the appellant, the second defendant.

O'Sullivan, for the respondents, the plaintiffs.

The Court delivered the following

JUDGMENT :—In this case we took time to consider whether the adoption of a Bráhmin, upon whom the Upanayana had been performed in his natural family, can legally be made, and whether the adoption of one of the Smartha sect, the person for whose benefit the adoption was made being of the Vaishnava sect, is legal.

(*a*) Present : Frere and Holloway, JJ.

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Mr. Justice Strange in his *Manual* distinctly states that such an adoption is invalid. The case however, quoted by him as an authority for his opinion is not strictly an authority, for the statement of the Pandits was given incidentally as to the requisites of a Bráhmin's adoption and the decision of the Court dealt with the case of Sudras only. It was erroneously said in argument that the authority of Sir T. Strange was in favour of the validity. The language of the learned Judge, at pages 92 and 93, expresses great doubt upon the matter, and those doubts are of very great weight, following as they do upon a dissertation upon the extreme importance of the Upanayana, a ceremony distinguished from all others by the mystical efficacy supposed to attach to it and the religious benefits which it imparts. The doctrine of both the *Dattaka Mimansa* and *Dattaka Chandrica* is, as explained by Mr. Sutherland, that an adoption in the only form now permissible cannot be made after the Upanayana has been performed in the natural family (Syn. Note XI.) The note of Mr. Colebrooke, to which reference is made, has no bearing upon the subject. The case of *Kemturen* v. *Musmorowt Bhabriesri* (1 Sel. Rep. 161) before that great authority, Mr. Colebrooke, went upon the question whether an adoption after the age of 5 years was valid, and the answer of the Pandits, upon which the Court acted, was that it was, if the ceremony of Tonsure and other initiatory ceremonies were performed in the family of the adopter. This therefore is rather an authority against the validity of an adoption where these ceremonies have been performed.

The only authority on the other side is the extra-judicial opinion of a Pandit at page 87, Vol. II of Sir T. Strange, on a question as to the adoption of a Sudra, and it seems to go upon no authority whatever. J - 52809

Then it was contended that as being the son of a Gnáti, the prohibition did not apply. The only authority for this position is the note of Sir W. Macnaghten to the case already referred to. He there says that, if the adoption be of one who is a near relation of the adopter on the paternal side, a boy of greater age may be taken, and ~~Sir T. strange~~

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on the authority of this note, says that the performance of the initiatory ceremonies in the natural family is of less importance in proportion to the nearness of relationship. He by no means says, however, as we have already seen, that even in this case a valid adoption can be made after the performance of the Upanayana. Whether, however, there is any weight in this opinion, it is quite unnecessary in the present case to consider, for a Gnáti is not a near but a distant kinsman. The argument that any one may be taken, at whatever age, if of the same Gotram, is quite unsustainable, for the very writers who fix the maximum of age, also enjoin the invariable adoption of one of the same Gotram. The prohibition, therefore, of necessity applies to the persons so taken.

The weight of authority is certainly against the validity of an adoption of one upon whom the Upanayana has been already performed. In strictness there is no authority upon the other side. It is unnecessary therefore to consider the other question reserved, one which we have felt to be of peculiar difficulty.

The special appeal will be dismissed with costs.